



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: **JAN 22 2008**

EAC 05 255 51872

IN RE:

Petitioner:

[Redacted]

Beneficiary:

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

The petitioner is an import/export firm. It seeks to employ the beneficiary permanently in the United States as an import/export agent. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$39.34 per hour, which amounts to \$81,827.20 annually. The ETA 750B, signed by the beneficiary on January 12, 1998, does indicate that he has worked for the petitioner since April 1997.

On Part 5 of the Immigrant Petition for Alien Worker (I-140),<sup>1</sup> filed on October 31, 2005, it is claimed that the petitioner was established on March 28, 1997, has gross annual income of \$22 million and currently employs twenty workers. As evidence of its continuing financial ability to pay the certified wage of \$81,827.20 per year and in response to the director's request for evidence relating to the petitioner's ability to pay the certified salary, the petitioner provided copies of its 1998, 1999, 2000, 2001, 2002, 2003, 2004 Form 1120, U.S. Corporation Income Tax Return. These returns reflect that the petitioner files its tax returns using a fiscal year running from March 1<sup>st</sup> to February 28<sup>th</sup> or 29<sup>th</sup> of the following year. Thus, the tax returns cover the period from March 1, 1998 to February 28, 2005. The 1997 tax return or other financial information covering the priority date was not provided. The tax returns contain the following information relevant to the corporate petitioner's income, assets and liabilities:

	1998	1999	2000	2001
Net Income <sup>2</sup>	\$37,332	\$ 68,178	\$ 115,181	-\$ 190,473
Current Assets (Sched. L)	\$77,270	\$1,757,941	\$2,162,012	\$1,536,314
Current Liabilities (Sched. L)	\$98,588	\$1,797,224	\$2,225,263	\$2,024,812
Net Current Assets	-\$21,318	-\$ 39,283	-\$ 63,251	-\$ 488,498

  

	2002	2003	2004
Net Income	\$ 140,776	\$59,305	\$ 332,001
Current Assets (Sched. L)	\$1,630,059	\$2,619,880	\$2,738,377
Current Liabilities (Sched. L)	\$2,535,329	\$2,430,158	\$2,161,365
Net Current Assets	-\$ 905,270	\$ 189,722	\$ 577,012

Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1

<sup>1</sup> The petitioner's first I-140 was filed in 2002 using the same labor certification. It was denied on January 23, 2003, based on the petitioner's inability to pay the proffered wage. The appeal was subsequently dismissed by the AAO on August 25, 2003.

<sup>2</sup> For the purpose of this review, line 28 of Form 1120, taxable income before net operating loss deduction and special deductions, will be treated as net income.

<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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

through 6 and line(s)16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. Although the petitioner did not submit copies of W-2s for other years, the director reviewed the W-2s that had been submitted with the previous I-140 filed by the petitioner. The W-2s indicated that the following wages were paid to the beneficiary:

1998	\$17,769.24
1999	\$28,187.72
2001	\$36,920

In each of those years, the actual wages paid was \$64,057.96 less than the proffered wage in 1998; \$53,639.48 less in 1999 and \$44,907.20 less than the certified salary in 2001. The director denied the petition on August 22, 2006. He determined that the petitioner's net income of \$68,178 could cover the shortfall of \$53,639.48 between the actual wages paid to the beneficiary and the proffered wage in 1999 and demonstrate the petitioner's ability to pay during this year. He further noted that either the petitioner's net income or net current assets were sufficient to pay the proffered wage in 2000, 2002, 2003 and 2004, but concluded that the petitioner had not established its continuing ability to pay the certified wage because neither its net income or net current assets in 1998 and 2001 was sufficient cover the difference between the actual wages paid to the beneficiary and the proffered wage.

On appeal, counsel submits a copy of the beneficiary's W-2 for 2005. It shows that he was paid \$70,000 by the petitioner. A copy of the petitioner's 2005 tax return was also provided. It indicates that the petitioner reported net income of -\$367,724. Schedule L shows that it had current assets of \$2,853,913 and current liabilities of \$2,917,253, resulting in -\$63,340 in net current assets.

Counsel asserts that the petitioner had the ability to pay the proffered wage for most of the years under discussion. Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that factors other than net income or assets may be considered in determining an employer's ability to pay the proffered salary. Counsel also contends that depreciation should be considered because it does not represent an actual cash loss in the year claimed. Counsel further claims that the modest profit reported in 1998 is easily explainable as the petitioner was established in 1997 and only started doing business in 1998. He also suggests that 2001 was a negative year because the petitioner does business in New York City and many businesses were negatively affected by the World Trade Center attacks of September 11, 2001. He further states that if the petitioner's income were averaged every year, the petitioner is generally able to pay the proffered salary. Counsel asserts that very large companies that report revenue in the tens of millions often report little or no taxable income and yet can pay very high salaries to employees.

We do not find counsel's assertions persuasive. Counsel cites no legal authority for the theory that a petitioner's income should be averaged every year to determine its ability to pay a proposed wage offer. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial

ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is January 13, 1998. If the petitioner only commenced doing business in 1998, it could have delayed the submission of the ETA 750 until it was in a better financial position.

It is further noted that the record of proceeding contains no evidence specifically connecting the petitioner's business losses in 2001 to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. An unsupported statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as discussed above, the record indicates that the petitioner has employed the beneficiary since 1997.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

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 the Service should have considered income before expenses were paid rather than net income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng Chang* at 536.

As noted above, counsel's suggestion that the petitioner's depreciation should be added back somehow to its net income is unpersuasive.

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, the petitioner had not even been established for a full year before it filed an ETA 750. Although the petitioner has had some profitable years, it also has reported losses in both net income and net current assets, most recently on the 2005 tax return provided on appeal. It cannot be concluded that this represents the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is January 13, 1998. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Although it is noted that the beneficiary's W-2s are based on wages paid during the calendar year and the tax returns are based on a fiscal (March to the following February) year, this office concurs with the director's conclusions as to the petitioner's ability to pay the proffered wage in the years 1999, 2000, 2002, 2003 and 2004. As referenced by the director, however, neither the petitioner's net income of \$37,332 nor its net current assets of -\$21,318 could cover the \$64,057.96 shortfall resulting from a comparison of the actual wages paid of \$17,769.24 and the proffered wage of \$81,827.20 in 1998, the year of filing. In 2001, neither the -\$190,473 in net income nor the -\$488,498 in net current assets could cover the \$44,907.20 difference between the beneficiary's actual wages and the certified salary. Similarly, as shown by the tax return provided on appeal, neither the petitioner's net income of -\$367,724 nor its net current assets of -\$63,340 could cover the difference of \$11,827.20 between the actual wages of the beneficiary and the proffered wage in 2005. The evidence failed to establish the petitioner's continuing ability to pay the proposed wage offer during the relevant period.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning at the priority date of the petition as required by 8 C.F.R. § 204.5(g)(2).

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.