



U.S. Citizenship
and Immigration
Services

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BK APR 21 2005

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC 02 295 51622

IN RE: Petitioner: [Redacted]
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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Brazilian specialty foreign food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, current counsel asserts that the petitioner has had the continuing financial ability to pay the proffered wage. She states that she intends to submit additional financial information showing that the certified wage can be met.

The appeal was filed on January 30, 2004. No further documentation has been received to the record, as of this date, more than a year later. As such, this decision will be made on the record as it currently stands.

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, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour, which amounts to \$35,360 annually. The ETA 750B, signed by the alien beneficiary on April 02, 2001, does not indicate that the alien has worked for the petitioner.

As evidence of its continuing financial ability to pay the certified wage of \$35,360 per year, the petitioner initially provided a partial copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. It reflects that the petitioner reported taxable income of \$4,080 before the net operating loss (NOL) deduction.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on July 21, 2003. The director requested that the petitioner supply evidence of its ability to pay the proffered salary by providing audited financial statements, annual reports, or copies of federal tax returns demonstrating its ability to pay the

proffered wage as of the priority date of April 16, 2001 and continuing until the present. The director instructed the petitioner to also provide copies of the 2001 and 2002 Wage and Tax Statement provided to the beneficiary, if applicable, or copies of its 2001 and 2002 complete federal tax returns, or copies of its 2001 and 2002 annual reports which are accompanied by audited or reviewed financial statements.

In response, former counsel provided a complete copy of the petitioner's 2001 federal tax return. Schedule L of this tax return shows that the petitioner had \$14,723 in current assets and \$9,010 in current liabilities, resulting in \$5,713 in net current assets. As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Former counsel also submitted a copy of the petitioner's 2002 corporate tax return. It reflects that the petitioner declared taxable income of -\$3,488 before the NOL deduction. Schedule L of the return indicates that the petitioner had \$20,207 in current assets and \$11,761 in current liabilities, yielding \$8,446 in net current assets.

Also submitted in response to the director's request for additional evidence is a copy of the beneficiary's W-2 for 2001 and 2002. In 2001, the petitioner paid her wages of \$1,890. In 2002, she received \$16,380 in wages. A letter from the petitioner's accountant, [REDACTED] also accompanied these submissions. He states that the beneficiary is an excellent employee and that since she began working, sales have increased.

Upon reviewing the net income and net current asset figures reflected on the petitioner's 2001 and 2002 tax return, the director concluded that the evidence submitted did not support petitioner's continuing ability to pay the proffered wage beginning on the priority date, and, on January 7, 2004, denied the petition.

On appeal, counsel contends that the beneficiary is currently working in the certified position and was paid the full proffered salary in 2003. Counsel asserts that the AAO should consider the petitioner's financial status within the context of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted above, nothing further has been submitted to the record, so we are unable to verify where the alien beneficiary has been employed and what she has earned.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. Here, as noted above, the petitioner has paid

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the beneficiary \$1,890 in 2001 and \$16,380 in 2002. The shortfall between these actual wages paid and the proffered annualized salary amounts to \$33,470 and \$18,980, respectively.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). 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 the Service should have considered income before expenses were paid rather than net income.

In this case, as noted by the director, neither the petitioner's net taxable income of \$4,080 before the NOL deduction, nor its net current assets of \$5,713, could cover the difference of \$33,470 between the actual wages paid and the proffered wage in 2001.

Similarly, in 2002, the petitioner's net taxable income of \$3,488 before the NOL deduction was insufficient to cover the \$18,980 difference between the certified wage and the actual wages paid to the beneficiary. Nor could the petitioner's net current assets of \$8,446 pay this shortfall.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate its continuing ability to pay the proffered wage as of the priority date of the petition. As such, the petitioner's motion does not overcome the grounds of denial as set forth in the director's decision of January 7, 2004.

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, nothing in the record, including the two corporate tax returns submitted as evidence of the petitioner's ability to pay the beneficiary's proffered annual salary of \$35,360 serve reflect that unusual circumstances exist in this case, which parallel those in *Sonogawa*, or that the petitioner's level of income is somehow uncharacteristic within a framework of profitable years. It is noted that the petitioner's net taxable income was very modest in both years and declined slightly in 2002.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal,

the AAO concurs with the director's determination that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.