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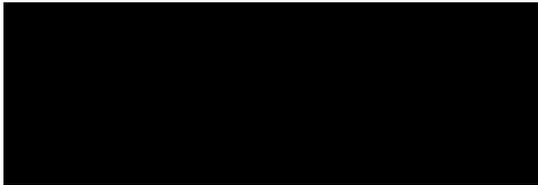
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JAN 13 2005

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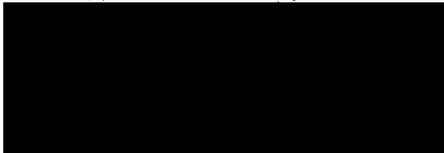
Petitioner:



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

The petitioner is a hospice. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute a Form ETA 750 Application for Alien Employment Certification accompanies 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.

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.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the petition was submitted. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition was submitted on November 29, 2002. The proffered wage as stated on the Form ETA 750 is \$20 per hour, which equals \$41,600 per year.

The petition states that the petitioner was established during 1996. On the Form ETA 750, Part B, the beneficiary did not claim to have ever worked for the petitioner. A G-325A Biographic Information form by the beneficiary on November 11, 2002 and submitted in a collateral matter states that the beneficiary has been unemployed since July 2002.

The petition states that the petitioner employs 70 workers. With the petition counsel submitted a letter from the petitioner's R.N. Director, dated November 11, 2002, also stating that the petitioner employs 70 workers. Counsel submitted no evidence of the petitioner's ability to pay the proffered wage.

Therefore, the California Service Center, on February 11, 2002, requested evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and stipulated that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$133,009 during that year. The corresponding Schedule L shows that the petitioner ended the year with current assets of \$35,200 and current liabilities of \$1,082, which yields net current assets of \$34,118.

The director observed that the petitioner has filed multiple petitions within the same year, and determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wages of all the beneficiaries. On May 6, 2003, the director denied the petition.

On appeal, counsel provides a copy of the petitioner's Form 2002 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$203,769 during that year. The corresponding Schedule L shows that the petitioner ended the year with current assets of \$318,800 and current liabilities of \$240,669, which yields net current assets of \$78,139.

The petition was denied because the director found that the petitioner had failed to demonstrate that it had the ability to pay the proffered wages of all of the beneficiaries for whom it had petitions pending. Although counsel never directly addresses the basis for the decision of denial on appeal, he argues that the petitioner's gross receipts, its assets, the size of its payroll, and its taxable income show the ability to pay the proffered wage. Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that under these circumstances the petitioner's profits are not dispositive of the issue of the ability to pay the proffered wage.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 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 *Sonogawa*, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the petitioner is a relatively new business, and the record contains no evidence that the profit of the petitioner's business during the pertinent years was

uncharacteristically low or that it has ever posted a profit large enough to show the ability to pay a significant number of new petitioned for employees. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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 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 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.

The priority date is November 29, 2002. The proffered wage is \$41,600 per year.

CIS computer records indicate, however, that the petitioner currently has other petitions for alien workers that were recently approved or are pending. Nine petitions were recently approved that have priority dates during 2002. An additional petition was approved with a priority date during 2003. Two petitions with priority dates

during 2003 remain pending. Another petition with a priority date during 2004 remains pending.<sup>1</sup> In order to show the ability to pay the proffered wage of the instant petition, the petitioner must demonstrate that it is able to pay the proffered wage of each of those petitions beginning on their priority dates.

The wages proffered in those other petitions are unknown to this office, as those files are not currently in this office. This office is forced to make a reasonable assumption pertinent to the amounts of those proffered wages. This office shall assume, for the calculations pertinent to this decision, that the wages proffered in those recently approved and pending decisions is the same as the proffered wage in the instant case.<sup>2</sup>

The proffered wage is \$41,600 per year. The priority date is November 29, 2002.

Nine petitions with priority dates during 2002 were recently approved. The petitioner must show the ability to pay the proffered wages of those nine petitions plus the proffered wage in the instant case, or \$416,000<sup>3</sup> during that year.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$203,769. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of \$78,139. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage.

The petitioner has not demonstrated the ability to pay the proffered wage during 2002. 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 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.

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<sup>1</sup> In addition, two petitions with priority dates during 2002 have been recently revoked and four petitions with priority dates during 2003 have been recently denied.

<sup>2</sup> This office notes that, in the event that the assumption is incorrect and unfairly prejudices the outcome of the instant case, that error may be addressed in a motion.

<sup>3</sup> \$41,600 x 10.