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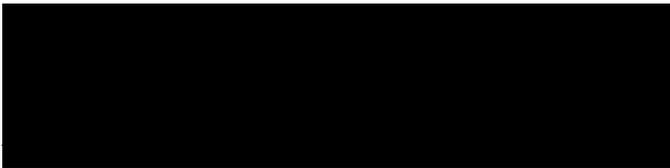
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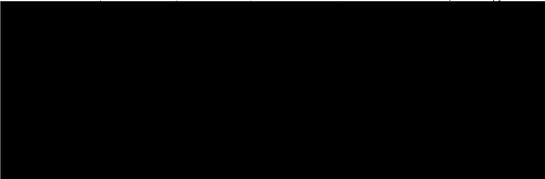
Office: CALIFORNIA SERVICE CENTER

Date: NOV 18 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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is software development firm. It seeks to employ the beneficiary permanently in the United States as a programmer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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, current counsel asserts that the director erred in concluding that the petitioner had not demonstrated its continuing ability to pay the proffered wage.

On Part 2 of the notice of appeal, Form I-1290B, current counsel requests an additional 30 days to submit a brief and/or evidence in support of the appeal. As of this date, nothing further has been submitted to the record. The appeal will be reviewed based on the record as it currently stands.

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 the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$35.50 per hour, which amounts to \$73,840 annually. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner states that it was established in 1980, has a gross annual income of 1.9 million dollars and currently employs fourteen workers. In support of its ability to pay the proffered annual salary of \$73,840, the petitioner submitted partial copies of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. They indicate that the petitioner files its tax returns based on a fiscal year running from March 1st until February 28th of the following year. Thus, the 2000 and 2001 tax returns contain information representing the petitioner's financial status from March 1, 2000 to February 28, 2002. The 2000 tax return shows that the

petitioner declared \$1,351 in net income. The 2001 tax return reflects that the petitioner reported \$13 as net income.

On November 8, 2002, the director requested additional evidence from the petitioner in support of its continuing ability to pay the beneficiary's proposed wage offer as of the priority date. The director advised the petitioner that it should submit either annual reports, federal tax returns, or audited financial statements as proof of this ability. The director specifically requested a copy of the petitioner's 2001 federal income tax return, as well as copies of its state quarterly wage reports for all employees for the last four quarters filed.

In response, the petitioner, through former counsel, submitted copies of its state quarterly wage reports for 2002. They show that the petitioner paid the beneficiary \$52,767.76 in compensation during this period. The petitioner also provided a copy of the beneficiary's pay stub as of the pay period ending December 15, 2002, which shows his year-to-date wages at \$55,200. A letter, dated January 21, 2003, from the petitioner's administrative director, confirms that the petitioner has employed the beneficiary since August 4, 2000 and that his current salary is \$55,200 per year. Ms. states that the beneficiary will receive the full proffered wage upon receipt of his permanent residence or employment authorization, whichever comes first.

The petitioner also submitted copies of unaudited financial statements presenting financial data for the eight-month period ending October 31, 2002, copies of bank statements of a payroll account and a general account for the period from April 30, 2001 to December 31, 2002, and a complete copy of its 2001 corporate tax return. The tax return reveals that the petitioner reported gross receipts or sales of \$1,061,995, officers' compensation of \$32,000, \$298,030 in salaries and wages, and, as noted above, a net income of \$13. Schedule L of the tax return reflects that the petitioner had \$168,594 in current assets and \$330,531 in current liabilities, resulting in -\$161,937 in net current assets. As a measure of a petitioner's liquidity, besides net income, CIS will examine a petitioner's net current assets as an alternative resource out of which a proffered wage may be paid. 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 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.

Former counsel's transmittal letter, accompanying these documents, notes the size of the petitioner's reported gross income for 2001 and asserts that it has continuously grown since its beginning. Citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Comm. 1967), counsel claims that the petitioner can reasonably be expected to show an increase in revenue and profits. Counsel also asserts that the petitioner's bank statements demonstrate its ability to pay the proffered salary.

On February 18, 2003, the director denied the petition, determining that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date. The director

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

reviewed the petitioner's net income and net current assets as presented on its 2001 tax return and concluded that neither could cover the proffered wage. The director also noted that the petitioner was obligated to pay the proffered wage by the terms of the application for the labor certification.

On appeal, counsel submits no additional evidence, but asserts only that the obligation to pay the proffered wage begins with an alien's entrance into the United States pursuant to the issuance of an immigrant visa or adjustment of status to permanent residence. The AAO concurs with this interpretation but notes that the level of salary being paid to an alien may be a relevant factor in determining a petitioner's ability to pay a proffered wage. *See* 20 C.F.R. § 656.20(c)(2).

At the outset, it is noted that unaudited financial statements and bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. 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. Bank statements reveal only a portion of a petitioner's financial status and do not reflect other encumbrances that may affect a petitioner's ability to pay a certified wage. Further, according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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 may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. If a petitioner may have employed an alien beneficiary at a salary less than the proffered wage, appropriate credit will be given. In this case, although the petitioner has employed the beneficiary, it has not employed him at the proffered wage.

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 a petitioner's gross receipts or gross income exceeded the proffered wage or exceeded a certain level is not sufficient. Gross income will not be considered without also reviewing the expenses incurred in order to produce that income. Similarly, showing that the petitioner paid wages to other employees or officers compensation in excess of the proffered wage is insufficient, as it represents money already expended and not available to pay the proffered wage. 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.

In the instant case, whether the beneficiary's wages in 2002 were \$55,200 as set forth on his December 2002 pay stub, or \$52,767.76 as reported by the petitioner on its state quarterly wage reports for 2002, both amounts are between \$18,640 and \$21,072 short of the proffered wage of \$73,840. Further, even if the alien beneficiary's 2001 wages had reached these levels, neither the 2001 reported net income of \$13, nor the petitioner's net current assets of -\$161,937 could come close to covering either of these shortfalls. Nor does Ms. [REDACTED] assurance that the alien beneficiary will, in the future, be paid the proffered wage of \$73,840 per annum satisfy the provisions of 8 C.F.R. § 204.5(g)(2), which require that a petitioner demonstrate its *continuing* ability to pay a proposed wage offer beginning at the priority date, through federal tax returns, annual reports, or audited financial statements.

While former counsel's assertion that *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small net income is correct, 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the two corporate tax returns submitted as evidence of the petitioner's ability to pay the proffered wage do not establish a framework of profitable years, nor do they demonstrate growth as claimed by former counsel. The petitioner's gross income decreased from \$1.6 million in 2000 to \$1.06 million in 2001. Salaries and wages declined from \$486,000 in 2000 to \$298,000 in 2001. Reported net income decreased from \$1,351 to \$13. The evidence does not show that unusual circumstances exist in this case, which parallel those in *Sonegawa*, or that this level of income is somehow uncharacteristic within a framework of profitable years. It cannot be concluded that the projection of future profitability overcomes the evidence contained in the record. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Upon review of the evidence and argument contained in the record and submitted on appeal, the AAO concludes that the evidence failed to persuasively demonstrate that it has had the continued ability to pay the proffered wage.

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.