



U.S. Citizenship  
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FILE:



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Office: NEBRASKA SERVICE CENTER

Date:

OCT 26 2005

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

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

Here, the Form ETA 750 was accepted on May 17, 2001. The proffered wage as stated on the Form ETA 750 is \$60,900.00 per year. The Form ETA 750 states that the position requires a bachelors of science degree or equivalent and two years experience.

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.

On August 6, 2003, the Director specifically requested the following: copies of bank account records; monthly balance sheets; annual reports; U.S. tax returns or audited profit/loss financial statements; U.S. Internal Revenue Service records including Form 1099-MISC, and, Form W-2 Wage and Tax Statements; Employers Quarterly Federal Tax Form statements (Form-941); and, a "State Unemployment Compensation Report Form" statement (or a comparable form for petitioner's state) which identifies all employees by name and social security number, hours worked and their earnings as well as other documentation.

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 1120S tax returns for years 2001 and 2002, banking accounts statements, and Employers Quarterly Federal Tax Form statements (Form-941).

The director denied the petition on May 10, 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 that the regulation at 8 C.F.R. §.204.5(g)(2) allows the introduction of evidence other than tax returns to demonstrate the petitioner's ability to pay the proffered wage. Counsel also asserted that the petitioner had sufficient cash on hand to pay the proffered wage.

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. No evidence was submitted to show that the 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 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.

The tax returns submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$60,900.00 from the priority date of May 5, 2001:

- In 2001, the Form 1120S stated taxable income<sup>1</sup> of \$22,925.00.
- In 2002, the Form 1120S stated taxable income of \$21,226.00.

In tax years 2001 and 2002, the petitioner was unable to pay the proffered wage from taxable income as above stated.

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. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence.

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<sup>1</sup> IRS Form 1120S, Line 21.

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.<sup>2</sup> 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, Schedule L found in each of those returns indicates the following:

- In 2001, the petitioner's Form 1120S return stated current assets of \$53,103.00 and \$26,598.00 in current liabilities. Therefore, the petitioner had \$26,505.00 in net current assets for 2001. Since the proffered wage was \$60,900.00, this sum is less than the proffered wage.
- In 2002, the petitioner's Form 1120S return stated current assets of \$41,110.00 and \$12,498.00 in current liabilities. Therefore, the petitioner had \$28,612.00 in net current assets for 2002. Since the proffered wage was \$60,900.00, this sum is less than the proffered wage.
- In 2003, the petitioner's Schedule L<sup>3</sup> stated current assets of \$96,223.00 and \$69,521.00 in current liabilities. Therefore, the petitioner had \$26,702.00 in net current assets for 2003. Since the proffered wage was \$60,900.00, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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 current assets.

Counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies between its taxable income and the proffered wage. Since depreciation is a deduction in the calculation of taxable income on tax Forms 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>3</sup> The petitioner withheld and did not submit the petitioner tax return for 2003, but only submitted its Schedule "L," and, Statement "1."

support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel contends that the beneficiary would replace other unspecified workers. He asserts that the recurring costs for outside "Contracted Services ..., which included technical services, some of which would have been performed by the alien..." could be reduced. Counsel has presented Statement "1" from three tax returns, 2001 through 2003, that show that these costs have already gone down dramatically without the hiring of the alien. From a high of \$164,391.00 in 2001, for each succeeding year, these costs have declined. In 2002, the cost was reduced to \$78,710.00, and in 2003, the cost stated for "Contracted Services" was only \$40,758.00. It is not credible to believe that the petitioner desires to employ the alien at a proffered wage of \$60,900.00 when some or all of her duties are already performed at a much lower expense to the company.

Notwithstanding the above, the record does not name these outside workers who proved contract services, state their compensation, verify their full-time employment, or provide evidence that the petitioner will replace them with the beneficiary. Compensation already paid to others is not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the services provided by these outside workers or services involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If those workers performed other kinds of work, then the beneficiary could not have replaced some or any of them. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel advocates the use of the cash balance of the two business accounts to show the ability to pay the proffered wage. 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 also includes among his contentions cash stated on Schedule "L" of the tax returns submitted. Correlating the cash amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is suggesting combining the petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To do so would be duplicative of the petitioner's taxable income. Also on Schedule "L," it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L" which is a balance sheet that shows both current assets and current

liabilities. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2001 and 2002. A review of the 2003 Schedule "1" shows that a item for trade notes and receivables appears for the first time on the balance sheet, that once received, would translate into gross receipts or sales. However, petitioner did not submit the 2003 tax return. There is no explanation for the withholding of the 2003 tax return in the record of proceeding. It is unfair to this discussion to show only a portion of the entire 2003 return, and not the return itself, since the best evidence of the ability to pay are audited financial statements, tax returns, and, annual reports according to the regulation at 8 C.F.R. § 204.5(g)(2). The evidence for 2003 consists of an incomplete tax return. Therefore, the AAO cannot make a determination as to petitioner's ability to pay the proffered wage for 2003.

*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 was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that the high cost of "Contracted Services" is such an unusual and unique circumstance that caused the petitioner's profits to be depressed in 2001. However upon closer examination, the petitioner has substantially reduced its outside services cost without appreciably increasing its taxable income, which is much lower than the proffered wage. Petitioner has not submitted proof that it could expect higher profits. By the evidence presented, the petitioner, while a going concern, is not a viable business that has proved its ability to pay the proffered wage.

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.