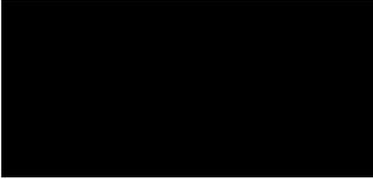


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FILE: [REDACTED]
LIN 03 068 52321

Office: NEBRASKA SERVICE CENTER

Date: JUL 18 2006

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 10, 2002. The proffered wage as stated on the Form ETA 750 is \$20,800.00 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications.

- Petitioner's Form 1120S tax return for 2001 stated taxable income¹ of \$4,533.00.

¹ Form 1120S, Line 21.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center on January 22, 2003, requested evidence pertinent to that issue.

Provide a copy of [REDACTED] most recent pay voucher. The voucher that you provide must identify both the beneficiary and his employer by name, and specify the beneficiary's gross/net pay, income received year-to-date, income tax deductions withheld, and the length of the pay period. Please provide Mr. [REDACTED] last pay voucher from 2002.

Please also provide, if unavailable, a copy of [REDACTED] W-2 from 2002.

Please submit copies of your most recent "Employers Quarterly Federal Tax Form" (Form-941) and "State Unemployment Compensation Report Form" (or comparable form for your state). These documents must be accompanied by the quarterly wage and withholding supplement which identifies all employees by name and social security number.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted Employers Quarterly Federal Tax return (Form-941) and "State Unemployment Compensation Report" as well as a profit and loss statement for 2002² for the business.

The director denied the petition on June 18, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the counsel submits a brief and submits or resubmits additional evidence: U.S. tax return Form 1120S for 2002, a balance statement as of December 31, 2002, bank statements from February 2003 to June, 2003, and, list of properties owned by the owner of the petitioner.

- For the tax year 2002, Form 1120S stated taxable income of \$17,782.00

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. There is no evidence submitted that petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the

² The profit and loss statement for year 2002 stated net income of \$13,896.72.

petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage in 2002.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120S U.S. Income Tax Return submitted by petitioner, Schedule L⁴ current assets never exceeded its current liabilities.

- In 2002, petitioner's Form 1120S return stated current assets of \$3,141.00 and \$172,042.00 in current liabilities. Therefore, the petitioner had a <\$168,901.00> in current net assets for 2002. Since the proffered wage was \$20,800.00 per year, this sum is less than the proffered wage.

Therefore, for the tax year 2002, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Counsel asserts that total assets, in and of itself, are "... a legitimate indicator of petitioner's ability to pay." Counsel is combining total assets with net current assets. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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

³ 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.

⁴ Form 1120S for tax year 2001 was submitted without schedules or attachments.

⁵ 8 C.F.R. § 204.5(g)(2), *Supra*.

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.

Counsel has submitted bank statements from February 2003 to June 2003 as proof of petitioner's ability to pay. Counsel's reliance on the balances in the petitioner's bank account 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. 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.

Counsel has submitted list of properties owned by the owner of the petitioner. Real property is a depreciable asset that the petitioner uses in its business. 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 property owned by the owner cannot be considered. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.⁶ See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel then postulates that the "...Petitioner's company will increase revenues, since he will add to the number of employees [by employing the beneficiary]" No detail or documentation has been provided to explain how the beneficiary's employment as a cook will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel believes that the petitioner's business is comparable to case precedent called *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). That case relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 couturiere.

⁶ No evidence was submitted showing that petitioner owned realty.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

Finally, counsel asserts that the petitioner is an "S" corporation, and, that "... a shareholder's assets may be used to compensate for any lack in corporate funds." While this statement may not be accurate in every case, in this instance it does have merit. Reviewing the tax return submitted for tax year 2001, the "Compensation of Officers" in the return on line seven stated \$65,400.00. While as a general rule, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage,⁷ it is reasonable for a business to reallocate a small portion of compensation due the corporate officers in circumstances in which its taxable income almost equals the proffered wage and the additional funds, that are necessary, amount to only a small percentage of officers compensation. In the present case, taxable income equals 85% (i.e. \$17,782.00) of the proffered wage, and the additional funds necessary to make up the difference are only a small percentage of the expenditure (i.e. 5% or \$3,018.00) for officers compensation.

The evidence submitted does establish that the petitioner 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 met that burden.

ORDER: The appeal is sustained.

⁷ See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).