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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: OCT 26 2005

WAC 03 167 53638

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 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 corporation that constructs and repairs high-grade cabinets and furniture. It seeks to employ the beneficiary permanently in the United States as a supervisor cabinetmaker. 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, and, that it had not established that the beneficiary has the requisite experience as stated on the labor certification 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour (\$41,600.00 per year). The Form ETA 750 states that the position requires four 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, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 and insufficient to show that the beneficiary had the requisite four years work experience, the California Service Center on December 17, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Provide IRS computer printouts of the petitioners [sic] 1120 Tax Returns for Tax Year 2001 and 2002.

Provide the beneficiary's W-2's from 1993 to the present while employed by the petitioner.

Experience: Submit evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750 (Application for Alien Employment Certification). Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

In addition, provide a copy of the beneficiary's valid C-3 Contractor's license.

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 Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002; W-2 Wage and Tax Statements for years 2000 through 2003; an employment verification letter; a state contractor's license; and, the petitioner's advertising material.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$41,600.00 per year from the priority date:

- In 2002, the Form 1120 stated taxable income¹ of \$79,870.00.
- In 2001, the Form 1120 stated taxable income loss of <\$35,880.00>.²

¹ IRS Form 1120, Line 28.

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 director denied the petition on April 2, 2004, 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, counsel asserts:

The District Director erred in his decision to rely solely on the net income of the petitioner to determine ability to pay. The petitioner has demonstrated the ability to pay 2003, 2002, and 2001

Additionally, the evidence submitted in the form of a Contractor's license was sufficient evidence that the beneficiary had obtained the experience listed on the ETA750. With Counsel's brief, the petitioner and beneficiary will present evidence that to obtain a Contractor's license in the State of Nevada, the applicant must have had within 10 years immediately preceding the filing of the contractor's application, at least four years experience as a journeyman, foreman, supervising employee or contractor in the specific classification the license is sought

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. According to evidence submitted to show that the petitioner employed the beneficiary and paid wages paid in 2001 of \$31,200.00, in 2002 wages were \$41,600.00, and in 2003 wages paid were \$41,600.00. Therefore for the year 2001, the petitioner did not pay the proffered wage of \$41,600.00 per year, but it did pay the proffered wage in 2002 and 2003.

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 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:

- In 2001, the Form 1120 stated taxable income loss of <\$35,880.00>. In 2001 wages paid were \$31,200.00. Since the proffered wage is \$41,600.00 per year, the sum of the taxable income and wages paid is less than the proffered wage.

- In 2002, the Form 1120 stated taxable income of \$79,870.00. In 2002 wages paid were \$41,600.00. Since the proffered wage is \$41,600.00 per year, the sum of the taxable income and wages paid is more than the proffered wage.

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 sufficient pay the proffered wage for the year 2001 for which petitioner's tax returns are offered for evidence.

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 two Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, the petitioner's Form 1120 return stated current assets of \$5,608.00 and \$0.00 in current liabilities. Therefore, the petitioner had a \$5,608.00 in net current assets for 2001. Since the proffered wage was \$41,600.00 per year, this sum is less than the proffered wage.
- In 2002, the petitioner's Form 1120 return stated current assets of \$33,120.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$33,120.00 in net current assets for 2002. Since the proffered wage was \$41,600.00 per year, this sum is less than the proffered wage.

Therefore, for the 2001 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.

In 2001 the petitioner paid wages to the beneficiary of \$31,200.00, and, it had \$5,608.00 in net current assets. There is insufficient net current assets and liquidity evident to demonstrate the ability to pay in year 2001. In the year 2001 through an examination of petitioner's net current assets and compensation paid to the beneficiary, the petitioner did not demonstrate the ability to pay the proffered wage.

Counsel asserts in the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date through the balance in its bank accounts, and by the amount of machinery and equipment expenses.⁴ Counsel also contends, that the events of September 11, 2001 terrorist attacks impacted the petitioner's business, and impacted its profitability. Counsel provides no evidence to show how those events specifically affected his business. According to regulation,⁵ copies of annual reports,

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 Petitioner has also submitted an opinion from its accountant of its viability and ability to be profitable. Since it is not an audited statement it has limited probative value.

⁵ 8 C.F.R. § 204.5(g)(2).

federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

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.

We reject the petitioner's assertion that the petitioner's total assets and expenditures for machinery and equipment should have been considered in the determination of the ability to pay the proffered wage. There is no substantiation in the record of proceeding that the purchase of machinery was discretionary and not in the ordinary course of business. 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.

Counsel contends, without substantiation, that the events of September 11, 2001 terrorist attacks impacted the petitioner's business specifically, and impacted its profitability. No direct proof of the above has been presented, or reasons shown why the petitioner was particularly affected by the occurrence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

CIS electronic database records show that the petitioner filed I-140 petitions on behalf of two other beneficiaries⁶ at about the same time as the instant petition was filed. The record in the instant case contains information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, and about the priority dates of those petitions, and the present employment status of those other potential beneficiaries. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage in 2002 and 2003, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. The total amount required to pay all the beneficiaries is \$112,985.60. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to all the beneficiaries for which petitions have been filed.⁷

⁶ WAC 03 172 52340, and, WAC 03 164 52299; the cabinetmakers positions, \$35,692.80 proffered wage each.

⁷ Currently, the petitioner has employment-based petitions in process for three workers, the present petition offering a wage of \$41,600 per year for the position of cabinetmaker supervisor, and two other petitions for the position of cabinetmaker at the wage of \$35,692.80 each. All the petitions are pending and none have

CIS will examine the financial viability of a business in the totality of the circumstances presented. Counsel has provided sufficient information concerning the petitioner and its business plans to reach a determination such as was made in *Matter of Sonegawa*. *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. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unique or unusual circumstances and evidence pertaining to the petitioner has been shown to exist in this present case to parallel those in *Sonegawa*, to explain why 2001 was an uncharacteristically unprofitable year for the petitioner. Aside from the assertions discussed above, counsel has not established a case for application of *Matter of Sonegawa*. Based upon the record of proceedings and the analysis in this discussion, the petitioner has not demonstrated the ability to pay the proffered wage from the priority date from the years examined for all beneficiaries of the petitioner's multiple pending petitions.

The second issue in this case relates to the qualifications of the beneficiary, and, specifically to the requirements of the certified Alien Employment Application.

The Form ETA 750 Part A prepared by the petitioner states that the proffered position requires:

Block 14 State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13 [job description] above.

<u>Education</u> (Enter number of years)	[Petitioner's Response]
Grade School	<u>Blank</u>
High School	<u>Blank</u>
<u>College</u>	<u>2</u>
College Degree Required (specify)	<u>N/A</u>
Major Field of Study	<u>N/A</u>

* * *

Experience

been withdrawn. The total of all proffered wages is \$112,985.60 per annum. In year 2001, the petitioner suffered a taxable income loss of \$35,880.00, and adding that negative figure together with the total proffered wages expense, the petitioner required \$148,865.00 to offset the income loss and pay the proffered wages in 2001. In 2001, the petitioner had no taxable income, \$5,608.00 in net current assets, and, in the beneficiary's case, did not pay the proffered wage in 2001.

Job Offered
Years

4

To determine whether a beneficiary is eligible for a third preference immigrant visa, CIS must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

On appeal, the counsel asserts that since the beneficiary has a Nevada contractor's license that requires a certain number of years of occupational experience, that fact should satisfy the requirements of the above employment certification. This is indirect evidence. CIS specifically requested evidence be presented "... in letter form on the previous employer's letterhead showing the name and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week."

As noted above, it was the petitioner's own job requirement that the beneficiary have four years of job experience as supervisor cabinetmaker. Counsel, in an exhibit to his brief in this matter, has provided a letter from a prior employer that states in part:

It is our understanding that [beneficiary] was under the employ of the company [i.e. prior employer] ... In a conversation with the previous owner, he recognized the employee's name. He also recalled that it was probably from 1993 to 1995 that [the beneficiary] worked full-time ... for the company....

This is an insufficient job verification based upon second hand testimony, and, as the director pointed out in the decision, the petitioner did not provide any substantiation such as W-2 statements to verify that work experience. There are no positive statements in that letter verifying the beneficiary's employment and four years occupational experience.

There is also a credibility issue present in the record of proceedings. The problem that arises in this case is the multiple inconsistencies in information provided by the beneficiary. The Form ETA 750 Part B states that the beneficiary was employed by the petitioner from September 1993 to April 2001 the date of signing of the form by beneficiary. However, now as set forth above, the petitioner has submitted a conflicting employment verification letter from a source who spoke to a prior employer. There has been no evidence other than the source's ambiguous statement to the beneficiary prior employment in the occupation despite requests by the director for W-2 or pay roll statements.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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. The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has the requisite job experience. The instant petition, submitted pursuant to 8 C.F.R. §204.5(1), may not be approved. The documentation now submitted by the petitioner does not establish that petitioner had the ability to pay the proffered wage on the priority date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

ORDER: The appeal is dismissed.