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U.S. Citizenship
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Services

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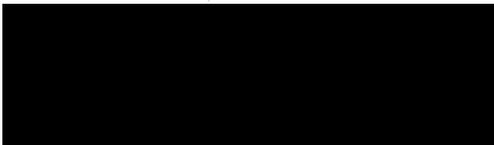
FILE: WAC 03 011 53765 Office: CALIFORNIA SERVICE CENTER Date: **APR 14 2005**

IN RE: Petitioner:
Beneficiary:



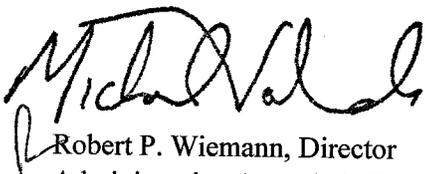
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration.

The petitioner is a manufacturer of equipment for ceramic microelectronic devices. It seeks to employ the beneficiary permanently in the United States as a sales engineer, electronic productions and systems. 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 submits a brief and additional evidence.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting 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) 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must also 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 August 18, 1999. The proffered wage as stated on the Form ETA 750 is \$68,494.40 per year. The labor certification states that the position requires a bachelor's degree in business administration and four years experience in the proffered position or four years of experience in the related occupations of sales, marketing, or financial management.

On the petition, the petitioner stated that it was established during 1987 and that it employs 16 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December 1997. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Carlsbad, California.

In support of the petition, counsel submitted the petitioner's compiled financial statements as of August 31, 2002. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage.

As to the beneficiary's employment experience, the Form ETA 750 states that the beneficiary worked as a credit and marketing executive for Hong Leong Finance in Singapore from June 1989 to October 1992, that he worked for as vice-president of Automation Precision Industries from October 1992 to August 1996, and that he worked for the petitioner in the proffered position since December 1997. Counsel provided no evidence of those employment claims with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary had the requisite experience as stated on the Form ETA 750, the California Service Center, on April 22, 2003, requested additional evidence pertinent to both issues.

Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. § 204.5 (1)(3)(ii), the Service Center requested that evidence of the beneficiary's experience in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the beneficiary's experience.

In response, counsel submitted the first two pages of the petitioner's 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Return. Those returns show that the petitioner reports taxes based on a fiscal year running from August 1 of the nominal year to September 30 of the following year.

The submitted portion of the 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$262,537 during that fiscal year, which ran from August 1, 1999 to September 30, 2000. Because the corresponding Schedule L was not submitted the submission did not include data from which the petitioner's net current assets could be calculated.

The submitted portion of the 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$611,597 during that fiscal year, which ran from August 1, 2000 to September 30, 2001. Because the corresponding Schedule L was not submitted the submission did not include data from which the petitioner's net current assets could be calculated.

The submitted portion of the 2001 return shows that the petitioner declared a loss of \$330,669 as its taxable income before net operating loss deduction and special deductions during that fiscal year, which ran from August 1, 2001 to September 30, 2002. Because the corresponding Schedule L was not submitted the submission did not include data from which the petitioner's net current assets could be calculated.

As to the beneficiary's employment experience the petitioner provided a letter, dated October 28, 1992, from the Hong Leong Finance Company in Singapore. That letter states that the beneficiary worked for that company from June 12, 1989 to August 31, 1991 as a branch officer, and from September 1, 1991 to October 24, 1992 as a marketing executive. The letter does not state whether the beneficiary's employment in those positions was full-time. The letter does not state the duties of the position.

The petitioner also provided a letter, dated September 16, 1996, from Automation Precision Industries PTE Limited of Singapore. That letter states that the beneficiary worked for that company from October 27, 1992 to April 30, 1993 as its Assistant General Manager (Business Development) and from May 1, 1993 to September 15, 1996 as its vice-president. The letter does not state whether the beneficiary's employment in those positions was full-time. The letter does not state the duties of the position.

On May 9, 2003 the California Service Center issued another Request for Evidence in this matter. Again, the Service Center requested, *inter alia*, evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also stipulated that, if the petitioner wished to rely on tax returns to show its ability to pay the proffered wage, it should provide complete copies of its tax returns, including the corresponding Schedules L.

In response counsel provided the first four pages of the petitioner's 1999, 2000, and 2001 tax returns. The 1999 Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets. The 2000 Schedule L shows that at the end of that fiscal year the petitioner had current assets

of \$1,462,228 and current liabilities of \$1,430,797, which yields net current assets of \$31,431. The 2000 Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets. Counsel did not explain why he still did not provide complete copies of the petitioner's tax returns as the Request for Evidence requested.

On September 22, 2003 the California Service Center issued a third Request for Evidence in this matter. The Service Center requested, again, that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. The Service Center again stipulated, consistent with 8 C.F.R. § 204.5(g)(2) that the evidence include copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In addition the Service Center requested Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during each year since the priority date.

Finally, the Service Center requested evidence that the beneficiary has the requisite experience as listed on the Form ETA 750. The Service Center requested that the evidence list, *inter alia*, the beneficiary's duties in his various positions and the number of hours he worked per week in those positions.

In response counsel submitted the petitioner's compiled financial statements for July 31, 2002 and June 30, 2003. Counsel also provided 1998, 1999, 2000, 2001, and 2002 W-2 forms showing wages the petitioner paid to the beneficiary during those years. Those W-2 forms show that the petitioner paid the beneficiary \$40,229.58, \$43,581.21, \$92,750.37, and \$75,795.49 during those years, respectively.

As to the beneficiary's employment experience, counsel submitted a letter, dated October 9, 2003, in which he stated that the beneficiary was employed full-time at all of his positions. Counsel also submitted letters pertinent to the beneficiary's appointments to those positions.

A letter from [REDACTED] dated June 9, 1989, states that the beneficiary was appointed to a trainee branch officer position but is silent as to the beneficiary's hours. As to the duties of the position the letter states, "You will be required to carry out such duties and job functions as may be assigned to you from time to time by the Company or Officers acting on behalf of the Company."

Another letter from [REDACTED] dated October 18, 1989, states that the beneficiary was appointed to an Acting Branch Officer position. That letter is silent as to the beneficiary's hours and duties.

A third letter from [REDACTED] dated December 19, 1989, states that the beneficiary was permanently appointed to his Branch Officer position. That letter is silent as to the beneficiary's hours and duties.

A fourth letter from [REDACTED] dated August 22, 1991, states that the beneficiary was appointed to a Marketing Executive position. That letter is silent as to the beneficiary's hours and duties.

A letter from Automation Precision Industries PTE Limited, dated September 30, 1992, states that the beneficiary was appointed to an Assistant General Manager, Business Development, position. That letter is silent as to the beneficiary's working hours. As to the duties and responsibilities of the position, that letter states, "You must at all times observe the company's policy and carry out faithfully and conscientiously the duties and responsibilities that are assigned to you from time to time."

Another letter from Automation Precision Industries, dated February 8, 1993, states that the beneficiary was appointed to an Assistant General Manager position in the Admin/Finance & Business Development Division. That letter is silent as to the hours and duties of the position.

A third letter from Automation Precision Industries, dated May 5, 1993, states that the beneficiary was appointed to a Vice-President position. That letter does not list the hours and duties of the position.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 20, 2003, denied the petition.

On appeal, counsel submits compiled financial statements as of October 31, 2003 and a letter from the petitioner's president/CEO. The president letter states that Accrued Wages of \$540,338 shown on its October 2003 balance sheet was carried for approximately eight years and is owed to him by the company. The president further states that, "Because it didn't look like this wage would ever be paid, it was necessary to stop accruing. The president further stated, "We are a privately held company and do not look at this as a true liability unless the company was sold or merged with a larger company. Our ability to operate the company and pay wages is based on sales and our ability to reduce costs when necessary." The president notes that if that liability is disregarded, then the petitioner would have sufficient net current assets to pay the proffered wage. The president also notes that the petitioner has an unused \$200,000 line of credit.

Counsel urges that, therefore, the petitioner's net current assets show its ability to pay the proffered wage. Counsel also states that a comparison of the petitioner's June 30, 2003 and October 31, 2003 balance sheets show that its accounts receivable increased and its inventory decreased, indicating increased sales. Counsel urges that, under these circumstances, the petition should be approved pursuant to the reasoning of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In fact, the Accrued Wages line item to which the petitioner's president refers is shown as \$514,674.10 on the October 2003 balance sheet, rather than as \$540,388. The only evidence in the file that this amount is not an actual Current Liability of the company is the statement by the president that it is owed to him and that he is not insisting on its immediate payment. Further, the record does not appear to indicate that this \$514,674.10 was included as a liability in the tax returns submitted.

Whether that debt was extinguished is insufficiently demonstrated. Further, the debt was not apparently carried as a current liability on the petitioner's Schedules L. Even if this office were to consider that it was extinguished retroactively, forgiveness of that debt would not apparently affect the current liabilities shown on the petitioner's tax returns. Even if this office were to disregard that debt, the only apparent effect would be to change the figures on the petitioner's compiled financial statements.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. As those financial statements are not reliable evidence, no change made to them, other than subjecting them to an audit, could cause them to become convincing evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's president's implicit assertion that the petitioner could simply reduce its expenses in an amount sufficient to permit it to pay the proffered wage is unconvincing. By claiming those expenses as income tax deductions the petitioner has represented them as necessary to its business.¹ The petitioner's president may not now show the ability to pay the proffered wage merely by claiming the ability to reduce its the petitioner's expenses as necessary.

The assertion that the petitioner's credit line is available to pay the proffered wage is similarly unconvincing. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary during 1998, 1999, 2000, and 2001, that it paid him \$40,229.58, \$43,581.21, \$92,750.37, and \$75,795.49 during those years.

Because the priority date is August 18, 1999, evidence of wages paid to the beneficiary during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The amount the petitioner paid the beneficiary during 1998 will not be further considered. Because the petitioner paid the beneficiary wages in excess of the proffered wage during 2000 and 2001, it has demonstrated the ability to pay the proffered wage during those years. The wages paid during 1999, however, demonstrate the ability to pay only part of the proffered wage during that year. The petitioner must demonstrate the ability to pay the balance of the proffered wage during 1999.² The balance of the proffered wage was \$24,913.19 during 1999.

¹ 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses

(a) In general

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

² Because the most recent Request for Evidence was issued on September 22, 2003 and the petitioner's 2002 fiscal year did not end until September 30, 2003 the petitioner is excused from providing that return and subsequent returns in response to the Request for Evidence.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$68,494.40 per year. The priority date is August 18, 1999. Having demonstrated the ability to pay the proffered wage during 2000 and 2001 the petitioner must demonstrate the ability to pay the proffered wage the proffered wage during 1999.

The petitioner has demonstrated that it paid the beneficiary \$43,581.21 during 1999 and must demonstrate the ability to pay the \$24,913.19 balance of that wage. During its fiscal year 1999, which began on August 1, 1999, the petitioner declared taxable income before net operating loss deduction and special deductions of \$262,537. That amount is sufficient to pay the balance of the proffered wage. The petitioner's fiscal year is not the calendar year. The petitioner is not obliged, however, to demonstrate the ability to pay the proffered wage during the first nine months of 1999. The petitioner has demonstrated the ability to pay the proffered wage during the salient portion of 1999.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. Addressing the petitioner's argument pertinent to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is therefore unnecessary.

An additional issue exists in this case, however, which was not addressed in the director's decision of denial. The regulation at 8 C.F.R. 204.5 § (I)(3)(ii) requires that evidence of the beneficiary's employment experience be in the form of letters from trainers or employers and give a description of the beneficiary's experience. The letters provided in this case give the titles of the positions the beneficiary held, but give no indication of the duties of those positions. No evidence in the record indicates that the beneficiary worked four years in the proffered position or four years in Sales, Marketing, or Financial Management positions, which the Form ETA 750 states is a requirement of the proffered position.

Further, other than counsel's assertion, the record contains no indication that those positions were full-time. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertion is insufficient to demonstrate that the positions were full-time. The evidence submitted does not demonstrate that the beneficiary is qualified for the proffered position.

The decision of denial, however, was not based, even in part, on the failure to demonstrate the beneficiary's qualifications. As such, the petitioner has not had an adequate opportunity to respond to that issue on appeal. Under these circumstances, this office is reluctant to dismiss the appeal.

The matter will be remanded for further inquiry into the qualifications of the beneficiary and a new decision. The director may also seek additional evidence pertinent to any other aspect of the approvability of the instant 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 petition is remanded for further consideration and action in accordance with the foregoing.