



U.S. Citizenship  
and Immigration  
Services



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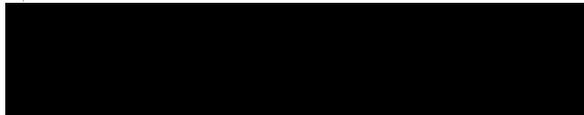
Office: VERMONT SERVICE CENTER

Date: AUG 04 2005

EAC 03 143 50164

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:



PUBLIC COPY

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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, the petitioner 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:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 the Service.

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 January 22, 2001. The proffered wage as stated on the Form ETA 750 is \$36 per hour, which equals \$74,880 per year.

On the Form I-140 petition, the petitioner did not state the date on which it was established or the number of workers it employs in the spaces provided on that form for that purpose. The petitioner also declined to state its net and gross annual income in the spaces provided for those figures. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Bridgehampton, New York.

In support of the petition, counsel submitted the petitioner's unaudited 2002 Profit and Loss Statements.

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 July 23, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center suggested that the petitioner provide its 2001 and 2002 tax returns and, if it had employed the beneficiary, Form W-2 Wage and Tax Statements showing the wages it paid to the beneficiary.

In response, the petitioner submitted copies of monthly statements of its bank account. The petitioner provided neither tax returns nor W-2 forms.

In a letter dated October 8, 2003 the petitioner stated that he declined to provide his tax returns as requested. The petitioner provided additional bank statements and stated that its bank statements demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

On December 3, 2003 the Vermont Service Center issued another Request for Evidence in this matter. The Service Center requested that the petitioner provide its 2001 and 2002 tax returns and W-2 forms as evidence of any wages it paid the beneficiary during 2001 or 2002.

The Service Center also asked whether the proffered position is a newly created position or, if not, how long the position has existed, what wages were paid to the incumbent or previous employee in the proffered position, and the name of the incumbent or previous employee in the proffered position. The Service Center also requested that the petitioner document that the position was vacated.

At no time did the petitioner provided any W-2 forms. The petitioner did not respond to the Service Center's questions pertinent to the position, the incumbent, and the wages paid to the incumbent.

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 March 10, 2004, denied the petition.

On appeal, counsel argued that the bank statements provided demonstrate the petitioner's ability to pay the proffered wage and cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as support for that position, and for the proposition that approval of an employment-based visa is not precluded by the fact that a petitioner's net income during a given year is less than the proffered wage.

Counsel noted that in *Matter of Sonegawa, supra*, the Regional Commissioner found that reasonable expectation of increased profits established the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

*Matter of Sonegawa* however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity in *Sonegawa* 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.

Counsel 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. None of those factors are present in the instant case, nor is a single year's loss or low profit the issue in this case. *Sonegawa* offers no support for the proposition that the petitioner may submit bank statements in lieu of the evidence required by 8 C.F.R. § 204.5(g)(2), which states that evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Counsel also cited *Matter of Yarden*, 15 I&N Dec. 729 (BIA 1976) for the proposition that focusing on the absence of tax returns was an abuse of the Acting Director's discretion.

In *Matter of Yarden* the district director denied an application for adjustment of status because the applicant failed to demonstrate exemption from the requirement of a labor certification and on other grounds. Counsel submits no argument on that point and this office is aware of no argument based on *Yarden* that might apply.

Counsel goes on to cite precedent and other authority pertinent to labor certification invalidations and revocations. Because the instant case does not involve invalidation or revocation of a labor certification, those authorities are not directly relevant, and the proposition for which counsel cited them is unclear.

The regulation at 8 C.F.R. § 204.5(g)(2) obliges the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. The petitioner had submitted none of those three acceptable types of evidence of its ability to pay the proffered wage when the decision of denial was rendered.

Instead, the petitioner insisted on appeal that his bank statements should suffice instead of the evidence required by the regulations and requested by the Service Center. 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.<sup>1</sup>

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<sup>1</sup> 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

Finally, the petitioner was obliged to provide the tax returns because they are relevant to a material issue in this matter and the Service Center requested 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).

With the appeal in this matter pending, the petitioner belatedly submits the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns. Those returns include corresponding Schedules C, Profit or Loss from Business. Each return has a Schedule C for a carpentry company and a Schedule C for a home decorating company. As their profits or losses are reported on Schedules C, this office concludes that they are held as sole proprietorships.

Whether the carpentry company is known as McGrath Building and Contracting is unclear.<sup>2</sup> In his responses to the July 23, 2003 and December 3, 2003 requests for the petitioner's tax returns, the petitioner's owner stated, "I do not release my Corporate Income Taxes," thus implying that the petitioner is a corporation. The evidence does not demonstrate clearly that the Schedules C for the petitioner's owner's carpentry company relate to the petitioner in this case.

Even if those Schedules C do relate to the petitioner, they may not now be considered. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988).

The petitioner's 2001 and 2002 tax returns were twice requested by the Service Center and the petitioner's owner explicitly declined to provide them. The petitioner was put on notice of required evidence and twice accorded an opportunity to provide it for the record before the visa petition was adjudicated. The appeal will be adjudicated based on the record of proceeding before the director. The AAO will not consider the tax returns submitted on appeal for any purpose.<sup>3</sup>

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,

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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.

<sup>2</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date must accompany the petition. Had the petitioner provided evidence, consistent with 8 C.F.R. § 204.5(g)(2), of its ability to pay the proffered wage with the petition, as required, or had it provided its tax returns in response to the first request for them, or even the second, the Service Center could have inquired further to determine whether they relate to the petitioner. That material line of inquiry was foreclosed by the petitioner's failure to timely submit those returns.

<sup>3</sup> Had the 2001 and 2002 personal income tax returns been considered, they would not have demonstrated the petitioner's ability to pay the proffered wage during those years. During 2001 the sole proprietor's adjusted gross income was less than the proffered wage. During 2002, the petitioner's adjusted gross income exceeded the proffered wage by \$27,619. The record contains no evidence, however, that the petitioner's owner could have supported his household of six on that amount after paying 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 did not establish that it 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 that 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, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage. In the instant case, however, the petitioner submitted no evidence from which the petitioner's net current assets may be computed.

The proffered wage is \$74,880 per year. The priority date is January 22, 2001. The petitioner has submitted no reliable evidence from which the director might determine whether it was able to pay the proffered wage during 2001 and 2002. Therefore, the petitioner did not establish that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied.

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.