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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 03 108 51073

Office: VERMONT SERVICE CENTER

Date: **MAY 25 2007**

IN RE: Petitioner:
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:



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. Wieman, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the instant preference visa petition. The Administrative Appeals Office (AAO) denied a subsequent appeal. The matter is now before the AAO pursuant to a motion to reopen/reconsider. The motion will be granted. The previous decisions of the acting director and AAO will be withdrawn. The petition will be approved.

The petitioner repairs, services, and tests electronic equipment. It seeks to employ the beneficiary permanently in the United States as an electronics mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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. The AAO affirmed that decision, dismissing the appeal.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the acting director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 19, 1998. The proffered wage as stated on the Form ETA 750 is \$39,860 per year.

The Form I-140 petition in this matter was submitted on February 19, 2003. On the petition, the petitioner stated that it was established on January 1, 1996. In the space reserved for the petitioner to report the number of workers it employs the petitioner entered, "Family owned and operated business One assistant." On the Form ETA 750, Part B, signed by the beneficiary on September 15, 1998, the beneficiary claimed to have worked for the petitioner since June 1997. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Brooklyn, New York.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) copies of the petitioner's 1998, 1999, and 2000 Form 1120, U.S. Corporation Income Tax Returns, (2) copies of the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, (3) copies of the beneficiary's 1998 2001, 2002, 2003, Form 1040 U.S. Individual Income Tax Returns, (4) copies of the beneficiary's 1999 and 2000 Form 1040A U.S. Individual Income Tax Returns, (5) copies of 1999, 2000, 2001, 2002, 2003, and 2004 Form W-2 Wage and Tax Statements, (6) copies of monthly statements pertinent to the petitioner's bank account, (7) 1998 Form W-3 transmittal, and (8) copies of checks drawn to the order of suppliers. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's Tax Returns show that it is a corporation, that it incorporated on January 1, 1996, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During 1998 the petitioner declared taxable income before net operating loss deductions and special deductions² of \$4,811. At the end of that year the petitioner had current assets of \$8,258 and current liabilities of \$6,111, which yields net current assets of \$2,147.

During 1999 the petitioner declared a loss of \$14,051 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2000 the petitioner declared taxable income before net operating loss deductions and special deductions of \$30,585. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2001 the petitioner declared ordinary income³ of \$22,953. At the end of that year the petitioner had current assets of \$24,474 and current liabilities of \$3,999, which yields net current assets of \$20,475.

During 2002 the petitioner declared ordinary income of \$33,246. At the end of that year the petitioner had current assets of \$48,535 and current liabilities of \$22,250, which yields net current assets of \$26,285.

During 2003 the petitioner declared ordinary income of \$28,775. At the end of that year the petitioner had current assets of \$62,242 and current liabilities of \$35,090, which yields net current assets of \$27,152.

During 2004 the petitioner declared ordinary income of \$25,379. At the end of that year the petitioner had current assets of \$42,515 and current liabilities of \$34,551, which yields net current assets of \$7,964.

The beneficiary's 1998 and 2000 tax returns are not accompanied by W-2 forms or Form 1099 Miscellaneous Income statements. The proposition they were provided to support is unknown to this office.

The 1999, 2000, 2001, 2002, 2003, and 2004 W-2 forms show that the petitioner paid [REDACTED] \$25,912, \$25,500, \$25,500, \$25,500, \$24,500, and \$25,000 during those years, respectively. The social security number on that W-2 form matches that on the beneficiary's tax returns, indicating that [REDACTED] and the beneficiary, [REDACTED], are the same person.

The petitioner's 1998 Form W-3 transmittal shows that the petitioner paid total wages of \$31,972 during that year.⁴ The proposition counsel wished to support with the checks drawn to suppliers is unknown to this office.

² Taxable income before net operating loss deduction and special deductions is located at Line 28 of Form 1120, U.S. Corporation Income Tax Return. It is analogous to net income and is used as such in the analysis of a subchapter C corporate petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ Ordinary income is located at Line 21 of Form 1120S, U.S. Income Tax Return for an S Corporation. It is analogous to net income and is used as such in the analysis of a subchapter S corporate petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁴ The petitioner showed no Line 13 Salaries and wages on its 1998 return. The amount shown on its 1998 W-

The acting director denied the petition on January 8, 2004. The AAO dismissed the appeal on December 21, 2005.

The petitioner retained a new attorney to represent it on the motion. The petitioner's previous attorney submitted previous argument and evidence. With the motion the petitioner's new attorney submitted a Form G-28 Notice of Entry of Appearance executed by a representative of the petitioner. This office recognizes the petitioner's new counsel as its attorney of record. All evidence and argument will be considered, but the decision will be provided only to the petitioner and its present attorney of record.

On the motion counsel argues that the sum of (1) the wages the petitioner paid to the beneficiary during a given year, (2) its net profit, (3) its net current assets, and (4) its depreciation deduction is the correct formula to determine the funds the petitioner had during a given year to pay additional wages. Counsel also argues that the amount of the proffered wage the petitioner must demonstrate the ability to pay the proffered wage during 1998 should be prorated to reflect the portion of the year remaining on the priority date.

Counsel asserted in the motion that the petitioner paid the beneficiary wages of \$7,653 during 1998, but that the W-2 form evincing that payment was not currently available to her. Counsel requested 30 days to obtain and provide that evidence. No further evidence or argument was received. The record does not contain a 1998 W-2 form.

Finally, counsel argued that, if in a given year the petitioner's tax return does not, in itself, show the ability to pay the proffered wage, then, in view of the totality of the circumstances of the case, this could be overlooked pursuant to the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's reliance on the bank statements in this case 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 cannot show the sustainable ability to pay a proffered wage.⁵

3 transmittal is the total of its Line 12, Compensation of officers and its Schedule A Line 3 Cost of labor. Compensation of officers is subject to FICA and Medicare deductions and, as such, is correctly included on the W-3 transmittal. Line 3 Cost of labor typically represents payments made for non-employee contractor labor. Such payments are not subject to FICA and Medicare levies and are not, therefore, included on a W-3 transmittal. Why the petitioner chose to report employee wage payments on Schedule A is unknown to this office, but this anomaly does not appear to be relevant to any material issue in this case.

⁵ 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 during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown

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 requests that CIS prorate the proffered wage during 1998 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

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. This office is aware that a depreciation deduction does not require or represent a specific cash outlay 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 cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See 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.

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.⁶ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel suggests that the petitioner's end-of-year net current assets should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. The petitioner's end-of-year net current assets include its end-of-year cash on hand. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's

the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁶ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would be duplicative, at least in part.

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 established that it paid the beneficiary \$25,912, \$25,500, \$25,500, \$25,500, \$24,500, and \$25,000 during 1999, 2000, 2001, 2002, 2003, and 2004, respectively. The petitioner must demonstrate the ability to pay the remaining balance of the proffered wage during those years.

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). See also 8 C.F.R. § 204.5(g)(2).

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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$39,860 per year. The priority date is October 19, 1998.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998 and must show the ability to pay the entire proffered wage during that year. During 1998 the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,811. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$2,147. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner's tax return is insufficient, in itself, to demonstrate the petitioner's ability to pay the proffered wage during 1998.

During 1999 the petitioner paid the beneficiary \$25,912. The petitioner must show the ability to pay the remaining \$13,948 balance of the proffered wage. During 1999 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner's tax return is insufficient, in itself, to demonstrate the petitioner's ability to pay the proffered wage during 1998.

During 2000 the petitioner paid the beneficiary \$25,500. The petitioner must show the ability to pay the remaining \$14,360 balance of the proffered wage. During 2000 the petitioner declared taxable income before net operating loss deductions and special deductions of \$30,585. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner paid the beneficiary \$25,500. The petitioner must show the ability to pay the remaining \$14,360 balance of the proffered wage. During 2001 the petitioner declared ordinary income of \$22,953. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary \$25,500. The petitioner must show the ability to pay the remaining \$14,360 balance of the proffered wage. During 2002 the petitioner declared ordinary income of \$33,246. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$24,500. The petitioner must show the ability to pay the remaining \$15,360 balance of the proffered wage. During 2003 the petitioner declared ordinary income of \$28,775. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary \$25,000. The petitioner must show the ability to pay the remaining \$14,860 balance of the proffered wage. During 2004 the petitioner declared ordinary income of \$25,379. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petitioner's tax returns were insufficient to show the petitioners ability to pay the proffered wage during 1998 and 1999. Counsel argues that this shortcoming should be overlooked, pursuant to the doctrine of *Matter of Sonegawa*, 12 I&N at 612. Counsel is correct that, pursuant to *Sonegawa*, a petitioner's losses or low profits during a given year may, under some circumstances, be overlooked. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. It does not stand for the proposition that a petitioner need not show the ability to pay the proffered wage. The issue here is whether all of the circumstances of the instant case make it an appropriate case in which to ignore low profits in a few of the salient years.

During the year in which the petition was filed *Sonegawa* the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

In the instant case the petitioner has been in business since 1996. Although its tax returns failed to show the ability to pay the proffered wage during 1998 and 1999, its tax returns for the five following years, 2000, 2001, 2002, 2003, and 2004, show it was able to pay the proffered wage during those years. Those are the last years for which returns were available when the instant motion was filed on January 20, 2006.⁸ Further, the petitioner paid the beneficiary a substantial portion of the proffered wage during each of the years from 1999 through 2004.

Although the petitioner appears to have had a difficult period during 1998 and 1999, the evidence and the circumstances of the instant case, taken as a whole, appear to show that the petitioner has been able to pay the proffered wage since the priority date. The petitioner has overcome the sole basis for denial of the petition and no other basis for denial appears in the record.

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 met that burden.

⁸ This office infers that, 20 days after the end of 2005, its 2005 tax return was unlikely to have been finalized.

ORDER: The motion is granted. The AAO's decision of December 21, 2005 is withdrawn. The petition is approved.