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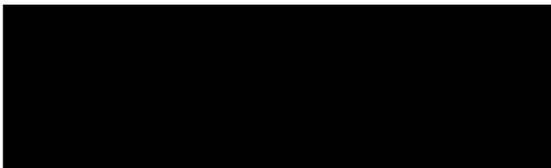
FILE: [REDACTED]
SRC 03 225 51342

Office: TEXAS SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

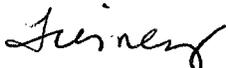
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a motorcycle, ATV, and watercraft engine machine shop. It seeks to employ the beneficiary permanently in the United States as an experimental mechanic. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

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

As set forth in the director's decision of denial the issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the qualifications that the Form ETA 750 stated as necessary qualifications.

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 the granting of 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 regulation at 8 C.F.R. § 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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$800 per week, which equals \$41,600 per year. The Form ETA 750 states that the position requires six years of experience in the job offered.

The Form I-140 petition in this matter was submitted on August 8, 2003. On the petition, the petitioner stated that it was established during 1995 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$825,958 and that its net annual income is a loss of \$840. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Pompano Beach, Florida.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as an experimental mechanic from February 2001 until at least April 17, 2001, when he signed that form.

The beneficiary further stated that he had worked as a motorcycle mechanic and parts fabricator and modifier for [REDACTED] in Pocos de Caldas, Brazil, from June 1978 to October 1983 and again from December 1989 to September 1992. Further still, the beneficiary claimed to have worked as a motorcycle, watercraft and ATV technician for Stamford Motorsports of Stamford, Connecticut from July 1994 to February 1997; for Honda, Yamaha, Seadoo of Fort Lauderdale, Florida from March 1997 to November 1998; for [REDACTED] and Watercraft also of Fort Lauderdale, from November 1998 to February 2000; and for Power Sports of Fort Lauderdale from April 2000 to February 2001. The beneficiary listed no other employment.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains the following evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date: (1) the petitioner's 2001 and 2002 Form 1120, U.S.

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

Corporation Income Tax Returns, (2) photocopies of checks the petitioner issued to the beneficiary during 2001, (3) photocopies of monthly statements pertinent to the petitioner's bank account, (4) copies of a 2001 Form W-2 Wage and Tax Statement, (5) copies of Form 941 Employer's Quarterly Tax Returns, (6) copies of Florida quarterly returns, (7) photocopies of 2001, 2002, and 2003 Form 940-EZ Employer's Annual Federal Unemployment Tax Returns, and (8) A letter dated March 2, 2004 from the petitioner's president. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record contains the following evidence pertinent to the beneficiary qualifying employment experience: (1) a letter dated April 17, 2001, (2) a letter dated April 18, 2001 from Stamford Powersports, (3) a letter dated April 6, 2001 from Power Sports in West Palm Beach, Florida, and (4) the March 2, 2004 letter from the petitioner's president. The record contains no other evidence pertinent to the beneficiary's qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on January 1, 1995, and that it reports taxes pursuant to the calendar year and a hybrid of cash and accrual convention accounting.

The petitioner's 2001 tax return shows that the petitioner reported taxable income before net operating loss deductions and special deductions of \$15,399 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$30,490 and current liabilities of \$28,046, which yields net current assets of \$2,444.

The petitioner's 2002 tax return shows that the petitioner reported a loss of \$840 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,973 and current liabilities of \$20,637, which yields net current assets of \$4,336.

The photocopies of 2001 checks issued to the beneficiary show that most of them were issued on Fridays. This office will assume for purposes of this analysis that they are paychecks. The sum of the amounts shown as having been paid on those checks is \$8,724.50. This office notes that the amounts shown on those paychecks is not gross pay, but net pay.

The 2001 W-2 form shows that the petitioner paid the beneficiary gross wages of \$11,023.80 during that year. The social security number shown on that form is 100-80-4103.

The Federal quarterly returns show total wages the petitioner paid during all four quarters of 2001, all four quarters of 2002, and all four quarters of 2003.

The Florida quarterly returns cover all four quarters of 2001, the first and second quarters of 2002, and all four quarters of 2003. Those returns identify the petitioner's employees by name and social security number. During the first quarter of 2001 the petitioner employed the beneficiary, [REDACTED] for whom no social security number was listed. During the second quarter of 2001 the petitioner employed M.D. [REDACTED] social security number [REDACTED], also apparently the beneficiary. The returns for the third and fourth

quarters of 2001 do not indicate that the petitioner employed the beneficiary. The 2001 returns show that the petitioner paid the beneficiary a total of \$11,023.80.

The 2002 quarterly returns do not indicate that the petitioner employed anyone with a name or social security number similar to that of the instant beneficiary. During all four quarters of 2003 the petitioner employed _____ social security number _____ presumably not the beneficiary. Those returns contain no other name and no social security number similar to the beneficiary's name and social security number.

The Forms 941-EZ show that the petitioner paid total wages of \$123,207.69, \$88,443.55, and \$56,984.31 during 2001, 2002, and 2003, respectively.

The petitioner's president's March 2, 2004 letter states that the petitioner employed the beneficiary from February 2001 to June 2001 as an experimental mechanic. That letter also states that the petitioner's tax returns reflect that it owns the building in which it does business and has net assets sufficient, if necessary, to obtain a loan to pay the proffered wage in this case.

The April 17, 2001 letter states that the beneficiary "worked in our company from June of 1978 to October of 1983, and from December of 1989 to September of 1992." Although that letter does not identify by name the company for which beneficiary worked, this office notes that the periods of employment stated in that letter conform to the periods during which the beneficiary claimed to have worked for _____ in Brazil. That letter, however, is not signed.

The April 18, 2001 letter states that Stamford Motorsports employed the beneficiary as a motorcycle, ATV, watercraft, and snowmobile mechanic from July 1994 to February 1997.

The April 6, 2001 letter from Power Sports states that it employed the beneficiary as a watercraft manager/technician from April 3, 2000 to February 9, 2001. The letterhead indicates that Power Sports is located in West Palm Beach. This office notes that the beneficiary claimed to have been employed by Power Sports of Fort Lauderdale.

The director denied the petition on April 8, 2004. The director found that the evidence does not demonstrate that the petitioner has been continuously able to pay the proffered wage beginning on the priority date.

The director also found that, because the beneficiary was not authorized to work in the United States, his employment experience in the United States could not be counted in determining whether the petitioner had demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification. Although the director's analysis is not entirely clear to this office, the director appeared to find that the fact that the beneficiary had worked illegally in the United States indicated that the petitioner had obtained the labor certification through fraud or material misrepresentation.

On appeal, as to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, counsel stated that the decision of denial fails to recognize that some large corporations, with the ability to absorb the additional wage expense occasioned by hundreds of new workers, may yet show a loss for tax purposes.

Counsel also asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel cited several non-precedent decisions of this office in support of that proposition. Counsel also cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of the visa petition is not precluded by the fact that the petitioner was unable to pay the proffered wage out of its net profit during a given year. Counsel also asserted that the petitioner is paying the beneficiary in excess of the proffered wage.

As to the beneficiary's qualifying employment experience counsel stated that the evidence demonstrates that the beneficiary had six years of experience as an experimental motorcycle mechanic on the priority date. Counsel asserts that the finding in the decision of denial, that the beneficiary's employment experience in the United States should not be counted in determining whether he qualifies for the proffered position, is unfounded.

Counsel's reliance upon non-precedent decisions of this office is misplaced. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

This office concurs with counsel's assertion that the beneficiary's employment in the United States must be considered in determining whether he is qualified for the proffered position, notwithstanding that he may not have been permitted to work here legally. The petitioner has overcome that portion of the decision of denial. All evidence of qualifying employment will be considered.

Counsel asserts that large corporations may be able to absorb hundreds of new employees even though they reported a loss for tax purposes. Counsel is clearly correct in this assertion.

However, pursuant to 8 C.F.R. § 204.5(g)(2), any petitioner must demonstrate, with copies of annual reports, federal tax returns, or audited financial statements, that it is able to pay the proffered wage. Counsel's assertion neither demonstrates that the petitioner is able to pay the proffered wage, nor relieves it of the obligation to demonstrate that ability.

The petitioner's ability to obtain a loan secured by real estate it owns is inapposite. The ability of the petitioner to acquire mortgage loan, or a line of credit, or any other indication of credit available to the petitioner, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel's citation of *Matter of Sonogawa*, *supra* is unconvincing. Counsel is correct that, pursuant to *Sonogawa* a petition need not necessarily be denied because a petitioner's net profit during a given year was less than the annual amount of the proffered wage. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and 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 it was unable to do regular business. In that case the petitioner's profit was unusually low for a demonstrable reason.

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 that 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 record contains no evidence that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 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.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. (Reg. Comm. 1967).

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 paid the beneficiary \$11,023.80 during 2001 but did not establish that it paid him any amount during any other year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 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. 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.

The petitioner's net income, however, 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 the 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, those expected to be 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 \$41,600 per year. The priority date is April 24, 2001.

Having demonstrated that it paid the beneficiary \$11,023.80 during 2001 the petitioner is obliged to show the ability to pay the \$30,576.20 balance of the proffered wage. The petitioner reported taxable income before net operating loss deductions and special deductions of \$15,399 during that year. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of \$2,444. That amount is also insufficient to pay the balance of the proffered wage. The petitioner has submitted no reliable evidence of additional funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 and is obliged, therefore, to show the ability to pay the entire proffered wage. The petitioner reported a loss of \$840 during

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

that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$4,336. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of additional funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petition in this matter was submitted on August 8, 2003. On that date the petitioner's 2003 tax return was unavailable. On December 3, 2003 the service center requested that the petitioner submit additional evidence of its continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2003 tax return was still unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2003 and subsequent years.

The evidence does not demonstrate that the petitioner had the ability to pay the proffered wage during either 2001 or 2002. Therefore the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The job offered in the instant case is experimental mechanic. The Form ETA states that, in order to be qualified for the proffered position the beneficiary must have six years of experience in the job offered, experimental mechanic.

Although counsel asserted that the evidence shows that the beneficiary has six years of experience as an experimental motorcycle mechanic this office is unable to find evidence sufficient to demonstrate six years of employment before the priority date. The letter from the petitioner is sufficient to show approximately two months of employment prior to the priority date. The letter from Stamford Motor Sports demonstrates approximately two years and six months of employment. The April 17, 2001 letter, apparently from [REDACTED] in Brazil, alleges that the beneficiary has more than five years of employment experience with that company. That letter, however, is unsigned and therefore unreliable evidence. That experience shown in that letter will not be considered.

Further, other than the March 2, 2004 letter from the petitioner, the employment verification letters state that the beneficiary worked as a mechanic on motorcycles, all-terrain vehicles, and watercraft, and that he worked as a watercraft manager/technician, but do not state that he worked as an experimental mechanic. The beneficiary did not even allege, on the Form ETA 750, that he worked as an experimental mechanic at any time prior to his employment by the petitioner.

The evidence submitted demonstrates that the beneficiary had approximately two months of experience as an experimental mechanic, rather than the requisite six years. Because the decision of denial did not discuss this issue, and the petitioner has not been accorded an opportunity to respond to it, today's decision is not based on this issue, even in part. If the petitioner attempts to overcome today's decision on motion it should address this issue.

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.