

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

FILE: WAC-01-258-53927 Office: CALIFORNIA SERVICE CENTER Date: **MAR 09 2004**

IN RE: Petitioner:
Beneficiary:

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:

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

On the petition, the petitioner claimed to sell prepaid telephone calling cards. It seeks to employ the beneficiary permanently in the United States as a financial analyst at an annual salary of \$59,446. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

The AAO concurred with the director, noting that the record contained no evidence of any relationship between the petitioner and Union West International, the entity paying the beneficiary a wage less than the proffered wage. The AAO further concluded that Union West International's tax return did not demonstrate that it had the ability to pay the difference between the wage paid and the proffered wage.

On motion, counsel requests that we consider the petitioner's gross income, as it is possible to pay one's employees while in debt. The petitioner submits a "Merger Agreement" between the petitioner and Union West International, Inc.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's filing date is February 20, 2001. The beneficiary's salary as stated on the labor certification is \$28.58 per hour, which equates to \$59,446 annually.

With the original petition, the petitioner submitted its Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1999 that contained the following information:

Net income (loss)	(\$384,726)
Current assets	\$1,132,487
Current liabilities	\$1,641,610

The tax return indicates that the petitioner is engaged in providing telecommunications services and Schedule L lists no inventory. The petitioner's employer identification number is listed as 33-0640109 and the address is 26500 West "Agura" Road. On December 12, 2001, the director requested payroll documentation and original computer records of the petitioner's 2000 tax return stamped by the Internal Revenue Service (IRS). In response, the petitioner submitted the following documentation for Union West International: the company's 2001 Form W-3 listing an employer identification number of 62-2029714 and address at 26500 West Agoura Road, #211; Payroll documentation for December 28, 2001 reflecting that the company paid the beneficiary \$11 per hour; quarterly wage reports listing the beneficiary as an employee; and the payroll history for the beneficiary.

The director noted that the petitioner had not submitted its tax return as requested, that the beneficiary was only receiving \$11 per hour, and concluded that the petitioner had not established that it had the ability to pay the proffered wage of \$28.58 per hour.

On appeal, the petitioner submitted an IRS computer record of the 2000 tax return filed by Union International, employer identification number 51-0398152 and address 23852 Pacific Coast Highway, reflecting a net loss of \$131,746. The IRS only provided some information from Schedule L. Thus, the computer records do not allow for a calculation of the company's net current assets in 2000. The petitioner also submitted Union West International's Bank of America Statements. The statements for December 2001 through February 2002, reflect that Union West International does business as Supertel and Supertel Communications. The address is listed as 23852 Pacific Coast Highway, Suite 664. Finally, the petitioner submitted letters from its Chief Financial Officer asserting that the petitioner is a subsidiary of Union West International.

The AAO rejected the evidence of Union West International and Union International on the following grounds: the record contained insufficient evidence of the relationship between these companies and the petitioner, a corporation is a separate legal entity from its shareholders, and the 2000 tax return reflects a net loss.

On motion, counsel asserts that Union International's gross receipts of \$14 million and salaries paid of \$435,456 sufficiently establish its ability to pay the beneficiary the proffered wage. Counsel notes that the Federal Government pays its employees despite being in debt. The petitioner submits a "Merger Agreement" between the petitioner and Union West International that provides: "It is hereby agreed that effective as of February 28, 1998 [the petitioner] shall become a subsidiary of Union West International, Inc. with details to be arranged by both parties to this Agreement." No other details of the "merger" are provided, such as how much Union West International will pay for stock in the petitioner or what percentage of stock it will receive.

Counsel's arguments are not persuasive. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), 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. *Id.* at 1084. The court specifically rejected the argument that the Service (now 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989); see also *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)).

In addition, we cannot consider the payment of its employees by Union West International and Union International as evidence of their ability to pay the beneficiary the proffered wage because the record does not establish that either company paid the beneficiary the full proffered wage. Further, the requirement that a petitioner establish its ability to pay the beneficiary would be meaningless if it could simply argue that it could do so by going further into debt.

Also, the petitioner's net current assets in 1999 are insufficient to establish the petitioner's ability to pay the proffered wage. We cannot determine Union International's net current assets from the computerized record from the IRS as current assets are not listed separately.

Finally, the "Merger Agreement," a self-serving document that provides no details regarding the "merger," is inconsistent with the remainder of the record. The petitioner's 1999 tax return, Schedule K, line 5, indicates that a corporation did not directly or indirectly own 50 percent or more of the petitioner's voting stock. In addition, as stated above, Schedule K also indicates that the petitioner is a telecommunications *service* provider. Schedule L includes no inventory. Yet, on the petition, the petitioner indicates that it sells prepaid calling cards. The record also fails to establish that Union West International and Union International are one and the same. The record also lacks any evidence of the petitioner's ability to pay the proffered wage after 2000. Thus, we cannot conclude that the petitioner currently has the ability to pay the proffered wage.¹

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of March 19, 2003 is affirmed. The petition is denied.

¹ The California Business Portal, www.ss.ca.gov/business/business.htm, indicates that the petitioner's status is currently "suspended." A search of California corporations produces no responses for Union West International. The bank statements for Union West International indicate that it does business as Supertel Communications. The California Business Portal does have information regarding Supertel Communications. The agent for this company has the same last name as the petitioner. Its status, however, is also listed as "suspended."