

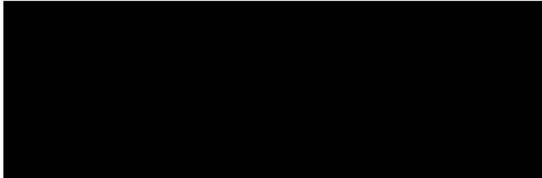
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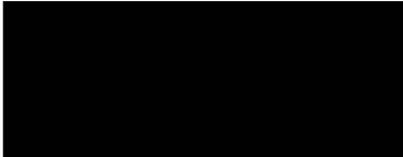
FILE: EAC 04 162 51190 Office: VERMONT SERVICE CENTER Date: **SEP 25 2008**

IN RE: Petitioner:
Beneficiary:



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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 gallery. It seeks to employ the beneficiary permanently in the United States as a custom fine art framer. 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000.00 per year. The Form ETA 750 states that the position requires three months of training.

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; 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 August 27, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements for 2001 and 2003. The director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements.

In response to the request for evidence, counsel submitted copies of the following documents: the beneficiary's the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for the year 2001.

The director denied the petition on December 6, 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 director failed to "look at the employer's business by the whole picture." Counsel then calculates the petitioner's ability to pay as more fully set forth below.

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. No evidence was submitted to show that the petitioner employed the beneficiary.

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 return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$25,000.00 per year from the priority date of April 25, 2001:

- In 2001, the Form 1120S stated taxable income of \$2,756.00.¹

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 in year 2001 for which the petitioner's tax return is offered for evidence.

¹ IRS Form 1120S, Line 21.

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.² 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 1120S 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 1120S U.S. Income Tax Return submitted by the petitioner, Schedule L found in that return indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$46,230.00 and \$95,254.00 in current liabilities. Therefore, the petitioner had <\$49,024.00>³ in net current assets. Since the proffered wage is, this sum is less than the proffered wage.

Counsel contends that in 2001 the petitioner had current assets of \$68,230.00. Counsel derived this figure by adding inventories stated to be \$46,230.00 and a deposit of \$22,000⁴ (tax return line items 3 and 14 on Schedule L of the tax return). Neither of these items is a current assets.

The value of inventories owned by the petitioner and their ability to produce future income cannot be evidence of the ability to pay. Insofar as the revenue generated by the sale or use of the inventories is expressed ultimately on the tax returns as taxable income, counsel is attempting to duplicate the petitioner's income producing potential without considering the offsetting cost of operations. 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.

Therefore, 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 that security deposits included on the return are current assets but as noted above they are not current assets.

Counsel asserts in his statement 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,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

² 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.

³ 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.

⁴ This is a security deposit, and as such, cannot be accessed while current assets generally can be readily accessed to provide funds to the petitioner.

⁵ 8 C.F.R. § 204.5(g)(2).

Counsel asserts that the director failed to “look at the employer’s business by the whole picture.” There is insufficient income and financial data to determine in the totality of all the evidence submitted in this case, that the petitioner has the ability at least according to one case precedent. *Matter of Sonegawa*, 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner.

Petitioner’s counsel advocates the addition of deductions taken in the year 2001 tax return to increase the taxable income. This method would eliminate deductions as a factor in the calculation of taxable income. Counsel states that most of the deductions such as compensation to officers, salaries and wages, repairs and maintenance, and the like are discretionary expenses that may be considered as assets. We disagree. Counsel offers no support in case precedent or regulation for such a contention. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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 corporate tax return 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.