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U.S. Citizenship
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FILE: WAC 02 196 51113 Office: CALIFORNIA SERVICE CENTER Date: **DEC 19 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 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 sustained. The petition will be approved.

The petitioner is a reference laboratory. It seeks to employ the beneficiary permanently in the United States as a medical technologist. 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, the petitioner, through counsel, asserts that the petitioner's financial ability to pay the proffered wage had been established.

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 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) 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 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$27.15 per hour, which amounts to \$56,472 per year. Form ETA 750B, signed by the beneficiary on April 10, 2001, does not reflect that the petitioner has employed the beneficiary.

Part 5 of the preference petition, filed May 30, 2002, indicates that the petitioner was established in 1970, claims to have a gross annual income of \$809,714, and to currently employ twelve workers.

In support of its financial ability to pay the beneficiary's proposed wage of \$56,472, the record fails to indicate that counsel submitted a copy of the petitioner's 2001 tax return as indicated by his transmittal letter submitted with the petition.

On October 19, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. He directed the petitioner to submit either copies of annual reports, federal tax returns or audited

financial statements for the year 2001. The director also requested that the petitioner provide copies of its state quarterly wage reports for the last three quarters filed, as well as an employer's job offer letter.

In response, the petitioner, through counsel, submitted copies of its quarterly state wage reports for 2002. They indicate that the petitioner reported the wages for eleven to fourteen employees during 2002. The beneficiary's name is not listed as one of the workers.

The petitioner also supplied a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000. This return shows that the petitioner files its taxes using a fiscal year running from December 1st to November 30th of the following year. The 2000 return reflects the petitioner's financial information for the period from December 1, 2000 to November 30, 2001. This tax return reflects that the petitioner reported gross income of \$943,628, officer compensation of \$96,000, salaries and wages of \$325,902, and taxable income of \$19,286 before the net operating loss (NOL) deduction.

Schedule L of the tax return shows that the petitioner had \$113,294 in current assets and \$68,704 in current liabilities. Current liabilities include \$17,000 identified as a credit line on the attached Schedule 8. As illustrated on Schedule L, the petitioner had \$44,590 in net current assets. Besides net income, CIS will also 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 and are a measure of a petitioner's liquidity as of a given date.¹ A corporation's year-end current assets and current liabilities are shown on line(s) 1 through 6, and line(s) 16 through 18 of Schedule L of its corporate 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 as they represent a readily available resource out of which a proffered salary could be paid.

The director requested additional evidence again on December 1, 2003. The director instructed the petitioner of the required financial documentation as set forth in 8 C.F.R. § 204.5(g)(2) and noted that such evidence was requested for 2001 and 2002.

Counsel responded on February 9, 2004 by submitting another copy of the petitioner's 2000 tax return and a copy of the petitioner's 2001 federal tax return, which, although not designated, would represent a fiscal year running from December 1, 2001 to November 30, 2002. This tax return reflects that the petitioner declared gross income of \$695,522, officer compensation of \$76,000, salaries and wages of \$259,407, and -\$50,769 in taxable income before the NOL deduction. Schedule L of the return shows that the petitioner had \$90,862 in current assets and \$94,744 in current liabilities, resulting in -\$3,882 in net current assets. Schedule 8 reflects current liabilities as including \$50,954 described as a credit line.

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

With the response, counsel submitted a copy of a letter, dated September 30, 2003 from the US Bank confirming that the petitioner's principal shareholder has a personal line of credit for \$27,000 and a business line of credit for \$50,000.

Counsel further included an Internal Revenue Service (IRS) Form 7004 indicating that the petitioner had requested an extension of time to file its return for the tax year running from December 1, 2002 to November 30, 2003. These submissions also included a copy of another IRS Form 7004 that had been filed for the 2000 tax return and a copy of the petitioner's 1998 corporate tax return. It reflects that the petitioner reported \$805,466 in gross income, officer compensation of \$64,000, salaries and wages of \$303,036, and \$49,240 in taxable income before the NOL deduction. Schedule L shows that the petitioner had \$136,543 in current assets and \$131,247 in current liabilities, yielding net current assets of \$5,296. A statement attached referencing line 18, "other current liabilities," reflects that the petitioner had \$51,113 included as a "credit line payable."

Counsel's transmittal letter, dated February 9, 2004, references the combined business and owner's credit lines of \$77,000 as available to pay the proffered wage.

On April 7, 2004, the director issued a notice of intent to deny the petition. The director misstates the priority date, but references the request for evidence sent to the petitioner on December 1, 2003 and recites the evidence submitted in response to the request. The director refers to the net income shown on the 2000 and 2001 tax return as less than the proffered wage and rejects consideration of either line of credit as acceptable evidence. The director concludes that the beneficiary is not clearly eligible for consideration for classification but affords the petitioner thirty additional days to submit additional information, evidence or argument.

In response to the notice of intent to deny, counsel submits previously supplied evidence including the 2000 and 2001 federal tax returns, the application for extension of time to August 15, 2004, to file the 2002 tax return (IRS Form 7004), and the September 30, 2003, US Bank letter referencing the principal shareholder's personal and business line(s) of credit. Counsel also provides a letter, dated May 4, 2004, from the petitioner's president, [REDACTED] Mr. [REDACTED] states that for the fiscal year ending November 30, 2003, the petitioning business made a profit of \$27,384.46, representing an increase of \$78,153 over fiscal year November 30, 2002. Mr. [REDACTED] further states:

In 2001 we expanded our operation to include the latest in saliva testing. In April 2002 we spun off this division into a separate corporation. That event caused us to show a net loss for fiscal year end 11/30/02. Since that time we have been concentrating our efforts and resources on our core business of diagnostic testing on body fluids. We feel our efforts have been successful and that we have positioned our laboratory to be competitive for several years to come. At this time we need the services of the beneficiary for the position of Medical Technologist that we established on April 25, 2001.

Attached to this letter are copies of internal financial statements with the petitioner's name at the top, consisting of a balance sheet for the period ending November 30, 2003 and a profit and loss statement for the period between December 2002 through November 2003, a balance sheet for the period as of April 30, 2004, as well as a profit

and loss statement for the period between December 2003 and April 2004. The balance sheet for the period ending November 30, 2003, shows current assets exceeding current liabilities by \$9,602.97. Current liabilities are shown as including both the petitioning corporation's credit line of \$35,000 and the principal shareholder's personal credit line of \$2,118.29. The December 2002-November 2003 profit and loss statement shows gross profit of \$621,851.19, salaries-lab/office of \$257,109.85, officer salaries of \$22,500, and net income of \$27,384.46.

The attached 2004 balance sheet for the four-month period as of April 30, 2004 shows current assets exceeding current liabilities by \$19,957.13. Current liabilities include both the petitioning corporation's credit line of \$35,000 and the shareholder's personal credit line of -\$337.74. The profit and loss statement for the December 2003 to April 2004 period reflects gross profit of \$258,732.59, salaries -lab/office of \$108,872.22, salaries -officer of \$15,000, and net income of \$10,354.16.

Counsel's letter accompanying these documents asserts that the petitioner has a continued expectation of profit and increase in business despite the loss of \$50,769 reported on the 2001 tax return. Counsel asserts that this loss is anomalous and was caused by the expansion of the petitioner's business and subsequent creation of a separate corporation. Counsel contends that the loss reported in 2001 "is not an accurate representation of the petitioner's usual financial state of affairs." Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as an authority permitting a finding that a petitioner may establish its ability to pay a proffered wage despite credit lines as a source out of which the proffered wage could be paid.

The director denied the petition on May 24, 2004, finding that the petitioner had failed to show that it had established its ability to pay the proffered wage of \$56,472. The director declined to consider the lines of credit advanced as a source out of which the proffered wage could be paid that the petitioner's net income had been inadequate to cover the certified wage in either of the periods covered by the 2000 or 2001 tax returns.

On appeal, counsel initially argues that the director's decision is so poorly written with so many typographical and grammar errors as to be incomprehensible. The AAO agrees that some of the director's statements are obscure. The decision, however, constitutes sufficient notice to inform the petitioner of the main reason for denial of the petition. In any event, because the AAO finds that the appeal should be sustained for the reasons stated below, this issue need not be addressed further.

In referring to the credit lines that the petitioner and the petitioner's principal shareholder maintain, counsel asserts on appeal that the source of a petitioner's funds with which to pay a certified wage should not be a consideration in assessing a petitioner's ability to pay a proffered wage, noting that there is no regulation mandating a particular source from which a petitioner's funds must be derived. While as a general observation, this may be true for some petitioners such as sole proprietorships, it is also true that under the controlling regulation, the petitioner, as the prospective U.S. employer must demonstrate its financial ability to pay the certified wage. In this case the prospective U.S. employer is a corporation and exists as a separate legal entity from its shareholder(s) or owner(s). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court 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.” Thus, CIS need not consider a personal credit line of a principal shareholder in determining the petitioner’s ability to pay the proffered wage. With regard the petitioner’s business credit line, the evidence indicates that it has already been included among the listing of current liabilities on Schedule L of the submitted tax returns and the petitioner’s own financial statements submitted to the record. Thus, as mentioned above, it has already been included in the calculation of the petitioner’s net current assets.

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will first examine whether a petitioner may have 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, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. If a petitioner may have employed an alien beneficiary, consideration may be given the amount of wages paid. If the difference between the actual wages paid and the proffered wage can be covered by either a petitioner’s net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered wage.

If, as in this case, where the petitioner has not employed the alien, CIS will next examine a petitioner’s net income figure reflected on the petitioner’s relevant federal income tax returns, or other prescribed evidence, 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. Case law clearly establishes that CIS is reasonable in requiring that a petitioner’s net income reflect an ability to pay the proffered salary. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d mem.*, 703 F.2d 571 (7th Cir. 1983).

Where a petitioner’s net income or net current assets may be insufficient to cover the proffered wage, a petition is not automatically deniable if other relevant factors are present, which show that there is a reasonable expectation of increasing profits. In *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the petitioner 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 sustained substantial business reverses involving changed business locations, 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, based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

In this case, we believe other relevant factors weigh on behalf of this petitioner, within the context of *Matter of Sonogawa* and merit more latitude in considering the ability to pay the proffered wage. Although the petitioner’s net income and net current asset figures on the tax returns and internal financial statements fail to show sufficient amounts to pay the proffered wage during the periods represented, in this case, as noted by Mr. [REDACTED] and the relevant tax returns, the dramatic loss of \$50,769 as shown on the 2001 tax return was an unusual event in the operation of the petitioning business, which has operated profitably during the other years shown and has shown potential for growth and recovery from the expenses of organizing another business operation. The quarterly state wage reports also show that the petitioner has maintained a consistent payroll of eleven to fourteen employees. There does not appear to have any significant turnover of workers as most of the same names appear in each quarter, along with some evidence that one employee has been paid at least the quarterly equivalent of the proffered wage, although there is no indication of his position. Most significantly, as indicated by the evidence, this petitioner has been operation since 1970, more than three times longer than the *Sonogawa* petitioner.

There is sufficient evidence to indicate that this petitioner is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Sonogawa, supra*.

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.