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FILE: EAC 03 161 50214 Office: VERMONT SERVICE CENTER Date: **DEC 21 2005**

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. 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 appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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, counsel 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, 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 March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$14.72 per hour, which equals \$30,671.60 per year.

On the petition, the petitioner stated that it was established on August 14, 1997 and that it employs six workers. The petition states that the petitioner's gross annual income is \$290,976. The petitioner did not state its net annual income in the space provided on the petition. On the Form ETA 750B, signed by the beneficiary, the beneficiary June 1998 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 Manchester Township, New Jersey.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. Those returns show that the petitioner is a corporation, that it incorporated on August 14, 1997, and that it reports taxes pursuant to the calendar year and cash convention.

The 2001 return shows that the petitioner declared a loss of \$10,397 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$11,060 and current liabilities of \$5,990, which yields net current assets of \$5,060.

The 2002 return shows that the petitioner declared ordinary income of \$14,960 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$34,172 and current liabilities of \$6,729, which yields net current assets of \$27,443.

Counsel also submitted the beneficiary's 2001 and 2002 Form 1040 U.S. Individual Income Tax Return, including Form W-2 Wage and Tax Statements for those years. The 2001 W-2 form is only partially legible, but appears to indicate that the petitioner paid the beneficiary \$11,700 during that year. The 2002 return shows that the petitioner paid the beneficiary \$15,600 during that year.

On March 9, 2004 the Vermont Service Center, stating that the evidence then in the record was insufficient to establish eligibility, requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response counsel submitted a letter dated May 26, 2004, in which he stated that the petitioner's position is that the evidence previously submitted is sufficient to establish the petitioner's ability to pay the proffered wage.

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 June 18, 2004, denied the petition.

On appeal, counsel argues that the petitioner's gross sales, its net income, its depreciation deductions, and the amounts it paid to the beneficiary are all indices of the petitioner's ability to pay the proffered wage. Counsel further asserts that "The year 2001 was for many companies a down year financially and this is especially true in this case." Counsel notes the increase in the petitioner's gross receipts from 2001 to 2002, and the improvement from a loss to a profit during those same years, and argues that "[g]iven the strong rebound indicated between 2001 and 2002 the [petitioner] is in a secure enough position to absorb the additional salary."

Counsel's argument that the petitioner's gross receipts are, in themselves, an index of the petitioner's ability to pay additional wages is unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income,² the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage

¹ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

² The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), had properly relied on the petitioner's net income figure, as stated on the petitioner's 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.

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. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure 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 is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *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. 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. Such a scenario is unacceptable.

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 \$11,700 during 2001 and \$15,600 during 2002.

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).

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, 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.

The proffered wage is \$30,671.60 per year. The priority date is March 26, 2001.

During 2001 the petitioner paid the beneficiary wages of \$11,700. The petitioner must show the ability to pay the \$18,971.60 balance of the proffered wage during that year. During that year the petitioner declared a loss of \$10,397. The petitioner is unable to demonstrate its ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of \$5,060. That amount is insufficient to pay the balance of the proffered wage. The petitioner has submitted no evidence of any other funds available to it during 2001 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary \$15,600. The petitioner must show the ability to pay the \$15,071.60 balance of the proffered wage during that year. During that year the petitioner declared ordinary income of \$14,960. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of \$27,443. That amount is sufficient to pay the balance of the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2002.

The petitioner's tax returns were sufficient to demonstrate its ability to pay the proffered wage during 2002 but not during 2001. Counsel asserts that notwithstanding that the petitioner's tax returns do not numerically demonstrate that ability, the petition is still approvable, citing the change in the petitioner's net income from a loss of \$10,397 in 2001 to a profit of \$14,960 in 2002 and the increase in the petitioner's gross receipts during that same period.

Precedent exists for the proposition that in some cases a petition is approvable even though the petitioner's net income is less than the annual amount of the proffered wage during a given year. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful 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 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. Here, no special circumstances have been demonstrated to parallel those in *Sonegawa*. Counsel alleges that 2001 was an unusually unprofitable year for the petitioner, but the only evidence in support of that assertion is that the petitioner declared a loss during 2001 and made a profit during 2002. That is insufficient to demonstrate that the petitioner's losses during 2001 were uncharacteristic or to establish a trend. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.