



U.S. Citizenship
and Immigration
Services

02

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **OCT 27 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 unauthorized
invasion of privacy

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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 publication company and distributor of a Hebrew newspaper. It seeks to employ the beneficiary permanently in the United States as a layout artist. 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, counsel states that the petitioner has demonstrated sufficient financial resources to pay the proffered wage during the relevant period.

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)(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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is September 28, 1999. The proffered wage as stated on the Form ETA 750 is \$26.54 per hour, which amounts to \$55,203.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 1999.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$914,497.00, and to currently have ten employees.

The evidence submitted initially and in response to a request for evidence (RFE) issued by the director consists of the following: a letter dated January 15, 2003 from the petitioner's president describing the petitioner's business operations and stating a job offer to the beneficiary; copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1999, 2000, 2001 and 2002; a copy of the petitioner's California Sellers Permit date October 14, 1999; copies of the petitioner's Forms DE 6 California

quarterly wage and withholding reports for the third and fourth quarters of 2001 and the first quarter of 2002; a copy of the beneficiary's marriage certificate issued April 30, 1998; a copy of a letter dated June 26, 1996 from a former employer of the beneficiary in Israel confirming the beneficiary's experience as a layout artist from January 1995 until June 1996; a copy of a letter dated August 20, 1998 from another former employer of the beneficiary in Israel confirming her work experience in writing, graphic design, layout and related matters from 1996 to 1998; copies of certain pages of the beneficiary's passport; copies of certain pages of the passport of the beneficiary's husband; copies of Form W-2 wage and tax statements for the beneficiary for 1999 and 2000; copies of Form 1040 U.S. individual income tax joint returns for the beneficiary and her husband for 2001 and 2002; a copy of a Form I-797C approval notice dated October 17, 2002 for an I-539 application to extend/change nonimmigrant status submitted by the beneficiary; a copy of a Form I-797A amended approval notice dated December 12, 2002 for an I-129 petition for a nonimmigrant worker filed by an employer on behalf of the beneficiary's husband; and a copy of a Form I-797A approval notice dated December 2, 1998 for an I-129 petition for a nonimmigrant worker filed by the petitioner on behalf of the beneficiary

In a decision dated August 27, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence consisting of a copy of a statement from the Bank of the West, Sherman Oaks, California, for an account of the petitioner for the month of August 2003; a copy of a letter dated May 2, 2000 to the petitioner from the California Employment Development Department; copies of newspaper advertisements for the offered position; a copy of a recruitment notice for the offered position; and additional copies of documents submitted previously in support of the instant petition.

Counsel states on appeal that the petitioner has demonstrated sufficient financial resources to pay the proffered wage during the relevant period. Counsel states that the years 1998, 1999, 2000, 2001 and 2002 were uncharacteristically unprofitable ones for the petitioner, in part because of expenses incurred by the petitioner as part of its plans to expand its business. Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also states that the bank statement evidence in the record is additional evidence of the petitioner's available financial resources. Finally, counsel states that a denial of the instant petition will cause hardship to the petitioner.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the Form W-2 wage and tax statements in the record show that the petitioner paid the beneficiary \$8,037.84 in 1999 and \$20,612.76 in 2000. Concerning 1999, the ETA 750B states that the beneficiary began working for the petitioner in August 1999. A pro-rata share of the proffered wage for the last four months of 1999 would be \$18,399.23. The actual wages paid the beneficiary in 1999 during that period were \$10,361.39 less than that amount. For 2000, the amount of \$20,612.76 in actual wages paid the beneficiary was \$34,590.34 less than the proffered wage of \$55,203.20. No wage and tax statements of the beneficiary for other years were submitted in evidence. Therefore the evidence on the actual compensation paid to the beneficiary fails to establish the petitioner's ability to pay the proffered wage as of the priority date or at any time thereafter.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: -\$48,632.00 for 1999; \$76,459.00 for 2000; \$32,963.00 for 2001, and \$4,597.00 for 2002. For 1999, the petitioner's ordinary income was negative, and it therefore fails to establish the petitioner's ability to pay the proffered wage that year. For 2000, the amount needed to raise the petitioner's actual salary to the proffered wage was \$34,590.44. Since the petitioner's ordinary income in 2000 was greater than that amount, the petitioner's ordinary income is sufficient to establish the petitioner's ability to pay the proffered wage in 2000. For 2001 and 2002 the record lacks evidence of the beneficiary's actual salary. Therefore, for those years the petitioner must establish that it had the ability to pay the entire proffered wage to the beneficiary. The petitioner's ordinary income in 2001 and in 2002 was less than the proffered wage of \$55,203.20. Therefore the petitioner's ordinary income figures fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$13,733.00 for the beginning of 1999; \$18,840.00 for the end of 1999; \$24,559.00 for the end of 2000; -\$51,263.00 for the end of 2001, and \$2,546.00 for the end of 2002. The copy of the petitioner's Schedule L for 2001 in the record is incomplete, with line 1 showing cash assets missing from the copy. Therefore in the foregoing calculation for the petitioner's net current assets for the end of 2001, the figure for petitioner's cash at the beginning of 2002 was used, \$30,041.00, taken from line 1(a) of the Schedule L for 2002.

For 1999, the amount needed to raise the petitioner's actual salary to the proffered wage is \$10,361.39 on a pro-rata basis for the final four months of 1999. Since the petitioner's net current assets at the beginning of

1999 and at the end of 1999 were greater than that amount, the petitioner's net current assets figures establish the petitioner's ability to pay the proffered wage in 1999.

For 2000, the amount needed to raise the petitioner's actual salary to the proffered wage is \$34,590.44. The petitioner's net current assets at the end of 2000 of \$24,559.00 are less than that amount. As noted above, for 2001 and 2002 the record lacks evidence of the beneficiary's actual salary, and the petitioner must therefore establish that it had the ability to pay the entire proffered wage to the beneficiary in those years. The petitioner's net current assets of -\$51,263.00 for the end of 2001 and of \$2,546.00 for the end of 2002 are less than the proffered wage of \$55,203.20. Therefore the petitioner's figures on net current assets fail to establish the petitioner's ability to pay the proffered wage in the years 2000, 2001 and 2002.

It should be noted that under an analysis of the petitioner's ordinary income, the petitioner's ability to pay the proffered wage is established only for the year 2000. On the other hand, under an analysis of the petitioner's net current assets, the petitioner's ability to pay the proffered wage is established only for the year 1999. CIS does not combine those two methods of analysis, since to do so could result in double counting. Funds received as ordinary income in one year would affect a petitioner's assets in that year and in subsequent years. The petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, using a consistent method of evidentiary analysis from year to year.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years but only within 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 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, parallel to those in *Sonogawa*, have been shown to exist in this case. Counsel states that the years 1998, 1999, 2000, 2001 and 2002 were uncharacteristically unprofitable ones for the petitioner, in part because of expenses incurred by the petitioner as part of its plans to expand its business. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the instant petition, the assertions of counsel are not supported by evidence in the record. The letter dated January 15, 2003 from the petitioner's president describes the petitioner's business operations and its plans for future expansion, but the letter lacks information to support counsel's assertion that the petitioner incurred unusual expenses from 1998 through 2002.

In his decision, the director correctly stated the petitioner's net income for each of the years in question and correctly calculated the petitioner's net current assets, except for the year 2001. For that year the director stated the petitioner's net current assets as -\$32,335.00, though the correct figure is -\$51,263.00, a difference of -\$18,928.00. It is unclear what figures the director used in calculating the petitioner's net current assets for 2001. Nonetheless, the director's error on that point did not affect the result of the director's analysis. The

director correctly concluded that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

The evidence newly submitted on appeal includes a copy of a bank statement for an account of the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, only a single bank statement was submitted in evidence, for an account of the petitioner for the month of August 2003. No analysis of the petitioner's continuing ability to pay the proffered wage can be made from a single bank statement.

The other evidence submitted for the first time on appeal consists of a copy of a letter dated May 2, 2000 to the petitioner from the California Employment Development Department; copies of newspaper advertisements for the offered position; and a copy of a recruitment notice for the offered position. Those documents are apparently copies of documents submitted by the petitioner to the United States Department of Labor in support of the petitioner's Form ETA 750 labor certification request. But they contain no information relevant to the petitioner's ability to pay the proffered wage to the beneficiary.

All of the other documents submitted on appeal are duplicate copies of documents submitted prior to the decision of the director. That evidence is discussed above.

For the foregoing reasons, the evidence submitted by counsel on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO on appeal.

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.

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