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U.S. Citizenship
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Services

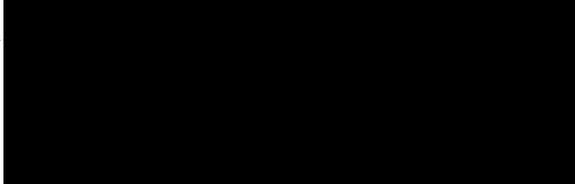


FILE: SRC 01 233 53729 Office: NEBRASKA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
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:



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prevent clearly unwarranted
invasion of personal privacy**

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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 employment based immigrant visa petition was denied by the Director, Nebraska a Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional. The petitioner is an assisted living facility. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and maintains that the petitioner has demonstrated its financial ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Act provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides 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. . . . 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 [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is December 15, 1998. The beneficiary's salary as stated on the labor certification is \$10.48 per hour or \$21,798.40 per year, based on a 40-hour week. The visa petition indicates that the petitioning business employs ten people, and claims a gross annual income of approximately \$400,000. The record reflects that it was established in 1975 and is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted a copy of an accountant's letter accompanied by the petitioner's balance sheet and income statement covering the period ending December 31, 1999. As noted by the accountant's letter, the compiled figures are the representation of management and have not been audited or reviewed. As such, CIS cannot conclude that such documents form a credible basis from which to evaluate a petitioner's continuing ability to pay a beneficiary's proposed salary since the regulation at 8 C.F.R. § 204.5(g)(2) neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

On February 26, 2002, the director requested additional evidence from the petitioner to support its continuing ability to pay the proffered wage beginning on December 15, 1998. The petitioner's response included a letter from the petitioner's administrator explaining that the petitioner reported its income on the tax return of

"Antonietta Llanes Wilnet's Amoco, Inc." in 1998 and 1999, before incorporating as a separate business entity. The petitioner submitted copies of Form 1120S, U.S. Income Tax Return for an S Corporation for Wilnet's Amoco for 1998 and 1999. The petitioner included a copy of its own Form 1120, U.S. Corporation Tax Return for 2000 and a copy of its Form 1120S for the year 2001. The petitioner's tax returns indicate that it originally incorporated in 2000. Besides net income, the tax returns show the filer's current assets and current liabilities on Schedule L. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year. CIS will consider net current assets as well as a petitioner's net income because it reflects the level of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, the petitioner's federal tax returns contain the following information:

Year	Ordinary Income Or Income Before Net Operating Loss (NOL) Deduction	Current Assets	Current Liabilities	Net Current Assets
1998	\$ -15,383	\$ 28,734	\$ 1,823	\$ 26,911
1999	80,070	52,239	1,619	50,620
2000	-0-	6,565	-0-	6,565
2001	-7,929	1,558	128	1,430

The petitioner also included a copy of a letter from a personal service representative of a bank reporting a balance of \$6,750.29 in a checking account held in the petitioner's name, as of December 26, 2001. While bank statements can be useful in showing a petitioner's cash flow, they do not reflect a business' complete financial picture. Moreover, there is no proof that this report of a checking account balance somehow represents additional funds beyond those reflected in the 2001 tax return. Following a review of the information reflected in the record, the director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage.

The AAO concurs. As noted above, when combined with another business' income and assets, either the ordinary income or the net current asset amounts were sufficient to cover the beneficiary's proposed wage offer of \$21,798.40 in 1998 and 1999. When viewed as a separate business beginning in 2000, however, neither the petitioner's ordinary income, nor its net current assets in either 2000 or 2001, were sufficient to cover the beneficiary's proposed salary.

On appeal, counsel submits a letter from the petitioner's accountant explaining that the petitioner showed losses in 2000 and 2001 due to rent and property tax obligations and that the facility did not support its full capacity of residents. The accountant anticipates that the petitioner will show ordinary income for the tax year 2002. The record also contains a copy of a bill of sale indicating that the petitioner purchased equipment, inventory, and the real property where the petitioner is doing business, in July 2002. This doesn't sufficiently support the petitioner's independent continuing ability to pay the proffered wage beginning in 2000 when it began separately reporting its income. The principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) are sometimes applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Sonogawa* 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 Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. Here, merely asserting that a petitioner had to pay rent and property taxes to operate its business does not parallel the unique business hardship that occurred in *Sonegawa*, nor does it support the assertion that the petitioner's ability to pay the proffered wage can be premised on future undeterminable profitability based on probability and projections. *Matter of Great Wall*, 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner show a *continuing* ability to pay the proffered wage. (Emphasis added.)

Counsel also offers copies of documents showing real estate holdings and various bank statements held in the individual names of the petitioner's principal shareholders or of their other company. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In determining the petitioner's ability to pay the proffered wage, 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. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

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.