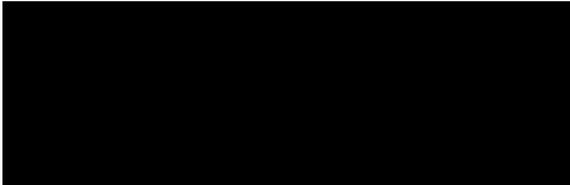


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 191 50513 Office: CALIFORNIA SERVICE CENTER Date:

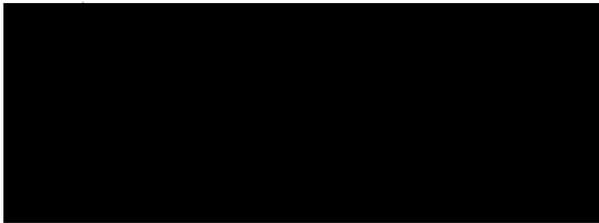
IN RE: Petitioner:
Beneficiary:



MAR 31 2004

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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, Director
Administrative Appeals Office

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

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 wholesale garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a garment sample maker. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *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 matter is rests upon 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 23, 1998. The beneficiary's salary as stated on the labor certification is \$11.50 per hour for a 40-hour week or \$23,920 per year.

Counsel initially submitted signed copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1998, 1999, 2000, and 2001 in support of the petitioner's ability to pay the beneficiary's wage offer of \$23,920. Within these copies, the petitioner's taxable income before net operating loss deduction (NOL) and special deductions, taxable income after deductions, and Schedule L net current assets were depicted as:

	Taxable income before NOL and special deductions	Taxable Income	Schedule L/Net Current Assets
1998	\$29,788	\$29,788	\$ 55,115
1999	\$36,886	\$36,886	\$119,214
2000	\$42,560	\$42,560	\$155,390
2001	\$46,419	\$46,419	\$144,846

As noted above, according to these records submitted with the petition, the petitioner could meet the beneficiary's salary in each year out of either its net income or its net current assets.

On August 7, 2002, the director requested additional evidence from the petitioner to support its ability to pay the beneficiary's proposed salary of \$23,920. The director requested the petitioner to submit the original computer printouts from the Internal Revenue Service (IRS) for the years 1998, 1999, 2000, and 2001. The director also instructed the petitioner to submit copies of the last four quarters of its state wage reports, copies of the petitioner's articles of incorporation, and a copy of the petitioner's current valid business license.

In response, counsel submitted copies of the IRS printouts of the petitioner's corporate tax returns for the years 1998, 1999, and 2000. Counsel advised in a letter accompanying the response that the 2001 printout was not available. These printouts contain the following information about the petitioner's taxable income before NOL and special deductions, taxable income, and net current assets:

Taxable income before NOL and special deductions	Taxable Income	Schedule L/Net Current Assets
1998 not listed	-\$22,460	-\$ 3,076
1999 not listed	\$10,717	-\$32,974
2000 not listed	\$ 8,952	-\$30,456

Counsel also again submitted additional unsigned copies of the petitioner's Form 1120, U.S. Corporation Tax Returns. These returns were stamped "client's copy." The 1998 copy is identical to the 1998 IRS record reflecting taxable income and net current assets. The 1999 copy shows the same taxable income as the 1999 IRS printout, but shows -\$15,944 in net current assets. The 2000 return reflects the same figure as the IRS printout for taxable income but shows -\$7,119 in net current assets. Finally, the copy of the petitioner's Form 1120 for the year 2001 that was submitted in response to the director's request for evidence shows the same figure of \$46,419 in taxable income as the originally submitted copy (signed by one of the petitioner's officers), but shows \$858 in net current assets on Schedule L rather than \$144,846.

Copies of the petitioner's quarterly state wage reports indicate that the petitioner maintained a payroll of approximately 20 to 23 employees during the period from the quarter ending September 30, 2001 to the quarter ending June 30, 2002. These records do not include the beneficiary's name as one of the employees. The articles of incorporation submitted in the petitioner's response to the director's request for evidence reflect that the petitioner was incorporated in 1997.

The director denied the petition, finding that the petitioner had not established its continuing ability to pay the beneficiary's salary as of the priority date because its net income shown in the IRS records could not meet the proffered wage. The AAO concurs and would note that the petitioner's net current assets figures as reflected in the IRS records also do not indicate that the petitioner could pay the beneficiary's salary. Nor do the third set of figures as reflected in the petitioner's second submission of copies of its Form 1120 corporate tax returns, with the exception of the year 2001, demonstrate an ability to pay the beneficiary's proposed salary out of either net income or net current assets. It is abundantly clear that there are major discrepancies between the copies of the petitioner's tax returns submitted with the petition, and those submitted in response to the request for evidence. No explanation whatsoever appears in the record as to why obviously false copies of signed tax returns were originally submitted with this immigrant visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies is not acceptable. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19I&N Dec. 582, 591-92 (BIA 1988)

On appeal, counsel objects to CIS failing to acknowledge receipt of Form 1120 for the year 2001, although it acknowledged receipt of the IRS computer tax records. Even if the petitioner's copy of its Form 1120 corporate tax return were considered reliable, it would represent only one year in which the petitioner's net income was sufficient to pay the beneficiary's wage offer.

Counsel also questions where CIS finds the petitioner's net current assets of -\$3,076 for the 1998 tax year. Net current assets are the difference between current assets and current liabilities. It identifies the amount of liquidity that a petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the balance sheet. On Schedule L of a petitioner's corporate tax return a figure for net current assets can be found by adding the totals for current (not long-term) assets and current liabilities and calculating the difference. If the sum is sufficient to pay the beneficiary's proposed salary, then CIS will accept this as credible evidence as ability to pay during the relevant period. Here, the petitioner's IRS printout record showing -\$3,076 (Schedule L/current liabilities - accts. receivables) matches the figures on the petitioner's 1998 copy of its Form 1120 when the difference between current liabilities and current assets is calculated. Counsel's query as to the 2000 IRS printout is similarly located. Current liabilities of -\$19,887 plus accounts payable of -\$14,325 are -\$34,212. Current assets shown on the IRS printout are found as notes and accounts receivable of \$3,756, resulting in -\$30,456. This figure, however, is different from the Schedule L figures submitted in the petitioner's 2000 copy of its tax return. The petitioner's figure for net current assets, in its third copy of tax returns stamped "Client Copy," is -\$7,119. Regardless of which version of the petitioner's tax returns is accurate, neither figure demonstrates sufficient funds to cover the beneficiary's salary of \$23,920 for the year 2000.

In determining the petitioner's ability to pay the proffered wage, CIS will review 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). Counsel's assertion that the petitioner's total assets figure as shown on its tax return should be included in the calculation is also unpersuasive. It does not include a consideration of total liabilities and does not represent readily available funds that could be used to meet the beneficiary's salary.

Counsel also contends that this case is analogous to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). That case is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturier. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Counsel also mentions that the job that the petitioner is attempting to fill is not a new position. There is no direct evidence in the record, however, that names the worker(s), their wages or duties, or otherwise provides evidence that the petitioner replaced them. Wages already paid to others are not available to prove the ability to pay the proffered salary to the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As set forth above, 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay the proffered salary beginning on the priority date.

After a review of the federal tax returns as well as further argument and evidence presented on appeal, it is concluded that the petitioner has failed to establish that it has had the continuing financial ability to pay the proffered wage as of the visa priority date of March 23, 1998.

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.