

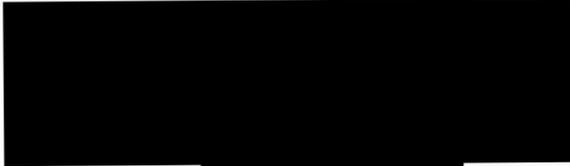


U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 06 2006

EAC 04 073 50239

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, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The matter will be remanded.

The petitioner is a landscape management company. It seeks to employ the beneficiary permanently in the United States as a landscaper. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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 denied the petition accordingly.

On appeal, counsel submitted 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 granting 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, the day the Form ETA 750 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 Form ETA 750 was accepted for processing on October 2, 2001. The proffered wage as stated on the Form ETA 750 is \$13.95 per hour, which equals \$29,016 per year.

On the petition, the petitioner stated that it was established on April 1, 2001 and that it employs 20 workers. The petition states that the petitioner's gross annual income is \$866,211 and that its net annual income is \$90,350. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Clifton, New Jersey.

In support of the petition, counsel submitted the first two pages of the petitioner's 2002 Form 1065 U.S. Return of Partnership Income. Those pages of that return reveal that the petitioner is a limited liability company (LLC), that it began operations on April 1, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year. During 2002 the petitioner declared ordinary income of \$90,350. Because the corresponding Schedule L was not submitted the petitioner's net current assets could not be calculated.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 13, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The service center also specifically requested that, if it employed the beneficiary during 2001, the petitioner provide copies of Form W-2 Wage and Tax Statements showing amounts it paid to the beneficiary during that year.

In response, counsel submitted (1) the petitioner's 2001 Form 1065 U.S. Return of Partnership Income, (2) a 2001 Form W-2 and a 2001 Form 1099 Miscellaneous Income statement, and (3) the beneficiary's 2001 Form 1040 U.S. Individual Income Tax Return.

That petitioner's 2001 tax return shows that the petitioner declared a loss of \$7,365 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The W-2 form indicates that the petitioner paid the beneficiary \$16,010 during that year. The 1099 form indicates that the petitioner paid the beneficiary an additional \$725 in non-employee compensation. The beneficiary's 2001 tax return confirms that the beneficiary was paid \$16,010 in wages but does not confirm any non-employee compensation.

In a collateral matter, submission of a Form I-485 application to adjust status, the beneficiary submitted a copy of his 2002 Form 1040 U.S. Individual Income Tax Return, including a 2002 W-2 form showing that the petitioner paid him \$19,969.25 during that year.

The acting 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 November 4, 2004, denied the petition.

On appeal, counsel submitted (1) a copy of the petitioner's 2003 Form 1065 U.S. Return of Partnership Income, (2) a copy of a 2001 W-2 form showing wages paid to a _____ and (3) a brief.

The petitioner's 2003 tax return shows that the petitioner declared ordinary income of \$311,350 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

_____ 2001 W-2 form shows that the petitioner paid him \$14,363 during that year. In the brief counsel states that _____ no longer works for the petitioner and that, therefore, amounts that would have been paid to him are available to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of a petition is not necessarily precluded by the fact that the petitioner suffered losses during a given year or its income was less than the proffered wage.

If [REDACTED] performed the duties of the proffered position, this raises an issue. The fundamental purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. The petition in this matter was filed on October 2, 2001. The evidence shows that [REDACTED] worked for the petitioner during 2001. If [REDACTED] is a legal U.S. worker and was performing the duties of the proffered position, then the petitioner may not, consistent with this visa category, replace him with a foreign worker out of preference. That would call into question the legitimacy of the petitioner's claim that it is unable to find U.S. workers to fill the proffered position.

Further, counsel did not submit any evidence to show what amount of the wages paid to [REDACTED] were for performance of the duties of the proffered position. If [REDACTED] was paid for performance of some other essential duties then the wages paid to him are not now available to pay the beneficiary for performing in the proffered position. Without evidence that the salary paid to [REDACTED] or some part of it, was for performing the duties of the proffered position, the amounts paid to [REDACTED] have not been shown to be available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner established that it employed the beneficiary during 2001 and paid him \$16,010 during that year.¹

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

¹ Because the amount on the beneficiary's 2001 W-2 form, \$16,010, was shown on the beneficiary's personal tax return this office finds, on the balance, that the petitioner paid him that amount. Because the amount shown on the Form 1099 was not shown on the beneficiary's tax return this office finds that the petitioner failed to establish that it paid that amount to the beneficiary.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically² shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$29,016 per year. The priority date is October 2, 2001.

During 2001 the petitioner paid the beneficiary \$16,100 and it must now show the ability to pay the \$12,916 balance of the proffered wage. During 2001 the petitioner declared a loss of \$7,365. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner's 2001 tax return does not, then, in itself, show that the petitioner was able to pay the proffered wage during that year.

During 2002 the petitioner paid the beneficiary \$19,969.25 and it must now show the ability to pay the \$9,046.75 balance of the proffered wage. During 2002 the petitioner declared ordinary income of \$90,350. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner submitted no evidence that it paid any wages to the beneficiary during 2003 and must show the ability to pay the entire amount of the proffered wage. During 2003 the petitioner declared ordinary income of \$311,350. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

Although the petitioner had no profits or net current assets with which to pay the balance of the proffered wage during 2001, counsel's citation of *Sonegawa, supra*, must be considered. *Sonegawa* relates to petitions

² The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years.

The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 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 couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner suffered a moderate loss during 2001, its inaugural year. For most types of businesses this is not extraordinary, and it may even be expected. The petitioner's 2002 and 2003 tax returns show that it quickly became profitable. The 2002 and 2003 tax returns show, not only that the petitioner was easily able to afford the beneficiary's wages during those years, but that the petitioner has a very reasonable expectation of yet higher profits or, at least, of remaining quite profitable in the future. In accordance with the decision in *Sonegawa*, this office finds that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

As proof of the beneficiary's claim of qualifying employment the petitioner submitted a letter dated December 9, 2003 from one of the petitioner's owners stating that it had employed the beneficiary part-time since March of 1999. Why that employment was not listed on the Form ETA 750B is unknown. Further, the record contains no evidence to demonstrate that the petitioner's alleged part-time employment of the beneficiary was the equivalent of two years of full-time employment.

The evidence of record does not demonstrate that the beneficiary is qualified pursuant to the terms of the approved Form ETA 750 labor certification. The evidence does not, therefore, show that the beneficiary is qualified for the proffered position. Because this issue was not mentioned in the decision of denial this office declines to dismiss the appeal on this basis. However, the petition may not be approved absent evidence that the beneficiary is qualified for the proffered position.

The matter will be remanded so that the service center can request additional evidence or conduct investigation pertinent to the beneficiary's claim of qualifying employment. The service center may also inquire into any other matter relevant to the approvability of the instant petition.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.



ORDER: The appeal is remanded for further consideration and action.