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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 03 018 52701 Office: VERMONT SERVICE CENTER Date: OCT 26 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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a "Carpenter Brush (Residential)."[1] 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 found 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 statement 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 February 16, 2001. The proffered wage as stated on the Form ETA 750 is $15.04 per hour, which equals $31,283.20 per year.

On the petition, the petitioner stated that it was established on January 15, 2000 and that it employs 45 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1998. The petition indicates that the petitioner will employ the beneficiary in Falls Church, Virginia.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return indicates that the petitioner is a corporation and reports taxes pursuant to the calendar year. During 2001 the petitioner declared a loss of $4,963 as its taxable income before net operating

[1] The proffered position is thus described in both the Form I-140 petition and the approved Form ETA 750 labor certification.

loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner reported no current assets and no current liabilities, which yields net current assets of $0.

That return indicates that the petitioner incorporated on September 4, 2001, but that the return also indicates that it covers the entire 2001 calendar year. Further, the return does not indicate that it is the petitioner's initial return, which it would be if the petitioner had incorporated on September 4, 2001. Those statements are apparently irreconcilable with each other, and irreconcilable with the beneficiary's statement, on the Form ETA 750, Part B, that he has worked for the petitioner since January 1998.

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 September 17, 2003, requested additional evidence pertinent to that ability. The Service Center specifically requested (1) the petitioner's 2001 and 2002 Form W-3 transmittals, (2) its 2001 and 2002 Form W-2 Wage and Tax Statements, and (3) the petitioner's 2002 income tax return.[2] The Service Center also noted that the petitioner had multiple petitions pending. Finally, the Service Center requested that, if the petitioner had employed the beneficiary during 2001 and/or 2002, it provide copies of the Forms W-2 or Forms 1099 showing the wages it paid to him during those years.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. Counsel did not provide the requested W-3 transmittals and W-2 forms and provided no evidence that it had employed and paid wages to the beneficiary.

The 2002 return shows that that during 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of $25,085. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $59,789 and current liabilities of $0, which yields net current assets of $59,789. That return states that the petitioner was incorporated on November 1, 2001.

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 May 24, 2004, denied the petition.

On appeal, counsel submits the petitioner's 2003 Form 1120 U.S. Corporation Income Tax Return, copies of monthly statements of the petitioner's bank account, and a letter, dated April 26, 2004, from the petitioner's office manager. Counsel also submits a copy of a 2003 W-2 form showing that the petitioner paid $23,872.50 to the beneficiary during that year and copies of 25 pay stubs issued by the petitioner to the beneficiary during 2001 and 2002. A discussion of the year-to-date totals shown on those pay stubs follows below.

Counsel states that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), establishes that W-2 forms are convincing evidence of a petitioner's ability to pay the proffered wage. Counsel also states that the petitioner "has been in business for over four years and has carried on a substantial and profitable business throughout that period," although counsel concedes that the petitioner's "tax returns my [sic] not show a net profit equivalent to the proffered wage. Counsel asserts that the W-2 forms, the bank statements, the petitioner's retained earnings,

[2] Why the Service Center did not request the petitioner's 2001 tax return is unclear.

and its cash on hand demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and that the petition should be approved.

The 2003 return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of $15,559. At the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of $0. That return states that the petitioner was incorporated on November 1, 2001.

The letter from the office manager states that since the company started in October of 1999 it has had sufficient work to employ twelve to fourteen full-time workers and that during 2003 it had gross receipts of over $1.4 million.[3]

Counsel's reliance on the bank statements is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated 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. Second, bank statements show the amount in an account on a given date, and generally cannot show the sustainable ability to pay a proffered wage.[4] Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel suggests that the petitioner's retained earnings demonstrate its ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, assuming no payments were made to stockholders, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, in themselves, an index of a company's ability to pay additional wages. The petitioner's profit will be considered, as will its net current assets. The other portions of the petitioner's retained earnings are inapposite to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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[3] Actually, the letter from the office manager states, "In the 2003 tax year the company made over 1.4 million dollars." Reference to the petitioner's tax return, however, shows that the office manager is referring to gross receipts, not net income.

[4] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

In the context of asserting that the petition should be approved pursuant to *Matter of Sonegawa, supra,* counsel states that the petitioner "has been in business for over four years and has carried on a substantial and profitable business throughout that period." How long the petitioner has been in business is not clear from the evidence, nor is its profitability.

Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 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 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. Here, the evidence is insufficient to establish those criteria. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Ordinarily, the year-to-date total gross wages shown on the most recent pay stub from each year would be acceptable evidence of the wages the petitioner paid to beneficiary during those years. In the instant case, however, the year-to-date totals shown on the pay stubs provided are unreliable. Illustrative examples follow.

The March 22, 2002 pay stub indicates year-to-date total gross wages of $10,150. The March 29, 2002 pay stub, however, indicates a year-to-date total of $8,918. This office notes that, during a given calendar year, the year-to-date total shown on a pay stub cannot decrease on a subsequent pay stub.

Similarly, the year-to-date total on the October 11, 2002 pay stub is $29,750, the October 25 total is $28,070, the November 7 total is $29,218, the November 22 total is $12,936, and the December 5, 2002 total is $28,980. Given the fluctuation in the year-to-date wages totals shown on those pay stubs; they cannot be considered reliable evidence of any wages paid to the beneficiary.

The Form I-140 petition states that the petitioner was established on January 15, 2000. The 2001 return, however, states that the petitioner was incorporated on September 4, 2001. The 2002 return states that the petitioner incorporated on November 11, 2001, as does the 2003 return.[5] The April 26, 2004 letter from the

[5] Further still, the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return, submitted in a different case, A96 260 747, states that the petitioner incorporated on January 15, 2000.

petitioner's office manager states that the petitioner "started in October of 1999." Those four dates are apparently irreconcilable. Further, all of those dates conflict with the beneficiary's statement, on the Form ETA 750, Part B, that he started working for the petitioner during January of 1998.

Additionally, various documents submitted show various Employer's Identification (EID) numbers for the petitioner. The Form I-140 petition shows that the petitioner's EID number is [redacted] as does the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The 2003 W-2 form shows that the petitioner's EID is [redacted] as do the petitioner's 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns.

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).

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 has established that it paid the beneficiary $23,872.50 during 2003. No other timely submitted evidence shows that the petitioner employed and paid the beneficiary.

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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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,[6] 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 $27,476.80 per year. The priority date is April 18, 2001.

During 2001 the petitioner declared a loss. The petitioner cannot, therefore, show the ability to pay any portion of the proffered wage out of its income. At the end of that year, the petitioner had no net current assets. The petitioner may not, therefore, show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no 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 the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of $25,085. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of $59,789. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary $23,872.50. That amount is less than the proffered wage. The petitioner would ordinarily be obliged to show the ability to pay the $3,604.30 balance of the proffered wage. The Request for Evidence in this case, however, was issued on September 11, 2003. On that date, the petitioner's 2003 tax return was unavailable. The petitioner is excused from providing additional evidence of its ability to pay the proffered wage during 2003.

The petitioner has failed to demonstrate its ability to pay the proffered wage during 2001. Therefore it has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that ground.

Further, in the Request for Evidence, the Service Center alluded to multiple petitions filed by the petitioner. The record contains no evidence of those multiple petitions. If the director wished to rely, even in part, on those multiple petitions in his decision, evidence of those multiple petitions, including, at a minimum, identifying information and the wages proffered in those other cases, should have been incorporated into the record. Because the petitioner has not demonstrated the continuing ability to pay the proffered wage even to the instant beneficiary, however, this office is not obliged to remand for evidence pertinent to the wages proffered in those other cases. This office notes, however, that if a petitioner has multiple petitions pending it is obliged to demonstrate the ability to pay the proffered wage to each of the beneficiaries, not just the single beneficiary of the petition involved in an individual proceeding.

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[6] The petitioner's cash on hand, which counsel argued should be included in the calculation of funds available to pay the proffered wage, is included in the petitioner's current assets, and therefore included in the petitioner's net current assets, after an offset of the petitioner's current liabilities. As such, the petitioner's cash on hand is considered.

An additional issue exists that was not discussed in the decision of denial. On the Form I-140 petition the petitioner stated that it employs 45 workers. In her April 26, 2004 letter the petitioner's office manager stated that the petitioner has always had enough work to employ 12 to 14 full-time workers. Whether those two statements are reconcilable is unclear. If the petitioner had provided its 2001 and 2002 W-3 transmittals and 2001 and 2002 W-2 forms for all of its employees, the issue could have been resolved. Despite the direct request for those documents in the September 11, 2003 Request for Evidence, however, the petitioner did not provide them. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional ground. Because the issue was not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, the instant decision is not based, even in part, upon that ground.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

ORDER: The appeal is dismissed.