



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **OCT 20 2004**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

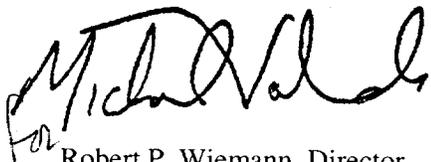
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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.

For 

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent [REDACTED] printed
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DISCUSSION: the Director, California Service Center, initially approved the employment-based preference visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a health care services and trading business. It seeks to employ the beneficiary permanently in the United States as administrative assistant. 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.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on May 30, 2001. It was initially approved on January 16, 2002. The alien beneficiary filed an application to adjust his status to that of lawful permanent resident. Following the receipt of information from both the petitioner and beneficiary relevant to the beneficiary's application to adjust to permanent resident status, the director concluded that the I-140 was approved in error and issued an intent to revoke the petition on March 7, 2003. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on April 21, 2003, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, asserts that the director's analysis did not accurately reflect the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) 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 the Service.

Eligibility in this case 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). Here, the petition's priority date is March 10, 1997. The beneficiary's salary as stated on the labor certification is \$14.50 per hour based on a 40-hour week, or \$30,160 annually. It is noted that on the Form ETA 750, signed by the beneficiary, that the petitioner has employed the beneficiary from March 1993 to the present.

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$30,160, copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for the years 1997 through 2001 are provided in the record. The director concluded that out of the five years represented on the tax returns, the petitioner failed to show its ability to pay the proffered wage in 1997 and 1998. Those tax returns contained the following information:

	1997	1998	1999
Net income	\$20,010	\$18,527	\$49,799
Current Assets	\$18,644	\$10,338	\$37,762
Current Liabilities	\$ 0	\$54,608	\$89,097
Net current assets	\$18,644	(\$44,270)	(\$51,335)
	2000	2001	
Net income	\$ 54,333	\$ 35,509	
Current Assets	\$591,900	\$648,191	
Current Liabilities	\$ 78,978	\$175,582	
Net current assets	\$512,922	\$472,609	

On appeal, counsel submits copies of the previously submitted documentation, and states:

The I.N.S.'s conclusion is refuted by the analysis made in the attached statement of

██████████ C.P.A., (See Exhibit "1" attached to Exhibit "C" herein), who analyzed the petitioner's tax schedules for years 1997 through 1998, and concluded that the petitioner had available cash to pay the proffered wage during those years. This accounting analysis is based on adding back the non-cash deductions claimed on the company's tax schedules, since these deductions do not reflect the actual cash available to pay the proffered wage.

Based on the attached accountant's report, there is actually cash available to pay the beneficiary's wages for the years in dispute. First, the "depreciation" deduction is a non-cash item which can be added back to the net income since it does not represent any actual outgoing cash. Second, the deduction for "compensation to officers" or compensation to the 100 percent owner of the company is also added back to the net income, since it is discretionary income which can be waived by the 100 percent officer and owner of the company. Third, the cash balance shown on Schedule L, of Form 1120, Line 1, is added back to the net income as it reflects the current cash amount available to pay its obligations.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (R.C. 1967) and *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C. 1988) in support of her assertions. Counsel further contends that "the petitioner's financial documents show steady growth, stability and long-term ability to pay wages to its employees" and that the petitioner's net income for the last four years exceeded the proffered wage of \$30,160.

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 that period. If the petitioner establishes by 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. In the instant case, the petitioner provided no evidence of the wages it paid to the beneficiary during the requisite years.

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 the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. The petitioner's net current assets during the years in question, 1997 and 1998, however, were \$18,644 and -\$44,270, less than the proffered wage.

Counsel submitted an "Independent Accountant's Report on JMJ Enterprises, Inc." from [REDACTED] C.P.A., dated April 3, 2003, as proof of the ability to pay the proffered wage for the years 1997 and 1998. It is not clear whether this information was intended to qualify as an audited financial statement or if it is better characterized as an unaudited financial statement. 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. At no time is the "Independent Accountant's Report" referred to as an audited financial statement. 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. Regardless, the financial statements that counsel submitted with the petition are not persuasive evidence.

Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, a 1997 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 1997 out of its income. Net current assets at

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

the end of 1997 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Counsel cites *Full Gospel Portland Church v. Thornburgh*, *supra*, however, the decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the proffered wage. Here, counsel is asserting that CIS should treat the petitioning owner's compensation of officers, as evidence of its ability to pay, even though the owner is not obligated to pay the debts and expenses of the corporation.

A corporation is a separate and distinct legal entity from its owners and shareholders, therefore, 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."

Counsel also cites *Matter of Sonogawa*, *supra* as a basis of consideration for the petitioner's ability to pay the proffered wage. *Matter of Sonogawa*, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1997 and 1998 were uncharacteristically unprofitable years for the petitioner.

Counsel's claim that the petitioner has shown a steady growth and that its net income for the last four years has exceeded the proffered wage is obvious. However, the petitioner must show its ability to pay the wage from the priority date, March 10, 1997, until the beneficiary obtains lawful permanent residence.

See 8 C.F.R. § 204.5(g)(2). The petitioner has not provided sufficient evidence, notably Forms W-2, Wage and Tax Statements, for the beneficiary for the years 1997 and 1998.

Based on the financial data contained in the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage 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.