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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: WAC 03 112 52392 Office: CALIFORNIA SERVICE CENTER Date: MAR 25 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a manager/training director. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is $61,000 per year.

On the petition, the petitioner stated that it was established on April 5, 1993 and that it employs one worker. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to work currently for the petitioner, but claimed to have worked for it as its manager/training director from March 1991 through March 1996. This claim appears to be contradicted by the statement that the petitioner was established on April 5, 1993. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Sherman Oaks, California.

In support of the petition, counsel submitted the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return. A Schedule C, Profit or Loss from Business, attached to that return shows that the petitioner's owner operated the petitioner as a sole proprietorship during that year and that it returned a profit of $54,293. The tax return shows that the petitioner's owner declared adjusted gross income of $49,291 during that year, including the petitioner's profit offset by deductions, and had one dependent.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 15, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a statement of the petitioner's owner's family's monthly expenses (as opposed to the petitioner's business expenses) and all Form W-2 Wage and Tax Statements showing wage payments from the petitioner to the beneficiary from 1991 to the present.

In response, counsel submitted a letter dated August 5, 2003. In that letter counsel stated that the beneficiary was never issued W-2 forms, and that copies of the beneficiary's tax returns for 1991 and 1992, and for 1995 through 2001 were being submitted in their stead. Counsel did submit copies of those returns. None of those returns indicate that the beneficiary worked as an employee of the petitioner or was paid wages. The 1991, 1992, and 1995 returns, however, show that the beneficiary operated a sole proprietorship during those years at the petitioner's business address. Counsel did not state why he did not provide copies of the beneficiary's 1993 and 1994 tax returns, during which time the beneficiary claimed to work for the petitioner.

Counsel also provided (1) a copy of the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return, (2) copies of monthly bank statements issued to the petitioner's owner, (3) the petitioner's owner's budget, and (4) a list of the hairstylists and assistants who worked at the petitioner's salon during the pay period ending July 8, 2003.

A Schedule C, Profit or Loss from Business, attached to the 2002 tax return shows that the petitioner's owner operated the petitioner as a sole proprietorship during that year and that it returned a profit of $35,499. The tax return shows that the petitioner's owner declared adjusted gross income of $38,305 including the petitioner's profit, and had no dependents during that year.

The monthly budget provided commingled the petitioner's owner's family's personal expenses with the expenses of operating the petitioning business. The petitioner's owner's family's personal expenses shown on that monthly budget are a house payment, a car payment, insurance, utilities, and credit cards.[1] Those expenses total $6,217 per month, or $74,604 annually.

The list of employees shows that 16 people work at the petitioning business. Because the petitioner stated on the Form I-140 petition that it has only one employee this office concludes that its hairstylists, and perhaps the assistants too, are contractors.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 18, 2003, denied the petition.

On appeal, counsel submits a brief and additional bank statements.

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[1] This office concludes that certain minor expenses, such as clothing and gasoline are included in the monthly credit card payment.

In the brief counsel argues that CIS should have considered the petitioner's growth and viability, the demand for its services, the collectibility of its receivables, its ability to pay its liabilities on time, and the availability of liquid assets for future contingencies. Counsel further notes that companies routinely seek to report little taxable income so as to limit their tax liability. Counsel thereby implies that the petitioner's tax returns may be a poor index of its ability to pay the proffered wage.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petition may be approved even though the petitioner's net income is less than the proffered wage. Counsel also cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989)[2], but does not state the proposition for which he is citing it. From the quote counsel chooses from that case this office infers that counsel intended to cite it for the proposition that the ability of the beneficiary to generate income for the petitioner should be considered in the determination of the petitioner's ability to pay the proffered wage, and the proposition that CIS should explicitly state the formula it utilizes in assessing the petitioner's ability to pay the proffered wage.

Counsel argues that the petitioner's depreciation deduction should be considered in the determination of the petitioner's ability to pay the proffered wage, arguing that it is an artificial loss.

Counsel notes that, by the reasoning employed in the decision of denial to show that the petitioner had not demonstrated the ability to pay the proffered wage, the petitioner's owner should be unable, also, to pay his personal expenses. Counsel's argument is inapposite.

Whether the petitioner's owner is able to pay his personal expenses without paying the proffered wage is not at issue. The petitioner must show that during each salient year it was able to pay the proffered wage, which it did not pay during those years, while leaving its owner still able to pay his personal expenses. Counsel's argument does nothing to address the issue at hand. It is of no weight in demonstrating that the petitioner is able to pay the proffered wage. Because the petitioner did not pay the beneficiary the proffered wage during the years since the priority date, it must show what funds it could have used to pay them had it been obliged to do so.

As to counsel's argument that the petitioner's growth and viability, the demand for its services, the collectibility of its receivables, its ability to pay its liabilities on time, and the availability of liquid assets for future contingencies should be considered is assessing ability to pay the proffered wage, this office notes that counsel submitted no evidence pertinent to any of those factors. Absent any pertinent evidence they cannot be considered.

Counsel's assertion that the petitioner's tax returns do not show the true financial condition of the corporation is inapposite. That assertion neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide

[2] Although counsel incorrectly stated the name of that case and incorrectly cited it, the quotation he includes in his brief makes clear that he citing *Masonry Masters*.

additional reliable evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

Counsel's assertion that the petitioner's depreciation deduction should be added to its net income in the analysis of its ability to pay the proffered wage is unconvincing. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings when replacement becomes necessary. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's citation of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel's reliance on *Masonry Masters, Inc. v. Thornburgh, Id.,* for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered is misplaced. A portion of that decision urges that the ability of the beneficiary in that case to generate income for the

petitioner should be considered.[3] That portion is clearly dictum, however, as the decision was based on other grounds. Further, it appears in the context of a criticism of the failure of the Immigration and Naturalization Service to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Finally, while that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence the Service will make no such assumption.

The remaining point for which counsel appears to have cited *Masonry Masters* is that CIS should specify the formula it uses to assess the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary at any time after the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the proffered wage out of his adjusted gross income and supported himself on the amount remaining.

The proffered wage is $61,000 per year. The priority date is April 17, 2001.

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[3] The AAO may consider the reasoning of this decision, however, the AAO is not bound to follow decisions of a United States district court even in cases arising within the same district. *See* Matter of K-S-, 20 I&N Dec. 715 (BIA 1993)

During 2001 the petitioner's owner declared adjusted gross income of $49,291, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence that the petitioner had any other funds at its disposal with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of $38,305 including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence that the petitioner had any other funds at its disposal with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.