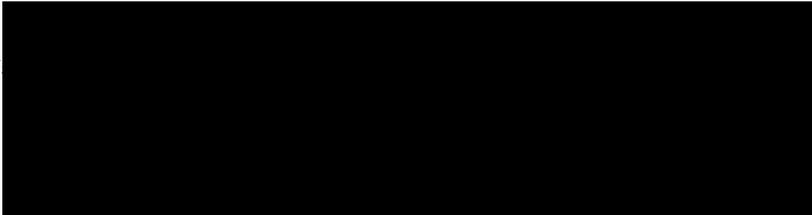




U.S. Citizenship
and Immigration
Services

B-5



FILE: WAC-00-258 55365 Office: CALIFORNIA SERVICE CENTER Date: JUL 9 2004

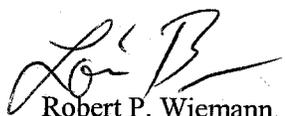
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a member of the Professions holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) Of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

The petitioner is a designer and manufacturer of semiconductors. It seeks to employ the beneficiary permanently in the United States as a design engineer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because she determined that the petitioner had failed to that it had the ability to pay the proffered wage.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advance degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is July 25, 2000. The beneficiary's salary as stated on the labor certification is \$85,000 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated November 12, 2000 the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax returns, annual reports or audited financial statements as well as evidence of wage payments to the beneficiary, if any.

In response to the RFE, counsel submitted the petitioner's Wells Fargo bank statements from the period July 1, 2000 through December 31, 2000, a California Quarterly Wage and Withholding Report EDD 98089 for the quarter ending September 30, 2000 indicating that the petitioner paid the beneficiary \$21,985.38 during the third quarter, and federal and state tax information for the second and third quarters of 2000. Counsel also submitted an unaudited financial statement for the period ending November 30, 2000. The statement indicated that the petitioner had year -to-date total revenue of \$696,022; total year-to-date operating expenses of \$760,792; gross operating year-to-date income/loss of -\$577,270; and, total year-to-date income before taxes of -\$678,272. Counsel also submitted evidence of various lines of credit extended to the petitioner. The unaudited statement reflected that the petitioner's current liabilities outweighed its current assets.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the petitioner has submitted sufficient evidence to establish its ability to pay the proffered wage. Counsel cited several unpublished AAO decisions as well as *Matter of Sonegawa, 12 I&N Dec. 612* (Reg. Comm 1967) as evidence that CIS failed to follow precedent and properly consider the evidence submitted in this case.

Counsel submits numerous purchase orders, copies of wires reflecting various lines of credit extended to the petitioner and, a letter from Joseph Fuhrig, Program Director, Department of Finance and Economics Golden State University, San Francisco, California, who states that he has reviewed the balance sheet, income statement and pro forma projections of the petitioner and has concluded that the petitioner has sufficient revenue to cover "variable costs." [REDACTED] states that the Balance Sheet shows a positive net worth (owner's equity) and that outside investors are interested in providing additional funding to the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage in 2000.

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. 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 (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 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, now CIS, should have considered income before expenses were paid rather than net income.

Nevertheless, counsel is correct that 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. We reject, however, counsel's argument that the petitioner's net worth and, thus, total assets should have been considered in the determination of the ability to pay the proffered wage. 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, which presumably include venture capital and any borrowed cash, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its federal tax returns or audited financial statements. Even though the unaudited financial statement submitted reveals that the petitioner is operating at a loss and that its current liabilities outweighed its current assets, the tax returns and financial statements would have demonstrated the amount of taxable income and net current assets the petitioner reported to the IRS, thereby revealing its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The unaudited income statements submitted as proof of the petitioner's ability to pay the proffered wage are in the record. However, they have little evidentiary value as they and the letter from Joseph Fuhrig are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), already quoted above in part, states:

Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

(Emphasis added.) 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.

Counsel noted that CIS approved other petitions that had been previously filed on behalf of individuals having employers with similar financial circumstances. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the 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 the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that any year was an uncharacteristically unprofitable year for the petitioner. The petitioner has not provided evidence of profitable years.

Even though the petitioner has submitted evidence that the beneficiary worked for it during the quarter ending September 30, 2000 and that it has additional funding available through its creditors, after a review of the evidence it is concluded that the petitioner has not established through regulatory-sanctioned evidence that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.