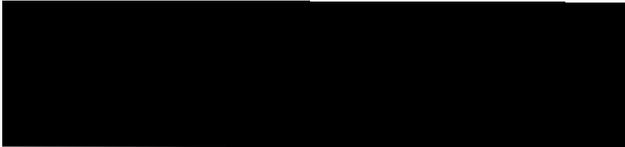


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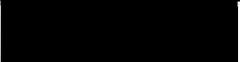
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **SEP 14 2007**

LIN 06 194 52705

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Other 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a beauty parlor cleaner. As required by statute, a Form ETA 9089, Application for Permanent 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 denied the petition accordingly.

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

As set forth in the director's original January 12, 2007, decision, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 1, 2006. The proffered wage as stated on the Form ETA 9089 is \$11.89 per hour or \$24,731.20 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case

appeal includes counsel's brief. Other relevant evidence includes a copy of the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, a copy of a bank statement for the period June 28, 2006 through July 26, 2006, copies of the beneficiary's 2003 through 2005 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, copies of the beneficiary's 2003 through 2005 Forms 1040, U.S. Individual Income Tax Returns, and pay statements for the beneficiary which cover part of 2006 up to August 15, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2004 Form 1120 reflects a taxable income before net operating loss deduction and special deductions or net income of \$1,528 and net current assets of -\$135,821.

The beneficiary's 2003 through 2005 Forms W-2 reflect wages paid to the beneficiary by the petitioner of \$18,549.77 in 2003, \$17,975 in 2004, and \$16,149.66 in 2005.

The petitioner's bank statement for the period of June 28, 2006 through July 26, 2006 shows a beginning balance of \$5,991.52 and an ending balance of \$10,916.95.

The beneficiary's 2006 pay statements reflect wages paid to the beneficiary by the petitioner of \$10,508.89 as of August 15, 2006.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and states:

A review of the ability to pay case law reveals that a totality of the circumstances is generally the standard used. *Sonogawa* allows an employer to show ability to pay if it has a reasonable expectation of future financial profit, such that the ability to pay the proffered wage is fulfilled upon the alien obtaining permanent residence. Thus, an employer's expectations of future financial profit are reasonable if:

- An employer shows it has been making a living and employing people without any evidence of financial difficulties;
- The employer establishes that it incurred unusual expenses in the year of filing that temporarily worsened its financial situation;
- The employer shows a significant increase in income in the years subsequent to the filing of the petition as established by relevant professionally prepared financial documents.

*Sonogawa* clearly addressed the need for a review of the petitioner's ability to pay the proffered wage with an eye towards modern business practices and a totality of the circumstances test. Clearly every year shows an increase in gross profits. It is clear from the growth that the petitioner is not merely surviving but thriving since its inception. Petitioner's documentary evidence does disclose several tax maneuvers designed to minimize taxation (as discussed below), but these legal and tax planning acts should not be construed as demonstrative of financial instability. . . .

\* \* \*

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provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the present case, petitioner, a California corporation established on October 28, 1966 and doing business since that time, submitted the 2004 tax return due to the fact that petitioner is on a fiscal year schedule and the tax period for 2005 ended on October 31, 2006. The 2005 return, now submitted herein, shows total assets of gross revenue of \$1,862,910 and total assets of \$149,000. A review of the 2004 tax return does disclosed [sic] that Petitioner had **current assets of \$170,177. Petitioner's payroll for 2005 was \$144,662. Additionally, Schedule L of each return shows that Petitioner owns the building in which it operates that has a claimed value of \$894,410.**

Therefore, using established case law and criteria recently expounded by the Administrative Appeals Office, the long history of viability and growth of the Petitioner (40 years), its high gross receipts, its large and consistent payroll and its sustained balances in its bank accounts should be sufficient to establish that Petitioner indeed has and will continue to have the ability to pay the proffered wage to Beneficiary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 9089, signed by the beneficiary on June 13, 2006, the beneficiary claims to have been employed by the petitioner from October 1, 2002 to April 1, 2006. In addition, counsel has submitted Forms W-2, issued by the petitioner on behalf of the beneficiary, for the years 2003 through 2005. Therefore, the petitioner has established that it employed the beneficiary from 2003 through 2005.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$24,731.20 and the actual wages paid to the beneficiary. Those differences would have been \$6,181.43 in 2003, \$6,756.20 in 2004, and \$8,581.54 in 2005.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax return demonstrates that its net income in 2004 was \$1,528.<sup>2</sup> Therefore, the petitioner has not established that it had sufficient funds to pay the difference of \$6,756.20 between the proffered wage of \$24,731.20 and the actual wages paid to the beneficiary of \$17,975 from its net income in 2004.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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. Rather, 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.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The petitioner's net current assets in 2004 were -\$135,821. The petitioner could not have paid the difference of \$6,756.20 between the proffered wage of \$24,731.20 and the actual wages paid to the beneficiary of \$17,975 from its net current assets in 2004.

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<sup>2</sup> Although counsel claims, on appeal, that he submitted the petitioner's 2005 tax return, that return is not in the record of proceeding, and, therefore, any information contained in that tax return cannot be corroborated or used by the AAO in determining the petitioner's ability to pay the proffered wage of \$24,731.20.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel claims that by using established case law and criteria recently expounded by the Administrative Appeals Office, the long history of viability and growth of the Petitioner (40 years), its high gross receipts, its large and consistent payroll and its sustained balances in its bank accounts should be sufficient to establish that Petitioner indeed has and will continue to have the ability to pay the proffered wage to Beneficiary. Counsel cites a non-precedent decision and *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his claims.

With regard to the non-precedent decision cited by counsel, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered below when determining the petitioner's net current assets.

Counsel's contention that the petitioner's long history of viability and growth of the petitioner (40 years), its high gross receipts, and its large and consistent payroll should be sufficient to establish that the petitioner has and will continue to have the ability to pay the proffered wage to the beneficiary is considered within the guidelines of *Matter of Sonogawa*.

In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided any evidence that unusual circumstances have been shown to exist that parallel those in *Sonogawa*, nor has it been

established that 2004 was an uncharacteristically unprofitable year for the petitioner. In addition, there is no evidence of the petitioner's reputation in the industry. Furthermore, the petitioner has provided only one tax return that, although positive with regard to its gross receipts, length of time in business, and its salaries paid, does not establish its ability to pay the difference between the proffered wage of \$24,731.20 and the actual wages paid to the beneficiary. In order to meet the provisions of *Sonegawa*, the petitioner would need to submit additional tax returns (before and after 2004) showing positive incomes and growth, evidence of its reputation in the industry, and corroborative evidence of its future viability such as a business plan. A mere statement by counsel or the petitioner will not suffice. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.