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U.S. Citizenship
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MAY 16 2007

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

WAC 05 002 50219

IN RE:

Petitioner:

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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification 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 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 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.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on October 1, 2004. The proffered wage as stated on the Form ETA 750 is \$27 per hour, which equals \$56,160 per year.

On the petition, the petitioner stated that it was established on June 14, 1952 and that it employs 190 workers. The petition states that the petitioner's gross annual income is \$9,300,000. The petitioner's net income is not stated on that form. On the Form ETA 750, Part B, signed by the beneficiary on September 30, 2004, the beneficiary did not claim to have worked for the petitioner.¹ The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in San Rafael, California.

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.²

In the instant case the record contains (1) the petitioner's 2001 and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) compiled financial statements for May 31, 2001, May 31, 2002, and May 31, 2003, (3) letters dated September 9, 2003 and November 17, 2005 from a bank vice president, (4) letters dated September 9, 2003 and November 16, 2005 from a vice president at another bank, and (5) information pertinent to the petitioner's operation including room rates and other fees. 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 tax returns show that it is a corporation, that it incorporated on May 1, 1980, and that it reports taxes pursuant to accrual convention accounting and a fiscal year that runs from June 1 of the nominal year to May 31 of the following year.

During its 2001 fiscal year, which ran from June 1, 2001 to May 31, 2002, the petitioner reported taxable income before net operating loss deductions and special deductions of \$167,806. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return, which would have pertained to the fiscal year from June 1, 2002 to May 31, 2003, was not provided.

During its 2003 fiscal year, which ran from June 1, 2003 to May 31, 2004, the petitioner reported a loss of \$190,712 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

¹ The beneficiary, in fact, claimed no prior employment at all, qualifying or otherwise. This is not disqualifying pursuant to the terms of the Form ETA 750 labor certification application, which requires no previous employment experience.

² 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).

The September 9, 2003 and November 17, 2005 vice president's letters state that she has known the family that operates the hospital since its beginning in 1952, that a second generation now operates it, that they treat their employees fairly and offer good benefits, that the hospital is highly regarded and well respected, and that the hospital operates with "approximately a moderate eight figures in total loans and deposits." The proposition this letter was intended to support is unclear. Most of the recitations in that letter are irrelevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The September 9, 2003 and November 16, 2005 letters from the vice president of another bank state that the petitioner has had a relationship with that bank "since 1976 with average deposit balances in the medium six figure," [sic] that the hospital and its owners are well-established members of the business community, and that the hospital has deposits and loans both in seven figures.

The director denied the petition on November 9, 2005.

On appeal, counsel listed various figures from the petitioner's tax returns and elsewhere, but did not detail how they demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel stated that CIS has long held, based on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), that "the reputation and longstanding business operation of a company may be considered in cases where ability to pay the proffered wage is a concern." Counsel asserted, based on *Sonegawa*, that a loss during a given year does not preclude approval of an alien worker petition, and that "the future fiscal strength of a company may be ascertained by a longstanding reputable business operation"

Counsel cited two non-precedent decisions of this office for the proposition that a petitioner may show the ability to pay the proffered wage with the sum of its taxable income, depreciation deductions, and cash on hand.³ Counsel cited an additional non-precedent decision for the proposition that depreciation deduction should be added back to a petitioner's net profit in assessing its ability to pay the proffered wage.

Counsel's citation of unpublished, non-precedent decisions is without effect. 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.

Counsel's assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware 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

³ Counsel stated that "tax on hand," is a factor in determining ability to pay the proffered wage. Context makes clear, however, that counsel intended to refer to cash on hand.

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. 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.⁴ 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.

Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part. The petitioner's cash on hand will, however, be considered in the calculations pertinent to its net current assets.

Counsel incorrectly characterized the petitioner's compiled, unaudited, financial statements as its "annual reports." Counsel's reliance on those unaudited financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the bank letters in this case is misplaced. The most salient statistic from those letters was the estimate of the petitioner's deposits or balances, which are insufficient, in themselves, to show ability to pay the proffered wage. 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

⁴ 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.

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.⁵ 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.

That the petitioner has outstanding loans, as evidenced by the bank letters, is not a factor in the petitioner’s favor. The only argument to be made pertinent to those loans would be that they show the petitioner is creditworthy. They do not, however, show that the petitioner is able to borrow any additional funds.

Even if the petitioner had demonstrated that it was able to borrow additional funds, that would not be a factor in its favor. A line of credit, or any other indication of available credit, 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.

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 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 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.*

⁵ 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.

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 typically⁶ 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 \$56,160 per year. The priority date is October 1, 2004.

During its 2001 fiscal year, which ran from June 1, 2001 to May 31, 2002, the petitioner reported taxable income before net operating loss deductions and special deductions of \$167,806. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during its 2001 fiscal year.

The petitioner's fiscal year 2002 tax return is not in the record. The petition in this matter was submitted on October 1, 2004. As the petitioner's 2002 fiscal year ended on May 31, 2003 its fiscal year 2002 tax return

⁶ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

should have been available for submission with the petition. If the petitioner intended to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with its tax returns its fiscal year 2002 tax return should have been submitted. No other reliable evidence directly relevant to the petitioner's ability to pay the proffered wage during its 2002 fiscal year is in the record.

During its 2003 fiscal year, which ran from June 1, 2003 to May 31, 2004, the petitioner declared a loss as its taxable income before net operating loss deductions and special deductions of. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits 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 tax returns submitted are insufficient, in themselves, to demonstrate the petitioner's ability to pay the proffered wage during its 2002 and 2003 fiscal years.

Counsel asserts, however, that the petition is approvable pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612. Counsel states, "the future fiscal strength of a company may be ascertained by a longstanding reputable business operation" This office does not interpret *Sonegawa* precisely as counsel does. This office does not read *Sonegawa* to hold that a long history guarantees a bright future.

Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years and within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 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 also suffered large moving costs and a period of time during which it was unable to do regular business.

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. The instant case is somewhat different. The record contains no evidence that 2002 or 2003 were unusually poor fiscal years.

The evidence does show, however, that the petitioner is a high volume operation and has been in business more than half a century. Although it did not report a profit for tax purposes during its 2003 fiscal year, it had gross receipts of almost \$9 million, and paid salaries and wages of almost \$5 million. The petitioner also stated, on the

Form I-140, that it employs 190 workers.⁷ *Sonegawa* urges CIS to consider the totality of factors pertinent to the petition under review. Under these circumstances, this office finds that the petitioner is able to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

⁷ In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). No such statement was provided, however, from any financial officer of the company. The instant case might have been more expeditiously handled if the petitioner had provided such a statement, either with the petition, in response to the May 5, 2005 request for evidence, or on appeal.