



U.S. Citizenship
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Services

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FILE: LIN 03 157 51626 Office: NEBRASKA SERVICE CENTER

Date: SEP 08 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a remodeling contractor. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. 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 \$52,087.55 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, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001, a personal tax return for the owner of petitioner and his wife, commercial checking statements, and, copies of documentation concerning the beneficiary's qualifications.

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.

Submit evidence to establish that you had the financial ability to pay the offered wage as of April 30, 2001, and continue to have such ability. Such evidence must include your latest annual report, your latest U.S. tax return, or audited financial statements. You may also

include additional evidence, such as profit/loss statements, bank account records, 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 Internal Revenue Service (IRS) Form 1120 tax returns for year 2000,¹ personal tax return schedules for the owner of petitioner and his spouse, and a state tax form for tax year 2000.²

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,087.55 per year from the priority date:

- In 2001, the Form 1120 stated a taxable income loss of <\$25,818.00>³.

On appeal, counsel submits the following copies of additional documents: the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for year 2002 and 2003⁴, and commercial bank checking account statements. The tax returns stated:

- In 2002, the Form 1120S stated taxable income of \$285,496.00.
- In 2003, the Form 1120S stated taxable income of \$8,323.00.

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. 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. 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.

¹ Since the priority date was 2001, financial evidence prior to that date cannot be considered probative of the ability to pay the proffered wage from 2001.

² There was also included a letter correcting a taxpayer identification mistake on a prior tax return.

³ 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.

⁴ The compensation for officers in the two returns varied between \$50,000.00 to \$60,000.00.

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. 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 at any time for the years 2001 and 2003 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.⁵ 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 three Form 1120 U.S. Income Tax Returns from the priority date submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2003, petitioner's Form 1120S return stated current assets of \$335,041.00 and \$1,499.00⁶ in current liabilities. Therefore, the petitioner had a \$336,540.00 in net current assets for 2003. Since the proffered wage was \$52,087.55 per year, this sum is more than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$281,195.00 and \$4,501.00 in current liabilities. Therefore, the petitioner had a \$276,694.00 in net current assets for 2002. Since the proffered wage was \$52,087.55 per year, this sum is more than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$56,506.00 and \$1,800,000.00 in current liabilities. Therefore, the petitioner had a <\$1,743,494.00> in net current assets for 2001. Since the proffered wage was \$52,087.55 per year, this sum is less than the proffered wage.

Therefore, for the years 2002, and 2003 the petitioner had 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 is another way to determine the petitioner's ability to pay the proffered wage from the priority date through a review of the total assets and general business viability of the petitioner. Counsel cites as legal precedent for the assertion *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). According to regulation,⁷ 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 by examining the totality of the petitioner's business circumstances, the petitioner as it reported its finances in the record of proceedings was, on the priority date, a viable business, able to pay the

⁵ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ Expressed in the return as -\$1,499.00.

⁷ 8 C.F.R. § 204.5(g)(2), *Supra*.

proffered wage. *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 above tax returns evidence that there was only one year when petitioner could not pay the proffered wage from taxable income or net current assets, year 2001. Thereafter, the petitioner had the ability the ability to pay the proffered wage from either taxable income or net current assets for each taxable year. Although bank statements are seldom, if ever, probative evidence of the ability to pay the proffered wage in these matters, in this instance, the petitioner has maintained very large ending monthly balances sufficient to pay the proffered wage on a monthly basis, and, it has also shown a positive tax income at year's end after 2001. Further with the transition of the petitioner into an "S" corporation form of doing business, as president and shareholder, petitioner's owner could adjust his officer's compensation to ensure payment of the proffered wage.

The unique and unusual circumstances have been shown to exist in this case parallel those in *Sonogawa*. In light of all the tax returns, it been established that the year 2001 was an uncharacteristically unprofitable period for the petitioner.

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.