U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: EAC 04 022 53525 Office: VERMONT SERVICE CENTER Date: APR 04 2006

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner[1] is a general contractor. It seeks to employ the beneficiary permanently in the United States as a restoration mason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director 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 the granting of 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $23.00 per hour ($47,840.00 per year). The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the first page of U.S. Internal Revenue Service Form tax returns for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on September 3, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

[redacted] was incorporated in May 2001.

On appeal, counsel asserts that the petitioner can pay the proffered wage. Counsel asserts that since the director did not request additional evidence such as bank account records, profit/loss statements or personnel records that therefore the petitioner could not prove its ability to pay. Counsel contends that the petitioner's total assets, and, salaries and wages paid, all are evidence of the ability to pay the proffered wage. Counsel also contends that because the beneficiary has use of the company truck "an additional $10,000.00" and contributions to social security (FICA) should be considered as compensation to the beneficiary each year as evidence of the ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: a letter from petitioner; a W-2 Wage and Tax Statement for 2003; "Employer's Quarterly Federal tax Return" for the periods ending March 31, 2004 and June 30, 2004 with Form WR-2. Counsel also submitted copies of the following documents received December 16, 2004: a cover memo; a Form I-797C; a letter from petitioner dated September 17, 2004; a W-2 statement; and, petitioner's Form 1120S tax return. On March 4, 2005, petitioner's accountant sent an explanatory letter without documentation concerning the petitioner's assets and revenues.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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. The petitioner states that the beneficiary was employed in 2001. The petitioner paid the beneficiary $39,430.88 in 2003. For the reporting quarter ending March 31, 2004, the petitioner paid the beneficiary $9,387.52, and, for the reporting quarter ending June 30, 2004, $10,824.16.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $47,840.00 per year from the priority date of April 27, 2001:

- In 2001, the Form 1120-A stated taxable income[2] of $33,900.00.
- In 2002, the Form 1120-A stated taxable income of $42,300.00.
- In 2003, the Form 1120S stated taxable income of $106,092.00.

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[2] IRS Form 1120-A, Line 24.

In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage in years 2001 and 2002 for which the petitioner's tax returns are offered for evidence. No Part III was submitted for the Form 1120-A U.S. Income Tax Returns for tax years 2001 and 2002 submitted by the petitioner.

Examining the Form 1120S U.S. Income Tax Return submitted by the petitioner, Schedule L found in that return indicates the following:

- In 2003, petitioner's Form 1120S return stated current assets of $185,795.00 and $0.00 in current liabilities. Therefore, the petitioner had $185,795.00 in net current assets. Since the proffered wage is $47,840.00 per year, this sum is more than the proffered wage.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[3] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts that since the director did not request additional evidence such as bank account records, profit/loss statements or personnel records that therefore the petitioner could not prove its ability to pay. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. There is no regulatory requirement for CIS to issue such a request. When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. The regulation at 8 C.F.R. § 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when an applicant or petitioner does not meet a basic statutory or regulatory requirement.

Counsel contends that the petitioner's total assets are evidence of the ability to pay the proffered wage. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner's, salaries and wages paid are evidence of the ability to pay the proffered wage. Counsel also contends that because the beneficiary has use of the company truck "an additional $10,000.00" and contributions to social security (FICA) should be considered as compensation to the beneficiary each year as evidence of the ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The U.S. Department of Labor promulgated a rule in January of 1995 for determining what may be included in the rate of pay for the determination of the prevailing wage ("proffered wage"). Under the rule, "wages paid" include all the payments stated on the employer's payroll records as earnings for the employee that are disbursed "cash in hand, free and clear," exclusive of legitimate deductions. These deductions as stated on the Form W-

[3] 8 C.F.R. § 204.5(g)(2).

2 Wage and Tax Statement are FICA, state/local taxes, retirement deductions, and, other allowed deductions. The value of benefits that are not given to the employee as "cash" such as the value of a car, or an apartment, may not be included in the rate of pay even though the employee may be liable for tax on the benefits.

Counsel and petitioner also contend that the business revenue is growing, and, the growth of the petitioner's business is evidence of the ability to pay the proffered wage. In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2001, 2002 and 2003. Since the company was incorporated in May 2001, the 2001 corporate tax return stated a partial year's receipts/income. In 2001, the tax return stated gross receipts of $138,000.00. In 2002, the tax return stated gross receipts of $634,000.00. In 2003, the tax return stated gross receipts of $1,901,414.00. For the years 2001 through 2003, the taxable income for the petitioner was $33,900.00, $42,300.00 and $106,092.00.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. 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. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 couturiere.

Unusual and unique circumstances have been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Petitioner's accountant recounts its business activities and states without substantiation that the petitioner's accounting method affected adversely its 2001 return. The petitioner's tax return was prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles. No such financial statements were submitted.

However, since the 2001 tax return submitted during the year in which the petitioner was incorporated only states a part of the total receipts and income of the petitioner for the remainder of year from May 2001, this is a unique circumstance that is uncharacteristic of the continued profitability of the petitioner. Considering that the amount of taxable income for 2001 ($33,900.00) represents only eight months of income, the AAO finds that the petitioner's income would have been sufficient to pay the proffered wage for the eight months remaining in year 2001 ($31,893.00). It is clear from the very rapid increase in the gross receipts of the petitioner, from $138,000.00 to $1,901,414.00, and, its taxable income from $33,900.00, to $106,092.00 for the years examined, that the petitioner has evidenced the ability to pay the proffered wage.

By the evidence presented, the petitioner has proven its ability to pay the proffered wage. The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 met that burden.

ORDER: The appeal is sustained.