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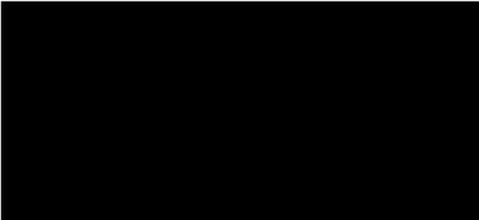


FILE: EAC 03 260 56049 Office: VERMONT SERVICE CENTER Date: MAR 30 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the instant preference visa petition. The Acting Director, Vermont Service Center, reopened the matter and denied the petition again. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limousine service. It seeks to employ the beneficiary permanently in the United States as a dispatch manager/cab supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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. The acting director affirmed that finding, again denying the petition.

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 acting director's decision on the motion the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.¹

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$26.09 per hour, which equals \$54,267.20 per year.

¹ Previously the service center had asserted that the petitioner's owner and the beneficiary are or might be related, based on their having the same given name. This office finds that inference unconvincing. Further, the record contains a letter dated April 1, 2005 from the petitioner's owner denying any blood relationship. Finally, the acting director does not seem to rely on that basis in the denial of the petition pursuant to the motion, and has not, therefore, preserved that issue. This office need not comment on that issue further.

The Form I-140 petition in this matter was submitted on September 23, 2003. On the petition, the petitioner stated that it was established on January 1, 1995 and that it employs four workers. The petition states that the petitioner's gross annual income is \$741,352 and that its net annual income is \$287,837.² On the Form ETA 750, Part B, signed by the beneficiary on April 4, 2001, the beneficiary did not claim to have worked for the petitioner.³ The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Jersey City, New Jersey.

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.⁴

In the instant case the record contains (1) copies of the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) a copy of a 2001 Federal Form W-2 Wage and Tax Statement, (3) copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001, (4) copies of the petitioner's New Jersey Quarterly Reports for the first and fourth quarters of 2001, (5) copies of portions of the petitioner's New Jersey Quarterly Reports for the second and third quarters of 2001, (6) copies of monthly statements pertinent to the petitioner's bank account, (7) copies of Form 1099 Miscellaneous Income statements showing that the petitioner paid non-wage compensation to various individuals and companies other than the beneficiary. 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 petitioner's Form 941 quarterly reports show that the petitioner paid total wages of \$39,000, \$26,400, \$10,400, and \$10,400 during the four quarters of 2001, respectively. The W-2 form provided shows that during 2001 the petitioner paid the beneficiary wages of \$39,000. The petitioner's New Jersey Quarterly Reports show that the petitioner paid the beneficiary \$13,000 and \$6,500 during the first and fourth quarters of 2001, respectively.

The petitioner's income tax returns show that it is a corporation, that incorporated on January 30, 1995,⁵ and that it reports taxes pursuant to cash convention and the calendar year.

² The evidence submitted does not support this claim pertinent to the petitioner's net income.

³ The instructions on that form required the beneficiary to list all jobs held within the previous three years and all jobs related to the proffered position.

⁴ 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).

⁵ Although this is somewhat at odds with the petitioner's assertion, on the Form I-140, that it was established on January 1, 1995, this office does not find this discrepancy material and will not rely on it.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$1,101. At the end of that year the petitioner had current assets of \$24,041 and no current liabilities, which yields net current assets of \$24,041.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$12,465. At the end of that year the petitioner had current assets of \$10,512 and no current liabilities, which yields net current assets of \$10,512.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$12,072. At the end of that year the petitioner had current assets of \$24,378 and current liabilities of \$1,794, which yields net current assets of \$22,584.

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of \$57,400. At the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0.

The proposition counsel intended to support with the Form 1099 Miscellaneous Income statements provided is unknown to this office.

The director denied the petition on May 13, 2005. The acting director subsequently reopened the matter pursuant to a motion and denied the petition again on October 6, 2005. The acting director then forwarded the matter to AAO to be treated as an appeal pursuant to 8 C.F.R. § 103.3(a)(2)(iv).

On appeal, counsel asserted (1) that the petitioner's total assets added to its total wage and salary expense exceed the annual amount of the proffered wage and demonstrates, therefore, that the petitioner was able to pay the proffered wage, (2) that the officer compensation received by the petitioner's owner was available to pay the proffered wage, (3) that the petitioner's bank statements show its continuing ability to pay the proffered wage beginning on the priority date, and (4) that the petitioner's growth shows its ability to pay the proffered wage pursuant to the language of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967)

In previous letter dated July 9, 2004 the petitioner's counsel argued that the petitioner's depreciation deductions during various years should be included in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁶ or otherwise increased its net income,⁷ the petitioner is obliged to show

⁶ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁷ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

Counsel urged that the petitioner's Form 1120, Line 12, Compensation of Officers need not have been paid to its owner, but could have been retained by the petitioner to pay the proffered wage. 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 officers has not, therefore, been shown to have been available to pay wages.

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.⁸ 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 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 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *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.

⁸ 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.

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.⁹ 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 to pay additional wages. Such a scenario is unacceptable.

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 Sonogawa*, 12 I&N Dec. 612 (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 beneficiary, in filling out the Form ETA 750B on April 4, 2001, did not claim to have worked for the petitioner, notwithstanding that he was required to list all employment within the last three years and all employment related to the proffered position. Subsequently, the petitioner submitted evidence that it had employed the beneficiary during 2001, including the first quarter. That evidence conflicts with the beneficiary's own version of his employment history reported on the Form ETA 750B.

This office accepts, on balance, that the petitioner has demonstrated that it employed the beneficiary as claimed, and that the beneficiary's failure to list his employment with the petitioner on the Form ETA 750B was an oversight. The petitioner has satisfactorily established that it paid the beneficiary \$39,000 during 2001. The petitioner has not, however, demonstrated that it paid the beneficiary any wages during any other year. The petitioner is obliged to show the ability to pay the balance of the proffered wage during 2001 and the entire annual amount of the proffered wage during the remaining salient years.

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.*

⁹ Counsel did 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, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

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).

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 minus 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 typically¹⁰ 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 \$54,267.20 per year. The priority date is April 12, 2001.

Having demonstrated that it paid the beneficiary \$39,000 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$15,267.20 balance of the proffered wage during that year. During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$1,101. That amount is insufficient to pay the balance of the proffered wage. At the end of that year, however, the petitioner had net current assets of \$24,041. That amount is sufficient to pay the balance of the proffered wage. The petitioner has shown 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 to show the ability to pay the entire annual amount of the proffered wage during that year. During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$12,465. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$10,512. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other amounts available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated, with copies of annual reports, federal tax returns, or audited financial statements, the ability to pay the proffered wage during 2002 as required by 8 C.F.R. § 204.5(g)(2).

¹⁰ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2003 and is obliged to show the ability to pay the entire annual amount of the proffered wage during that year. During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$12,072. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$22,584. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other amounts available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated, with copies of annual reports, federal tax returns, or audited financial statements, the ability to pay the proffered wage during 2003 as required by 8 C.F.R. § 204.5(g)(2).

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of \$57,400. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The visa petition in this matter was submitted on September 23, 2003. On that date the petitioner's 2004 tax return was unavailable. The service center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date on June 3, 2004 and March 3, 2005. On those dates the petitioner's 2005 tax return was still unavailable. The petitioner is excused from the obligation of demonstrating its ability to pay the proffered wage during 2005 and subsequent years.

The petitioner's tax returns, the only reliable evidence submitted pertinent to the petitioner's ability to pay the proffered wage, were insufficient to show that it was able to pay the proffered wage during 2002 and 2003. Counsel asserts, however, that pursuant to the holding in *Matter of Sonogawa*, 12 I&N Dec. 612, the growth of the petitioner's business shows its continuing ability to pay the proffered wage beginning on the priority date, notwithstanding that its tax returns do not.

Sonogawa does, in fact, indicate that, under some circumstances the fact that a petitioner's net profit during a given year is less than the annual amount of the proffered wage does not preclude approval of the petition. 12 I&N Dec. 612 (Reg. Comm. 1967), 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 *Sonogawa*, 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 *Sonogawa* 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 petitioner is a new business, and the record contains no evidence that it 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 2002 and 2003 were uncharacteristically unprofitable years for the petitioner.

Further although counsel asserts that the petitioner's business has "grown significantly" recently, the petitioner's gross receipts during various years are the statistics he cites in support of that assertion. As was noted above, a petitioner's gross receipts are a poor index of its continuing ability to pay the proffered wage beginning on the priority date. Similarly, growth in gross receipts is also a poor index.

Further still, the petitioner's gross receipts have not shown an inexorable rise during the salient years, and the difference in various years does not appear to this office to be significant, as counsel characterized it. The petitioner's gross receipts were \$782,006 during 2001, \$741,352 during 2002, \$781,448 during 2003, and \$785,643 during 2004. This office does not perceive the pattern counsel describes. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it 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 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.