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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 22 2005

EAC 03 136 52456

IN RE: Petitioner:
Beneficiary: [redacted]

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 Acting Director, Vermont 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 farm. It seeks to employ the beneficiary permanently in the United States as a supervisor of farming, vegetables. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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.

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 23, 2001. The proffered wage as stated on the Form ETA 750 is $15 per hour, which equals $31,200 per year.

On the petition, the petitioner stated that it was established during 1997. The petitioner describes the number of workers it employs as "4-8 (seasonal).[1] The petition states that the petitioner's gross annual income is $159,605. The petitioner did not state its net annual income in the space provided for that purpose. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Sherborn, Massachusetts. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

[1] Evidence subsequently submitted indicates that the petitioner employed only three workers during 2001 and only one employee during 2002.

In support of the petition counsel submitted a letter, dated January 29, 2003, from the petitioner's owner. That letter states relies on the petitioner's 2001 net profit, depreciation deduction, and wages paid to the president's husband and to another worker as evidence of the petitioner's ability to pay the proffered wage.

Counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, its 2001 W-3 transmittal showing that the petitioner paid total wages that year of $32,600, and three 2001 W-2 Wage and Tax Statements.

The W-2 forms show that the petitioner paid [redacted] who is the petitioner's president's husband; [redacted] and [redacted] $25,400, $3,600, and $3,600 during that year, respectively. This office notes that the sum of the amounts shown on those three W-2 forms provided is equal to the petitioner's entire 2001 wage expense.

The 2001 tax return shows that the petitioner is a corporation, that it incorporated on July 15, 1997, and that it reports taxes pursuant to the calendar year and cash basis accounting. The return also shows that the petitioner had taxable income before net operating loss deduction and special deductions of $950 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $1,952 and no current liabilities, which yields net current assets of $1,952.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 11, 2004, requested, *inter alia*, additional evidence pertinent to that ability.

In response, counsel submitted (1) a 2003 W-2 form showing wages the petitioner paid to the beneficiary during that year, (2) two 2004 pay stubs showing wages paid to the beneficiary on two dates during that year, (3) 2002 and 2003 W-2 forms showing wages the petitioner paid to Louis Recine during both of those years, (4) the petitioner's 2002 W-3 transmittal, and (5) a portion of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return.

The beneficiary's 2003 W-2 form shows that the petitioner paid him wages of $15,600 during that year. Louis Recine's 2002 and 2003 W-2 forms show that the petitioner paid $30,400 and $31,200 to Louis Recine during those years, respectively.

The beneficiary's pay stubs show that the petitioner paid him $600 for each of the one-week pay periods ending March 25, 2004 and April 1, 2004. The year-to-date shown on the more recent pay stub is $8,400.

The 2002 W-3 transmittal shows that the petitioner paid wages of $30,400 during that year. This office observes that amount is equal to the amount the petitioner paid to Louis Recine during that year.

The petitioner's 2002 tax return shows that the petitioner declared a loss of $15 during that year. The corresponding Schedule L was not provided with that return, the Service Center was unable to compute the petitioner's year-end net current assets.

Counsel also submitted a letter, dated April 23, 2004, from the petitioner's owners, [redacted] and [redacted] In that letter, the owners stress the wages paid to [redacted] as evidence of the petitioner's ability to pay the proffered wage, stating that all of those wages were for performance of the proffered position. The letter also stresses that the petitioner's depreciation deduction should be added to its net income in order to show its ability to pay the proffered wage. The letter states that the wages paid to its three employees, plus the petitioner's net profits, plus the petitioner's depreciation deduction demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In that letter, the owner's admit that Louis Recine continued to draw a salary after the beneficiary came to work for the petitioner.

The Acting 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 June 23, 2004, denied the petition.

On appeal, counsel argues that the pay stubs, the W-2 forms, the petitioner's growth as detailed in the April 23, 2004 letter, are indices of its continuing ability to pay the proffered wage beginning on the priority date, notwithstanding that its net income and its net current assets are insufficient to pay the proffered wage.

Counsel also argues that insufficient attention was paid to evidence extrinsic to the petitioner's tax returns, citing 8 C.F.R. § 204.5(g)(2) for the proposition that, "In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)]."

Counsel further cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petition in this matter may be approved notwithstanding that the petitioner's profits were insufficient to pay the proffered wage.

Counsel states that the $3,600 paid to [redacted] was for performing the duties of the proffered position for a few unspecified months of 2001. Counsel argues that, therefore, that amount should be included in the calculations of the petitioner's ability to pay the proffered wage during that year.

Counsel states that [redacted] worked in the proffered position from the time [redacted] left its employ[2] until mid-2003, when the petitioner began to employ the beneficiary. Counsel argues that, therefore, all of the salary paid to Mr. [redacted] should be included in the computations of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel is correct that 8 C.F.R. § 204.5(g)(2) allows the petitioner to submit additional material "in appropriate cases." Counsel has not demonstrated, however, that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Under these

[2] If this office were inclined to include the salary paid to [redacted] the computations pertinent to the petitioner's ability to pay the proffered wage, those computations would be complicated by the fact that the petitioner did not state the dates during which the petitioner employed [redacted] Other than the letter from the petitioner's owners, no evidence in the record demonstrates that Mr. [redacted] performed the duties of the proffered position or that Mr. [redacted] replaced Mr. [redacted]

circumstances, this office is unable to find that the Service Center failed to consider substantial material evidence. Further, even if that error occurred, the appropriate relief for that error on appeal would be for this office to consider all of the relevant evidence.

Counsel asserted that all of the wages paid to [redacted] before the petitioner hired the beneficiary were for performing the duties of the proffered position. This appears to be contradicted by the fact that [redacted] continued to draw the same or a greater salary after the petitioner hired the beneficiary. To explain this apparent discrepancy, counsel cites the petitioner's "substantial growth." The credibility of counsel's assertion necessarily relies upon the existence of that growth in the petitioner's operations.

The April 23, 2004 letter indicates that, since 2001, the petitioner has changed its focus from operating a produce stand to keeping horses and chickens. That is not, in itself, growth. The petitioner's tax returns indicate that from 2001 to 2002 the petitioner's gross receipts declined from $223,460 to $166,513; it's Gross profit declined from $159,605 to $116,599; and its taxable income before net operating loss deduction and special deductions declined from $950 to a loss of $15. This office does not see a convincing pattern of growth in the difference between those returns, and no more recent returns were submitted.

Counsel's asserts that Mr. [redacted] was performing the duties of the proffered position, but that those duties greatly expanded after the beneficiary was hired such that two workers were required to supervise operations. The assertion that the petitioner's vegetable farming supervisory duties have greatly increased is not borne out by any evidence except the April 23, 2004 letter. Counsel and the petitioner assert that the proffered position required only one employee, but upon the petitioner hiring the beneficiary it required two employees. An explanation more likely in view of the evidence of record is that the beneficiary did not replace Mr. [redacted] because they perform different duties. Under these circumstances, and absent competent objective evidence, this office finds the assertion that Mr. [redacted] salary prior to petitioner's hiring the beneficiary was available to pay the wages of the proffered position to be unconvincing. This office declines to include the wages paid to Mr. [redacted] in the computation of funds available to pay additional wages.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). This office also, therefore, declines to include the wages paid to Adilson Coelho during 2001 in the computations pertinent to funds available to pay the wages of the proffered position during that year, absent reliable evidence that those wages were paid for performance of the duties of the proffered position.

Counsel's citation of *Matter of Sonegawa, supra,* is unconvincing. *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 petitioner 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 the petitioner 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. Here, no evidence has been submitted to show that the petitioner has ever posted more than a nominal profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. 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 argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible 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. But 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.[3]

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.

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 submitted a 2003 W-2 form showing that it employed and paid the beneficiary wages of $15,600 during that year. The 2004 pay stubs show that the petitioner paid the beneficiary $8,400

[3] Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real and, in some instances, large cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the income the petitioner had available to pay additional wages. Even if this office were inclined to accept counsel's argument pertinent to the depreciation schedule, that scenario would be unacceptable.

for employment during 2004. The petitioner has not established that it employed the beneficiary at any other time or that it paid him any other wages.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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 total 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 corporate 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's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $31,200. The priority date is April 23, 2001.

During 2001 the petitioner reported taxable income before net operating loss deduction and special deductions of $950. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner listed net current assets of $1,952 on its Schedule L. That amount is also sufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner reported a loss as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its taxable income before net operating loss deduction and special deductions. The petitioner did not submit its 2002 Schedule L. Therefore, this office is unable to compute the petitioner's 2002 net current assets, and the petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its

net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated its 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 petition was correctly denied on this ground.

An additional issue exists in this matter that was not addressed in the decision of denial. The petition is for a "supervisor of farming, vegetables," as is the Form ETA 750. In the letter of April 23, 2004 the petitioner's owners stated, "

> In 2001 we had a produce stand, 2 horses and a few chickens. Currently we have 7 horses, 2 sheep, 2 goats, 1 llama, [and] 30+ chickens whose eggs we sell locally. In addition, we have started selling firewood and we have summer and fall haying of the local fields.

The petitioner's owners appear to have indicated that they previously had a vegetable operation, but no longer have. The Form ETA 750 was approved for a "supervisor of farming, vegetables." It is not apparently valid for a supervisor in the petitioner's current operations. Because this issue was not raised below, and the petitioner has not been accorded an opportunity to respond to it, this issue forms no part of the basis of today's decision. If the petitioner attempts to overcome the basis of today's decision on a motion, however, it should also address whether the Form ETA 750 labor certification is valid for the position in which it now intends to employ the beneficiary.

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.