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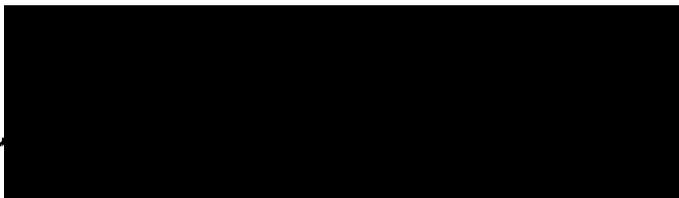
U.S. Department of Homeland Security  
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U.S. Citizenship  
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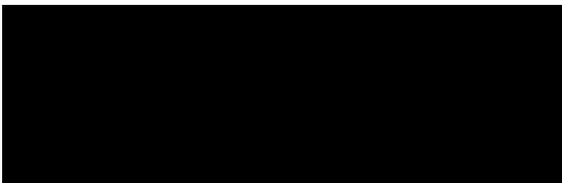


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **OCT 20 2004**

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained; the petition will be approved.

The petitioner is an international monetary exchange. It seeks to employ the beneficiary permanently in the United States as a manager. 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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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.

Eligibility in this matter hinges on 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. The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$38.45 per hour or \$79,976 per year.

With the initial petition, counsel submitted a 2001 audited financial report indicating total current assets of \$861,139; total current liabilities of \$879,274; and net current assets of -\$18,135. Counsel also submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return reflecting gross receipts of \$2,094,583; gross profits of \$2,094,583; compensation of officers of \$219,225; salaries and wages of \$927,209; and, taxable income before operating loss deduction and special deductions of -\$233,790. Schedule L of the return reflected total current assets of \$1,129,638; total current liabilities of \$799,274; and net current assets of \$330,364.

The director concluded that counsel had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated August 19, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax return and evidence of wage payments to the beneficiary for 2001, if any. In addition, the director requested evidence that the beneficiary's had obtained the required four years experience in the job offered.

In response to the RFE, counsel submitted a letter, dated September 24, 2002 from the petitioner's regional officer, [REDACTED] who indicated that beneficiary had been continually employed by the petitioner since August 1993, serving as a foreign exchange clerk from August 1993 to August 1997 and as a manager foreign monetary exchange from August 1997 to the present .

Subsequently, on November 20, 2002, the director requested a copy of the beneficiary's 2001 Form W-2 Wage and Tax Statement.

In response, counsel submitted the beneficiary's Form W-2 indicating that the petitioner paid the beneficiary \$21,180.71 during 2001.

The director determined that net income on the petitioner's tax returns and the net current assets on the petitioner's balance sheet did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. On appeal, counsel states that the director had undervalued the petitioner's assets.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) 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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001. Rather, the petitioner paid the beneficiary only \$21,180, \$58,796 less than 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, USCIS 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). Any reliance on the petitioner's gross receipts and wage expense is misplaced. 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 Service, now USCIS 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, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

The difference between the proffered wage and the wages paid to the beneficiary in 2001 is \$58,796. The petitioner's 2001 Form 1120 reflected taxable income before operating loss deduction and special deductions of -\$233,790. The petitioner could not pay the remaining proffered wage from that amount. As stated above, Schedule L of the return reflected net current assets of \$330,364, more than the remaining proffered wage. The director failed to consider this information, relying on the negative net current assets presented on the balance

sheet. While normally such an inconsistency would need to be resolved by the petitioner, we note that the difference results from the characterization of a \$200,000 U.S. treasury note.<sup>1</sup> On Schedule L, the note is characterized as a current asset, but on the balance sheet, the note is characterized as an "other asset." The Internal Revenue Service (IRS) includes U.S. government obligations among current assets by specifically listing them on line 4 of Schedule L. In addition, we note that the petitioner has been in business since 1980. In 2001, the petitioner had gross income of \$2,094,583 and paid wages of over \$1,000,000. Under the reasoning set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), we find that the petitioner's overall financial situation, including sufficient net current assets to pay the proffered wage when the treasury note is included, sufficiently establishes that it has the 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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<sup>1</sup> According to the record, the note matured in October 2002.