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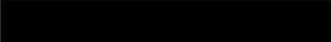
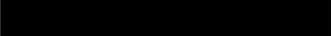
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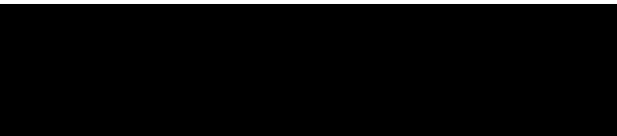
JAN 27 2005

FILE:  Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 050 54560

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate management, brokerage, and investment firm. It seeks to employ the beneficiary permanently in the United States as a management analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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, 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 July 17, 2001. The proffered wage as stated on the Form ETA 750 is \$36.45 per hour, which amounts to \$75,816 annually. In its letter of support, the petitioner stated that the beneficiary had worked for it since 2000; however, it provided no documentation as to any wages paid to the beneficiary, or the beneficiary's job title and responsibilities. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on 1989, to have a gross annual income of \$567,721, and to currently employ 30 workers. In support of the petition, the petitioner submitted a letter of support, a copy of IRS Form 1120 U.S. Corporation Income Tax Return for 2001, a copy of the petitioner's

business license, along with documentation of the beneficiary's academic credentials and his work experience with a prior U.S. employer.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on July 17, 2001, the priority date, the director requested additional evidence pertinent to that ability. On February 12, 2003, in accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements from July 17, 2001 to the present to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested that the petitioner provide signed and certified copies of federal income tax forms for the years 2000, 2001, and 2002. In addition, the director asked for copies of the beneficiary's federal tax returns for the years 2000-2002, with copies of the beneficiary's IRS W-2 forms. In addition, the director requested copies of Form DE-6, the state of California Quarterly Wage Report for all of the petitioner's employees for the last three quarters with names, social security numbers, and number of weeks worked for all employees. Finally the director requested copies of the petitioner's payroll summary, W-2 or W-3 forms for wages paid to employees for the years 2000-2002, and additional documentation with regard to the previous employment of the beneficiary in the United States and his academic degrees.

In response, former counsel resubmitted Form 1120 corporate tax returns for the petitioner for the year 2001. The petitioner also explained that its agents are paid on a commission basis, and as such, no DE-6 Quarterly Wage Reports or W-2s or W-3s are available. Counsel referred to two legal decisions in his comments, namely, *Elatos [sic] Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) and *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). Counsel stated that the former decision is not a controlling authority in the instant petition because the facts are not similar. Counsel states that in *Elatos*, the petitioner never presented proof/evidence of its net income, or any financial documentation. In contrast, counsel stated that the instant petitioner had presented its tax returns, and other documentation to prove its financial viability beyond the tax returns. Counsel also asserted that the *Sonegawa* decision allows that approval from the CIS is not precluded by the fact that its net income is not commensurate with the proffered wage. Counsel finally asserted that in citing to the *Elatos* case, tax returns should not be the only documentation viewed as material to establish the ability to pay, but as noted in *Sonegawa*, other financial documentation beyond tax returns should be considered.

The petitioner's tax returns reflect the following information for 2001:

	2001
Net income	\$ 3,269
Current Assets	\$20,677
Current Liabilities	\$ 800
Net current assets	\$19,877

In addition, counsel submitted copies of its bank statements; one from February 2003, and twelve statements for the year 2001. Counsel noted that the petitioner's end of the month balances covered the payment of the

beneficiary's salary which counsel identified as \$5,832 per month.¹ The petitioner also stated that its cash in the bank as well as its cash on hand, as indicated by Schedule L of its income tax return, were adequate to cover the beneficiary's monthly salary.

The 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 8, 2003, denied the petition.

On appeal, counsel submits the petitioner's bank statements from the Union Bank of California from June 2001 to May 2003, a period of time that includes the priority date for the labor certification application and the date for which the director requested additional evidence. Counsel states that it is not clear whether the petitioner's 2002 bank statements were submitted previously, and if so, why they were ignored in the director's denial. Counsel states that the bank statements establish that the petitioner's balance never fell below \$8,600 during this period of time, and the petitioner has had sufficient funds to pay the proffered monthly wage of \$6,318. Counsel further states that the \$444,213 paid to approximately 30 independent contractors or agents in 2001, could be reduced by hiring a management analyst. Such savings could be used to pay the beneficiary's salary. Counsel further asserts that the director's statement that the petitioner's current labor force of independent contractors casts doubt on the petitioner's intention to enter into an employer-employee relationship with the beneficiary is speculative and without foundation. According to counsel, such a statement disregards the petitioner's business decision to hire a management analyst to help make the petitioner's growing operation more efficient.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. With regard to former counsel's references to *Sonegawa* or *Elatos Restaurant v. Sava*, the points raised by counsel do not appear relevant to this proceeding. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. Neither counsel nor the petitioner has ever raised this issue in this proceeding. In addition, contrary to counsel's assertion, the petitioner in *Elatos Restaurant v. Sava* did finally submit a corporate income tax return for one year, which documented that the petitioner's net taxable income was insufficient to pay the proffered wage. The petition in *Elatos* was also denied because of issues raised by conflicting statements with regard to the beneficiary's educational credentials.

Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

¹ Former counsel incorrectly identified the beneficiary's monthly wage. The monthly wage for the proffered annual wage of \$75,816 is \$6,318. On appeal, current counsel correctly identifies this figure.

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 employed and paid 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, although the petitioner stated that the beneficiary had worked for it since 2000, it submitted no documentary evidence to establish that assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the petitioner submitted federal income tax forms for the beneficiary for the year 2001, as well as a W-2 form for 2001. The beneficiary's federal income tax form, which included a sole proprietor schedule C-EZ, indicates that the beneficiary earned \$7,217 in 2001, which is considerably less than the full proffered wage.

In addition, although in a letter dated October 2002, the petitioner stated that the beneficiary worked for it since 2000, the beneficiary's W-2 form for 2002 identifies its employer as Hamada, Inc., a company based in Las Vegas, Nevada. According to this document, the beneficiary earned \$25,074 in wages, tips, and other compensation in 2002. The petitioner has provided no evidence that it has employed the beneficiary at the time of the priority date and onward. To the contrary, the beneficiary appears to have worked for another employer in 2002, and no information is in the record as to the job title and responsibilities of this position. Therefore, the petitioner did not establish that it employed the beneficiary in 2001, and continued to pay the beneficiary the full proffered wage to the present day.

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, 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); *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 the Service should have considered income before expenses were paid rather than net income. The petitioner's net income for 2001, which is the only evidentiary documentation of the petitioner's net income during the period in question, was \$2,379, a sum clearly less than the proffered wage of \$75,816.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to

cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. As correctly noted by the director, the petitioner's net current assets during 2001, however, were only \$19,877. The petitioner submitted no further federal income tax returns upon which to evaluate the petitioner's net current assets in 2002, or 2003.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 and onward. The petitioner shows net income of \$3,269 and net current assets of only \$19,877 and has not, therefore, demonstrated the ability to pay the proffered wage, namely, \$75,816, out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and onward. 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.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.