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U.S. Citizenship
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Services

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FILE: LIN 03 209 50059 Office: NEBRASKA SERVICE CENTER Date: NOV 07 2005

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

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 on appeal. The appeal will be dismissed.

The petitioner is an export corporation. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 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, 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 as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 5, 2001. The proffered wage as stated on the Form ETA 750 is \$32,220.00 per year.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested additional evidence that the petitioner had the ability to pay the proffered wage including audited profit/loss statements, bank account records, and/or personnel records.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2001, 2002 and 2003. Also, counsel submitted financial statements for those same years.

The director denied the petition on May 27, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage.

On appeal, counsel asserts the petitioner has the ability to pay the proffered wage as demonstrated by the fact that the petitioner has employed the beneficiary and paid him the proffered wage from the priority date.

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. Evidence was submitted to show that the petitioner employed the beneficiary. The Petitioner paid the beneficiary \$27,261.00 in 2001, and, \$27,934.00 in 2002. Since the proffered wage \$32,220.00 per year, the petitioner did not pay the proffered wage for the years examined. There is a pay statement in the record of proceeding evidencing wages paid the beneficiary through June 13, 2003 of \$10,404.00.

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 petitioner's gross income. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$32,220.00 per year from the priority date of July 5, 2001:

- In 2001, the Form 1120S stated a taxable income of loss¹ <\$56,536.00>².
- In 2002, the Form 1120S stated a taxable income loss of <\$95,939.00>.
- In 2003, the form 1120S stated taxable income of \$90,948.00.

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. In years 2001 and 2002, the petitioner suffered losses. The sum of the wage paid and the taxable income in 2002 is less than the proffered wage. In 2003 the petitioner had sufficient income to pay the proffered wage.

¹ IRS Form 1120S, Line 21.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage.

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 1120 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 Returns submitted by the petitioner for 2001 and 2002,⁴ Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$70,113.00 and \$618,932.00 in current liabilities. Therefore, the petitioner had <\$548,819.00> in net current assets. Since the proffered wage was \$32,220.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$62,652.00 and \$628,369.00 in current liabilities. Therefore, the petitioner had <\$565,717.00> in net current assets. Since the proffered wage was \$32,220.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date through a review of the financial statements submitted, by payment of wages aforesaid, and by the financial viability of the petitioner. 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. In his calculations, counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Counsel submitted financial statements for 2001, 2002, and 2003. Examining the financial statements submitted they have little probative value since they are not identified as either audited or reviewed statements. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's⁶ Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. It is

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 The petitioner had sufficient taxable income in 2003 to pay the proffered wage.

⁵ 8 C.F.R. § 204.5(g)(2).

⁶ American Institute of Certified Public Accountants

the lowest level of financial statements. Although there is footnote references that would indicate the financial statements were prepared by accountants, there is no way to discern whether or not the statements are audited as portions of the reports have been omitted from evidence.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 2001 and 2002. The positive income for 2003 was more than offset by the losses of the two preceding years. The net current asset value for years 2001, 2002, and 2003 is negative according to the tax returns submitted.

Matter of Sonogawa, 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. 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.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined (2001 and 2002) was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner is not a viable business that has proved its ability to pay the proffered wage from the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the two corporate tax returns for years 2001 and 2002 as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.