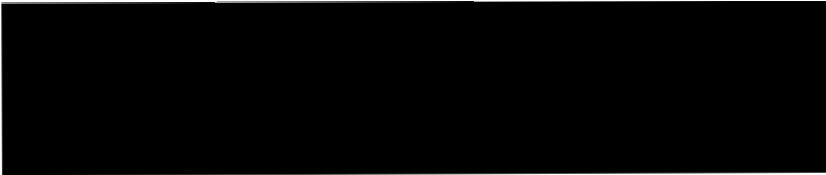




U.S. Citizenship
and Immigration
Services

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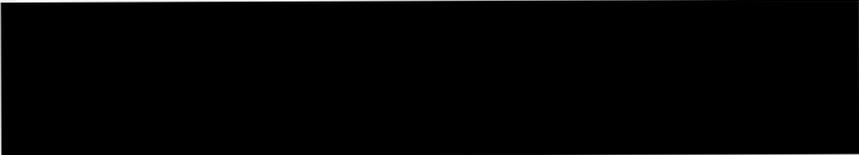
FILE: LIN 04 036 51303 Office: NEBRASKA SERVICE CENTER Date: APR 26 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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. Wiemant, Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary as a specialty foreign food cook. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief.

In pertinent part, Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on February 5, 2002. The proffered salary as stated on the labor certification is \$13.75 per hour or \$28,600 per year.

With the petition, the petitioner, through counsel, submitted a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of Forms 941, Employer's Quarterly Federal Tax Returns, for the year 2002 and the first and second quarter of 2003, copies of Forms UETR-1, Unemployment Insurance Tax Reports for the year 2002 and the first and second quarter of 2003, a copy of the petitioner's 2002 Form W-3, Transmittal of Wage and Tax Statements, and a profit and loss statement for the period January 1, 2003 through July 31, 2003. The 2002 Form 1120S reflected an ordinary income or net income of -\$15,363 and net current assets of -\$15,953. The Forms 941 showed that the petitioner did not employ the beneficiary in 2002 and the first two quarters of 2003. The Forms UETR-1 reflected wages paid by the petitioner of \$120,084 in 2002 and \$70,946 in the first two quarters

of 2003. The unaudited profit and loss statement reflected a net profit of \$42,868.93 for the period January 1, 2003 through July 31, 2003. The director considered this documentation insufficient and on March 19, 2004, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of audited profit/loss statements, bank account records, and/or personnel records.

In response, counsel submitted a copy of the petitioner's 2003 Form W-3, copies of the owners' 2003 Forms W-2, Wage and Tax Statements, a copy of the petitioner's Form 941 for the first quarter of 2004, and a copy of the petitioner's Form UTR-1 for the first quarter of 2004. Counsel did not submit the owner's 2002 Forms W-2. The owner's 2003 Forms W-2 reflected wages earned of \$82,322.18 and \$74,955.00 for a total of \$157,277.18. The Form UTR-1 reflected wages earned by the owners of \$17,400 and \$14,200 for the first quarter in 2004.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on July 7, 2004, denied the petition.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage by passing the two-prong test in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Those two tests consist of showing that the business incurred a substantial one-time start-up cost and that the company has demonstrated its growth through its expansion.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2002 and 2003 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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 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. Rather, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The petitioner's net current assets for the year 2002 were -\$15,953. The petitioner could not have paid the proffered wage from its net current assets in 2002. The tax return for 2003 was not submitted; and, therefore, net current assets for that year cannot be determined.

If the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

¹ 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.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided one tax return, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its reputation or historical growth. In addition, the petitioner has not demonstrated that any unusual circumstances existed in this case to parallel those in *Sonogawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner.

While counsel explains that the loss in 2002 occurred because the petitioner had a one-time start-up cost when opening a new restaurant, *Matter of Sonogawa*, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. In this case, the AAO has no other tax returns with which to compare the petitioner's 2002 return, and there is no evidence that establishes that the petitioner has enjoyed profitable years before or after the loss in 2002.

Counsel asserts that the petitioner has met the second part of the *Sonogawa* test by showing a history of profitability and appreciable growth by opening a second restaurant. Counsel is mistaken. The AAO only has counsel's word that the petitioner has been profitable in the past. As stated above, the petitioner has provided only one tax return; and, therefore, the AAO cannot determine if the petitioner has had profitable years before or after the loss in 2002. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the opening of a new restaurant, in itself, does not equate to a successful or profitable business. 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 contends that the depreciation expense should be added back to the net income when determining the petitioner's ability to pay the proffered wage. Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.

Counsel cites a non-precedent decision in support of his contention that the petitioner has established its ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

With the initial submission, counsel claimed that 30% of the owners' wages were paid for their cooking services and that with the hiring of the beneficiary, that 30% could be used to pay the wages of the beneficiary. However, the petitioner did not submit its Forms W-2 for the owners, but merely stated that one of the owners earned \$62,204 and the other owner earned \$57,880 in 2002. Thirty percent of the owners' total income would have been \$36,025.20, more than the proffered wage of \$28,600. However, the petitioner's statement does not correlate with the petitioner's 2002 income tax return. According to the tax return, when adding the officer's compensation and wages paid, the total equals \$89,796, and 30% of that total would be \$26,938.80, \$1,661.20 less than the proffered wage of \$28,600. This is also assuming that no wages were paid to any other employees, as the tax return does not show any cost of labor, nor does it contain any entries for wages in any other category. While the petitioner's unemployment quarterly tax returns do indicate that the owners earned the wages as stated, there is no evidence that those quarterly returns were actually filed with the Internal Revenue Service (IRS). *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.

* * *

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.

In addition, counsel has provided no evidence (statements, etc.) from the petitioners that 30% of their wages could be used to pay the beneficiary the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Finally, counsel maintains that “the standards used to deny the petition are out of touch with business reality, and with the President’s understanding of what makes small businesses succeed and grow.” While the President’s Small Business Agenda does seek to aid the small business entrepreneur by increasing small business expensing, simplifying taxes for small businesses, permanently repealing the death tax, etc., the Agenda was not meant to allow a small business to hire alien workers without providing proof of its ability to pay that alien worker the proffered wage as determined by the Department of Labor and as noted on the Form ETA 750. In addition, there is no regulation or statute that would allow CIS to make exceptions for businesses based on their size regarding ability to pay unless the business employs 100 or more employees. See 8 C.F.R. § 204.5(g)(2).

The 2002 tax return reflects an ordinary income or net income of -\$15,363 and net current assets of -\$15,953. The petitioner claims that its owners earned a total of \$120,084 in 2002 and that 30% or \$36,025.20 of that total could be used to pay the proffered wage to the beneficiary. However, the tax return did not reflect wages earned by the owners of \$120,084, and the petitioner did not submit Forms W-2 for the owners. Therefore, the AAO cannot accept the petitioner’s statement without corroborating evidence. The petitioner has not established its ability to pay the proffered wage in 2002.

In summary, the petitioner has not established its ability to pay the proffered wage in 2002.

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.