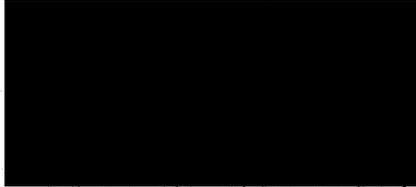


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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

NOV 20 2004

WAC 03 051 54884

IN RE:

Petitioner:

Beneficiary:



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

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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 retail store. It seeks to employ the beneficiary permanently in the United States as a video store manager. 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.¹

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$3,728 per month, which amounts to \$44,736 per annum. On the Form ETA 750B, signed by the beneficiary on January 7, 1998, the beneficiary does not claim to have worked for the petitioner, although, as will be discussed below, the evidence shows that the petitioner has employed him since 1996.²

¹ The record shows that the petitioner filed a previous employment-based petition on behalf of this beneficiary under receipt number WAC 02 105 50316. It was denied on June 12, 2002. The petitioner did not appeal.

² On the ETA 750B, the beneficiary states that he has worked for "Video Japan" since June 1996. The address given for this business is not the same as the address listed for the petitioner in the ETA 750A.

On Part 5 of the visa petition, the petitioner claims to have been established in 1989, to currently employ forty workers, to have a gross annual income of approximately two million dollars and to have a net annual income of \$19,530. In support of its ability to pay the beneficiary's proposed wage offer of \$44,736 per year, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998 through 2001. They reflect that the petitioner files its federal tax returns using a standard calendar year. They contain the following information:

	1998	1999	2000	2001
Net income	\$ 14,918	\$ 25,791	\$ 19,530	-\$ 61,980
Current Assets	\$112,768	\$ 52,994	\$ 49,810	\$ 50,574
Current Liabilities	\$ 82,266	\$112,756	\$163,273	\$139,633
Net current assets	\$ 30,502	-\$ 59,762	-\$113,463	-\$ 89,059

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

With its petition, the petitioner also submitted a copy of its federal depreciation schedule for 2000 accompanied by a letter from [REDACTED] a tax attorney. Mr. [REDACTED] explains that the petitioner's tax planning strategies include taking substantial depreciation deductions that represented non-cash deductions, which could be added back to the petitioner's net income to support the petitioner's ability to pay the alien's proposed wage offer.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On April 21, 2003, the director instructed the petitioner to submit copies of its state quarterly wage reports for all employees for the last twenty quarters. The director also instructed the beneficiary to provide copies of his pay stubs or cancelled paychecks for the last six months.

In response, the petitioner submitted a letter, dated May 13, 2003, signed [REDACTED] President. Mr. [REDACTED] states that the petitioner has employed the beneficiary since June 1996 as a sales clerk, then as a video sales manager. The state quarterly wage reports show that the petitioner paid the beneficiary \$7,573.46 in 1998, although the director subsequently references a 1998 Wage and Tax Statement (W-2) contained in the evidence supporting the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status. This document states that the petitioner paid the beneficiary \$14,745.47 in 1998. As this is a more accurate representation of wages earned by the beneficiary, this figure will be used in reviewing the petitioner's continuing

³ 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.

ability to pay the proffered wage. In 1999, the petitioner paid the beneficiary \$14,766.63 in wages; in 2000, he was paid \$22,645.59; in 2001, the petitioner paid the beneficiary \$21,287.92.

In response to a subsequent request for evidence issued by the director on June 4, 2003, the petitioner provided a copy of its 2002 corporate income tax return and a copy of the beneficiary's 2002 W-2. The W-2 reflects that the petitioner paid the beneficiary \$21,367.25. The petitioner's federal tax return indicates that it declared -\$50,481 in net income. Schedule L shows that it had current assets of \$35,769 and \$142,828 in current liabilities, resulting in -\$20,941 in net current assets.

The director reviewed the petitioner's net income and net current assets as shown on its corporate tax returns from 1998 through 2002, as well as the amount of wages that the petitioner paid to the beneficiary. The director concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of January 14, 1998.

On appeal, counsel claims that the petitioner has used a double declining depreciation method in order to accelerate the depreciation expense taken in the years 1999 through 2002, thus reducing its taxable income. Counsel submits copies of the petitioner's depreciation and amortization report (Form 4562) included in its corporate tax returns in support of this assertion. Counsel also submits copies of the petitioner's 1998-2002 checking account bank statements, maintaining that they show the financial health of 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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

Based on the figures discussed above and as noted by the director, the difference between the proffered wage of \$44,736 and beneficiary's 1998 wages of \$14,745.47 was \$29,990.53. The difference between the proffered wage and the beneficiary's 1999 salary of \$14,766.63 was \$29,969.37. The comparison between the proffered wage and the beneficiary's 2000 wages of \$22,645.59 results in a shortfall of \$22,090.41. In 2001, the beneficiary's wages of \$21,287.92 were \$23,448.08 less than the proffered wage. Finally, in 2002, the petitioner paid the beneficiary \$23,368.75 less than the certified 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. Counsel's reliance on the petitioner's election of a particular depreciation methodology is unconvincing. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology. Counsel cites no legal authority in support of his proposition.

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 or has already paid officer compensation at a specified level is insufficient. Counsel's argument that the expenses taken on a tax return may be added back to a petitioner's net income if they can be somehow be described as discretionary is not persuasive in this case. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

In this case, the petitioner demonstrated its ability to pay the proffered wage in 1998 because the difference of \$29,990.53 between the proffered wage and the actual wages paid to the beneficiary, could be paid out of its net current assets of \$30,502, as shown on its corporate tax return.

In 1999, neither the petitioner's net income of \$25,791, nor its net current assets of -\$59,762, could cover the shortfall of \$29,969.37 resulting from the comparison of the proffered wage and the actual wages paid to the beneficiary that year.

In 2000, the difference of \$22,090.41 between actual wages paid to the beneficiary and the proffered wage could not be met by either the petitioner's net income of \$19,530 or its net current assets of -\$113,463.

The difference of \$23,448.08 between the proffered wage and the actual wages earned by the beneficiary in 2001 could not be paid out of either the petitioner's net income of -\$61,980 or its net current assets of -\$89,059.

Finally, neither the petitioner's 2002 net income of -\$50,481, nor its net current assets of -\$20,941, could pay the shortfall of \$23,368.75 resulting from the comparison of the actual salary paid to the beneficiary and the proffered wage of \$44,736. The petitioner has not demonstrated its continuing ability to pay the proffered wage in four out of the five relevant years.

Nor is counsel's reliance on the balances in the petitioner's bank statements persuasive. First, 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," as discussed above, the petitioner has not convincingly 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 represent only a portion of a petitioner's assets and do not reflect other encumbrances that may affect its financial status. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that has been considered above in determining the petitioner's net current assets.

In the context of the financial information contained in the record, counsel asserts that the petitioner's 13-year history of operation as a video rental/wholesale operation, its gross sales of over two million dollars, and its payroll of 30 to 35 workers supports its future prospects for success and establishes its ability to pay the proffered wage. Similar principles were enumerated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, 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 couturiere. In this case, as noted above, the petitioner has consistently employed the beneficiary well below the proffered wage. Further, the four tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Here, the petitioner's net income, as set forth in its corporate tax returns, shows a steady decline since 1999, accompanied by negative figures representing its net current assets. The AAO cannot conclude that the petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.