

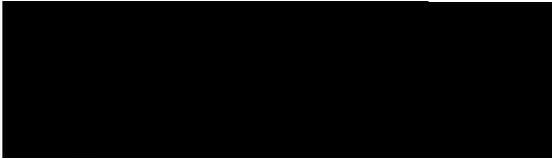


U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAY 02 2006
EAC 04 075 52693

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker's helper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 19, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$7.25 per hour or \$15,080 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

appeal includes a copy of a May 4, 2004 memorandum by William R. Yates on "Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2), a copy of a newspaper article on the petitioner, copies of the petitioner's 2001 through 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, an affidavit from the petitioner, copies of the beneficiary's 2000 through 2003 Forms W-2, Wage and Tax Statements, a letter dated February 11, 2005 from [REDACTED] Certified Public Accountant (CPA), a copy of *Elatos Restaurant Corp., etc. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986), and a copy of *Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. TX 1989). The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 Form 1120S reflects an ordinary income or net income of -\$2,834 and net current assets of -\$17,186. The petitioner's 2002 Form 1120S reflects an ordinary income or net income of -\$48,049 and net current assets of -\$39,676. The petitioner's 2003 Form 1120S reflects an ordinary income or net income of -\$24,857 and net current assets of -\$50,922.

The newspaper article states, "**So who's our winner?** Hands down, without a hint of doubt, our winner is the always-fattening, never-good-for-you, extremely large (almost in a practical joke way), snowy white sin in dough. The *McMillian's [sic] Bakery* cream donut."

The beneficiary's 2000 through 2003 Forms W-2 issued by the petitioner reflect wages earned of \$10,197.25, \$8,858.50, \$11,609.50, and \$11,767.25, respectively. The differences between the wages earned by the beneficiary during 2000 through 2003 and the proffered wage of \$15,080 were \$4,882.75, \$6,221.50, \$3,470.50, and \$3,312.75, respectively.

The letter from the petitioner's accountant states:

Clearly your personal financial situation can handle the reduced compensation you will receive from the Bakery as you have proven by your continued ability to personally lend money to the company when necessary, even if it meant doing so from taxable compensation you were receiving from the company.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$15,080 based on the amount of wages paid by the petitioner; that the beneficiary was actually receiving a salary of at least 75% of the proffered wage; that the petitioner owns the property and building, worth over \$600,000, the petitioner operates out of; that the petitioner grosses over one million dollars each year; that the petitioner has submitted all of the evidence to prove that it has the ability to pay the proffered wage according to the Yates memo; that depreciation costs should be considered; and that there is a high degree of certainty that the petitioner has a strong and unquestionable viability.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claims to have been employed by the petitioner since May 1999 to the present. In support of his contention, the petitioner submitted copies of the beneficiary's 2000 through 2003 Forms W-2 which reflect wages earned of \$10,197.25 or \$4,882.75 less than the proffered wage of \$15,080 in 2000², \$8,858.50 or \$6,221.50 less than the proffered wage of \$15,080 in 2001, \$11,609.50 or \$3,470.50 less than the proffered wage of \$15,080 in 2002, and \$11,767.25 or \$3,312.75 less than the proffered wage of \$15,080 in 2003. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the wages actually paid to the beneficiary and 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.

² It should be noted that the 2000 Form W-2 is before the priority date of April 17, 2001; and, therefore, it has limited relevance when determining the petitioner's continuing ability to pay the proffered wage from the priority date. Therefore, in this case, the beneficiary's 2000 Form W-2 will not be considered in deciding the petitioner's ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 in 2001 through 2003 were -\$17,186, -\$39,676, and -\$50,922, respectively. The petitioner could not have paid the difference between the actual wages paid to the beneficiary and the proffered wage in 2001 through 2003 from its net current assets.

Counsel contends that the petitioner's depreciation should be considered 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.

Counsel asserts that the value of the petitioner's property and building should be considered an asset and should be considered when determining the petitioner's ability to pay the proffered wage. However, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary.

Finally, 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

³ 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.

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.

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 the instant case, as noted by counsel, the petitioner has two shareholders (spouses) who took \$96,200 as compensation of officers in 2001 through 2003. While the proffered wage is \$15,080 or approximately 16% (less than 1/6th) of the amount of officer compensation, the shareholders need not pay the entire proffered wage from the officer compensation, but just the difference between the wages actually paid to the beneficiary and the proffered wage of \$15,080. The difference would have been \$6,221.50 in 2001, resulting in the officer compensation being \$89,978.50. In 2002, the difference would have been \$3,470.50, resulting in the officer compensation being \$92,729.50, and in 2003, the difference would have been \$3,312.75, resulting in the officer compensation being \$92,887.25. Furthermore, the petitioner has shown that it consistently grosses more than one million dollars each year and that it pays wages of \$400,000.00 to \$450,000.00 each year. Since the shareholders would need to decrease their officer compensation only by a meager amount, because the petitioner is well known in the industry, and in light of the petitioner's long and continuing business presence (since 1938), the AAO finds that the petitioner could pay the proffered wage in 2001 through 2003.

After a review of the record, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above and the assertions of counsel on appeal, the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition will be approved.