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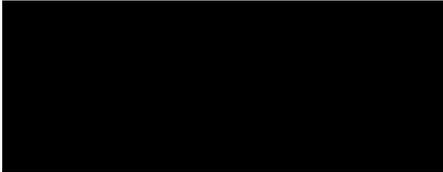
U.S. Department of Homeland Security  
20 Mass, N.W. Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLICATION OFFICE

B6



FILE: [Redacted]  
EAC 03 079 51685

Office: VERMONT DIRECTOR

Date: OCT 31 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Director, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a painting company. It seeks to employ the beneficiary permanently in the United States as a restoration supervisor. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$26.31 per hour (\$54,724.80 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; several affidavits of present and prior employment of the beneficiary; and, a copy of the petitioner's U.S. federal tax return for 2001.

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, 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 specifically requested in pertinent part:

\* \* \*

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary ... [of \$54,724.80 per year] as of April 30, 2001, the date of filing and continuing to the present.

If the beneficiary was employed by you at in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

\* \* \*

Submit Form W-3, Transmittal of Wage and Tax Statement covering the year 2001. Identify each employee by name, social security number and dollars paid.

Submit Forms 941, Employer's Quarterly Federal Tax Return, for each quarter of 2001 and for the first quarter of 2002.

Submit Form 1096, Annual Summary and Transmittal of United States Information Return, if you issued any Forms 1099-MISC in 2001.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a letter from the petitioner, a letter from the petitioner's bank acknowledging a line of credit, copies of the petitioner's U.S. federal tax returns for 2001 and 2002, and, a copy of Form 1099-MISC for 2002 issued to the beneficiary as well as other documents.

The director denied the petition on, 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.

Upon appeal, counsel submits additional evidence. Counsel submitted on appeal the following copies of documents: a letter from an accountant<sup>1</sup> dated May 19, 2004; the personal joint income tax return of the petitioner (Form 1040) for 2001 with Schedule "C"; U.S. federal tax returns Form 1120S for the years 2002 and 2003; a letter dated September 15, 2000, from a bank authorizing a personal line of credit in the amount of \$30,000.00; United States Department of Health and Human Services poverty guidelines for 2001; and, the petitioner's U.S. federal tax returns Form 1040 for the years 1999,<sup>2</sup> 2000 and 2001.

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. The petitioner employed the beneficiary from July 1998 according to the certified Alien Employment application found in the record of proceeding, but he has not

<sup>1</sup> The letter concerns the petitioner's depreciation deduction.

<sup>2</sup> Since the priority date was April 30, 2001, tax returns submitted prior to that date do not have probative value to show the ability to pay the proffered wage from the priority date date.

paid the beneficiary the proffered wage during that time according to the evidence presented as discussed below.

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.

The tax returns submitted by the petitioner demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$54,724.80 per year from the priority date of April 30, 2001:

- In 2001, the Form 1040 stated taxable income<sup>3</sup> of \$40,563.00.
- In 2002, the Form 1120S stated taxable income<sup>4</sup> of \$92,459.00.
- In 2003, the Form 1120S stated taxable income of \$127,018.00.

In tax years 2002 and 2002, the petitioner could pay the proffered wage from taxable income.

In 2001, the petitioner had \$40,563.00 in taxable income. According to the petitioner, the beneficiary had been in the employ of the petitioner since July 1998. The beneficiary personal tax returns are in evidence that state gross receipts earned in his business (house restoring) of \$25,700.00.<sup>5</sup> According to a letter dated December 29, 2003, submitted by the petitioner as part of the response to the director's request for evidence, "...[the beneficiary] ... has been working for me since 1998, however, in the early months of 2001 ...[the beneficiary] was not working full-time for me, and in fact, was barely working for me at all until the Spring of 2001 ...' Petitioner goes on to say that he did not issue the beneficiary a W-2 Wage and Tax Statement or Form 1099-MISC in 2001. There is no evidence that the beneficiary worked for anyone else, and, the weight of all the evidence describing the employer/employee relationship between the petitioner and beneficiary would indicate that the funds the beneficiary states on his tax return were paid to him by the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by

<sup>3</sup> IRS Form 1040, Line 33.

<sup>4</sup> IRS Form 1120S, Line 21.

<sup>5</sup> The petitioner was operating as a sole proprietorship in tax year 2001. Petitioner stated the "cost of labor" on Schedule "C" as \$131,569.00. There was no submission of information in evidence, although the director requested it, to identify the recipients of that amount paid in 2001 other than the beneficiary's personal tax return.

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. By subtracting \$25,700.00 from the proffered wage of \$54,724.80, the difference is \$29,024.80. The adjusted gross income of \$40,563.00 minus \$29,024.80 leaves \$11,538.20 remaining from income for year 2001. It is not credible to believe that the petitioner would have paid the beneficiary the proffered wage in year 2001, and, reduced the amount of money he and his spouse could live on for that year to below the poverty guidelines.

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. Counsel contended on Form I-290B and in the brief<sup>6</sup> submitted that the director failed to take into consideration in her decision a line of credit, "cash wages" already paid to the beneficiary by the petitioner, that the director failed to pro-rate the proffered wage from the priority date for 2001, and, failed to "add back" depreciation in her determination of available assets to pay the proffered wage.

According to regulation,<sup>7</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel, and an accountant who submitted his letter opinion in this matter, advocate the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiency. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, 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 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.

<sup>6</sup> Counsel also takes the position that although the petitioner employed the beneficiary without work authorization issued by CIS, "... It is common knowledge that many aliens seeking permanent residency have been employed without authorization, and, as such, the Petitioner cannot be held to a standard to have paid prevailing wage to an alien without employment authorization ...." By this, counsel goes on to say, the petitioner employed the beneficiary when he was not eligible to work and at less than the prevailing wage (i.e. proffered wage). This is an admission that the petitioner employed the beneficiary without the requisite employment authorization document. Insofar as counsel is attempting to show that petitioner received a benefit from a prohibited action, which was the employment of an alien the employer knew was without work authorization, it is against public policy to claim a benefit or advantage from a prohibited action in which the petitioner was a willing participant. However, the visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959).

<sup>7</sup> 8 C.F.R. § 204.5(g)(2).

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 asserts that since the priority date is April 30, 2001, the petitioner should be responsible for paying a pro-rated portion of the proffered wage corresponding to the remaining days of 2001 from April 30<sup>th</sup>. If this were the rule, then the petitioner's yearly taxable income would also have to be prorated which would eliminate the presumed benefits of pro-ration. Since CIS is attempting to analyze the petitioner's ability to pay over a given period of time, it would not be logical to measure income earned over a different and longer period of time against the wages earned for the shorter period of time.

As already noted, the petitioner has employed the beneficiary since July 1998. Counsel asserts that the director failed to take into account that the beneficiary has received wages or compensation from the petitioner. As was discussed above, for tax year 2001, even with the addition of the compensation paid (\$25,700.00) to the taxable income of \$40,563.00, there was insufficient income for the petitioner to pay the proffered wage of \$54,724.80 per year and meet his family living expenses for 2001. Since there was sufficient taxable income earned in 2002 and 2003, it is not necessary to calculate the addition of the wages paid the beneficiary for those years.

Counsel also asserts that a letter dated September 15, 2000, from a bank mentioning a personal line of credit in the amount of \$30,000.00 extended in 1997, should be considered as an asset to pay the proffered wage. CIS will not augment the petitioner's net income by adding in the sole proprietors or corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Also, the counsel's suggestion that the petitioner's income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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. For the years 2001 through 2003, the taxable income for the petitioner increased from \$40,563.00 in 2001, to \$92,459.00 in 2002, and, to \$127,018.00 in 2003. Evidence was submitted to show that the petitioner paid the beneficiary as a contractor \$26,594.00 in 2002 and \$23,812.00 in 2003. Adding this compensation to the taxable income reported in 2002 and 2003 would increase the cash available to pay the proffered wage for those years.

The petitioner stated that, although he had employed the beneficiary in 2001, that it was not full time. Therefore, there was an uncharacteristically unprofitable period in 2001 in evidence since it is reasonable to believe that had the petitioner had projects sufficient to employ the beneficiary in his key position of restoration supervisor, he would have done so. Therefore, there were unusual losses or costs that would have depressed the taxable income of the petitioner in 2001. Income was lost because there were fewer projects and fixed costs would have continued to be incurred regardless of the poor business climate. Through tax returns submitted, the petitioner has demonstrated substantially increased taxable income.

Counsel, by submitting complete tax records and other information, has established a case for application of *Matter of Sonogawa*. She has asserted that CIS should look at the entire business operation and consider the circumstances of the petitioner during the period examined. *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 been shown to exist in this case to parallel those in *Sonogawa*, to establish that 2001 was an uncharacteristically unprofitable year for the petitioner. The petitioner is 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 sustained.