



U.S. Citizenship  
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **MAY 16 2006**  
EAC 03 252 53502

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to  
§ 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[Redacted]

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 on appeal. The appeal will be dismissed.

The petitioner is a landscape construction corporation. It seeks to employ the beneficiary permanently in the United States as a landscape designer and constructor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

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 unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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 \$17.25 per hour (\$35,880.00 per year). The Form ETA 750 states that the position requires one-year experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition 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 on June 9, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the beneficiary's W-2 Wage and Tax Statements for 2001, 2002 and 2003 as well as all issued W-2 and Form 1099-MISC for all employees. Also, the director requested additional evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

In response to the request for evidence, counsel submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax return for year 2003; approximately 35 pages of bank statements; a W-2 Wage and Tax Statement and personal tax returns for the beneficiary for 2001, 2002 and 2003; and, W-2 statements for its employees.

The director denied the petition on November 5, 2004, 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.

On appeal, counsel asserts that the petitioner's assets and tax returns evidence the ability to pay the proffered wage. Counsel contends that in 2001, 2002, and 2003, the petitioner's net current assets were "equal to or greater than the proffered wage." Counsel further states that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), supports his contention that "... the Petitioner showed increasing profits and ample available cash."

Counsel has submitted no documents to accompany the appeal statement.

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. Counsel states in his brief submitted on appeal that the petitioner employed the beneficiary since April 1997. A letter by the petitioner dated June 9, 2003, was submitted to show that the petitioner employed the beneficiary at an hourly rate of \$14.50 per hour. According to the W-2 Wage and Tax Statements submitted the petitioner paid the beneficiary \$20,558.49 in 2001; in 2002, \$16,994.19; and, in 2003, \$28,805.16. By the evidence submitted, the petitioner did not pay the beneficiary the proffered wage nor the proffered wage rate.

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 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 demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,880.00 per year from the priority date of April 30, 2001:

- In 2001, the Form 1120 stated taxable income loss<sup>1</sup> of <\$5,320.00>.<sup>2</sup>
- In 2002, the Form 1120 stated taxable income loss of <\$7,092.00>.
- In 2003, the Form 1120 stated taxable income of \$54,333.00.

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.

- In 2001, the Form 1120 stated taxable income loss of <\$5,320.00>. The petitioner paid the beneficiary \$20,558.49 in 2001. The proffered wage is \$35,880.00 per year. The sum of the taxable income loss and the wages paid is less than the proffered wage.
- In 2002, the Form 1120 stated taxable income loss of <\$7,092.00>. The petitioner paid the beneficiary \$16,994.19 in 2002. The proffered wage is \$35,880.00 per year. The sum of the taxable income loss and the wages paid is less than the proffered wage.
- In 2003, the Form 1120 stated taxable income \$54,333.00. The petitioner paid the beneficiary \$28,805.16 in 2003. The proffered wage is \$35,880.00 per year. The sum of the taxable income and the wages paid is more than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage in tax years 2001, 2002 and 2003.

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.<sup>3</sup> 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 Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

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<sup>1</sup> IRS Form 1120, Line 28.

<sup>2</sup> 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.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

- In 2001, petitioner's Form 1120 return stated current assets of \$0.00 and \$32,685.00 in current liabilities. Therefore, the petitioner had <\$32,685.00> in net current assets. Since the proffered wage is \$35,880.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$43.00 and \$16,754.00 in current liabilities. Therefore, the petitioner had <\$16,711.00> in net current assets. Since the proffered wage is \$35,880.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$7,091.00 and \$14,715.00 in current liabilities. Therefore, the petitioner had <\$7,624.00> in net current assets. Since the proffered wage is \$35,880.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

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. According to regulation,<sup>4</sup> 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 the petitioner's assets evidence the ability to pay the proffered wage. Although counsel characterized them as net current assets, the amount she uses is the figure for the petitioner's total assets. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

Counsel advocates the use of the cash balance of the business accounts to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 and 2002. For the years 2001 through 2002, the taxable income loss stated by the petitioner was <\$5,320.00>, and, in 2002, the Form 1120 stated taxable income loss of <\$7,092.00>. The net current asset value for years 2001, 2002, and 2003 is negative, <\$32,685.00>, <\$16,711.00>, and, <\$7,624.00> respectively. According to evidence submitted, the petitioner employed the beneficiary at an hourly rate of \$14.50 per hour that is \$2.75 under the proffered hourly wage rate. According

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<sup>4</sup> 8 C.F.R. § 204.5(g)(2).

to the W-2 Wage and Tax Statements submitted the petitioner paid the beneficiary \$20,558.49 in 2001; in 2002, \$16,994.19; and, in 2003, \$28,805.16. For the years examined, the petitioner has not paid the beneficiary the 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 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.

Counsel attempts to distinguish what she contends is the present financial circumstances of the petitioner from the case present *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989), and, *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985). Contrary to counsel assertions, the courts both 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. Here, counsel desires CIS to disregard the financial evidence submitted by the petitioner that it could not pay the proffered wage for years 2001 and 2001 from taxable income, nor from its net current assets in years 2001, 2002 and 2003.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the 2001 and 2002 corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.