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FILE:

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Office: VERMONT SERVICE CENTER

Date: SEP 12 2006

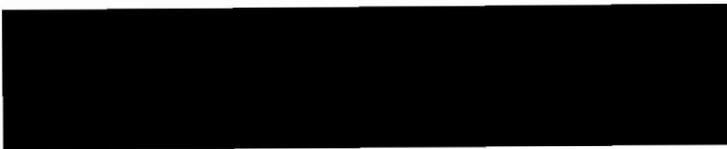
IN RE:

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 instant preference visa petition. Subsequently, pursuant to a motion, the Director, Vermont Service Center¹ reopened the matter and denied the petition again. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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. The director subsequently reopened the matter and denied it again on the same basis.

On April 6, 2005 the Director, Vermont Service Center, reopened the matter and reviewed the motion. The director found that the evidence submitted was still insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and again denied the petition.

On appeal counsel submitted a brief.

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 March 26, 1998. The proffered wage as stated on the Form ETA 750 is \$17.61 per hour, which equals \$36,628.80 per year.

On the petition, the petitioner did not state the date it was established in the space provided for that purpose. The petitioner also failed to state the number of workers it employs. Further still, the petitioner did not report

¹ During the period between the two decisions denying the petition the service center replaced its acting director with a director.

its gross annual income or net annual income in the spaces provided. 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 Lindenhurst, New York.

In support of the petition, counsel submitted copies of monthly statements pertinent to the petitioner's bank accounts and copies of the petitioner's 1998, 1999, 2000, 2001, and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation.

The 1998 return shows that the petitioner declared a loss of \$12,379 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 1999 return shows that the petitioner declared ordinary income of \$12,379 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$13,676 and current liabilities of \$5,257, which yields net current assets of \$8,419.

The 2000 return shows that the petitioner declared a loss of \$6,125 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$8,750 and current liabilities of \$5,525, which yields net current assets of \$3,225.

The 2001 return shows that the petitioner declared ordinary income of \$3,320 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 2002 return shows that the petitioner declared ordinary income of \$2,861 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 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 August 23, 2004, denied the petition.

With a motion filed in response to the decision of denial counsel submitted letters dated September 10, 2004 and September 18, 2004 from the petitioner's accountant, a copy of the Form 1120S, U.S. Income Tax Return for an S Corporation of [REDACTED] of East Hampton, New York, a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, and a brief.

The relationship of [REDACTED] to the petitioner, if any, was not apparent.

The petitioner's 2003 return shows that the petitioner declared ordinary income of \$34,506 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 petitioner's accountant's September 10, 2004 letter states that the petitioner expanded during 2003 and therefore required additional staff. The accountant further stated that the additional revenues and profits from this expansion would be sufficient to pay the additional salaries required, including the wage proffered to the beneficiary. The accountant did not state how he reached that conclusion.

The petitioner's accountant's September 18, 2004 letter stated, ". . . prior to 2003 as a matter of routine tax planning at year end the profits available at year-end are bonused [sic] out." That letter also cited the sum of the petitioner's shareholder's salary, its net profit, and its depreciation deduction during various years as an index of the petitioner's ability to pay the proffered wage.

In his brief counsel asserted that the acting director's decision to deny the petition without issuing a request for evidence was arbitrary and capricious. Counsel did not support that assertion with precedent or argument.

Counsel argued, "As a matter of routine tax planning it is a custom for 'S' Corporations to distribute out all profits available at the end of the year via compensation reported on each shareholder's W-2 form."

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of a petition is not precluded by the fact that the entity's net income was less than the proffered wage during a given year.

Counsel also asserted that the accountant's September 18, 2004 letter, which he refers to as a "financial statement,"² and the petitioner's bank statements demonstrate the petitioner's ability to pay the proffered wage.

On April 6, 2005 the Director, Vermont Service Center, reopened the matter and reviewed the motion. The director found that the evidence submitted was still insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and again denied the petition.

On appeal, counsel submitted a brief.

In the brief counsel reiterated the arguments he previously made on motion. Counsel did not explain the relationship, if any, between [REDACTED] and the petitioner. As the relevance of that entity's 2002 tax return to the instant petition has not been demonstrated it will not be further considered.

This office will first address counsel's assertion that a request for evidence was required in this matter before the petition could be denied.

The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

² Although 8 C.F.R. § 204.5(g)(2) states that the petitioner may, in addition to copies of annual reports, federal tax returns, or audited financial statements, provide financial statements, this office finds that statement to refer to the legal definition of "financial statement," which generally contemplates to a balance sheet or a profit and loss statement. (Black's Law Dictionary, Seventh Ed., 1999) This office finds that the statement by the accountant pertinent to the petitioner's finances does not qualify as a financial statement within the meaning of that term as used in 8 C.F.R. § 204.5(g)(2).

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence

If the petitioner had neglected to submit some portion of the initial evidence, evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted its 1998 through 2002 tax returns with the petition. The acting director found that, although the evidence was complete, the record contained evidence of ineligibility. No request for evidence was required in the instant case.

Even if a request for evidence were required the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence or argument pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence even if issuance of such a request were required.

The accountant has stated that the petitioner paid out its profits in the form of bonuses to its sole shareholder³ at the end of the salient years as a tax strategy. The tax returns do indicate Line 7, Compensation of Officers in amounts equal to the bonuses the accountant states were paid.

Counsel urges that the petitioner's Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage, and should therefore be considered a fund available to pay additional wages. Counsel provided no evidence, however, to support the supposition that the petitioner's owner was able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its owner has not, therefore, been shown to have been available to pay wages, and will not be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.⁴

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. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and

³ Although the accountant referred to "shareholders' bonuses" he also stated that the petitioner has only one shareholder.

⁴ Even if the amount of the petitioner's owner's compensation were considered an amount available to pay additional wages, the amount of the petitioner's owner's compensation would have been sufficient to pay the proffered wage during only 2000, and not during 1999, 2001, 2002, or 2003.

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.⁵ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁶ 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 reported on its tax returns.

Counsel's citation of *Matter of Sonogawa, supra*, is unconvincing. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful 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.

⁵ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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.

Counsel 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 did not post a profit large enough to pay the proffered wage during any of the six salient years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1998, 1999, 2000, 2001, and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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 did not establish that it employed and paid the beneficiary.

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, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 corporate 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.

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 typically⁷ 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 \$36,628.80 per year. The priority date is March 26, 1998.

During 1998 the petitioner declared a loss of \$12,379. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that it had any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 1998.

During 1999 the petitioner declared ordinary income of \$12,379. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$8,419. That amount is also insufficient to pay the proffered wage. The petitioner has not shown that it had any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 1999.

During 2000 the petitioner declared a loss of \$6,125. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of \$3,225. That amount is also insufficient to pay the proffered wage. The petitioner has not shown that it had any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2000.

During 2001 the petitioner declared ordinary income of \$3,320. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that it had any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2002 the petitioner declared ordinary income of \$2,861. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that it had any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$34,506. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that it had any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, 2003, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 dismissed.