



U.S. Citizenship
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FILE: WAC 03 235 52643 Office: CALIFORNIA SERVICE CENTER Date: **DEC 21 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 dismissed.

The petitioner is a heating and air conditioning installation firm. It seeks to employ the beneficiary permanently in the United States as an HVAC installation engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 maintains that the evidence demonstrates that the petitioner has had the continuing financial ability to pay the proffered salary.

On the notice of appeal, filed on August 18, 2004, counsel requests an additional 30 days to submit a brief and/or evidence in support of the appeal. Subsequently, an additional 30 days was requested. By recent response to a facsimile inquiry from the AAO, counsel claims that his brief submitted on appeal was previously forwarded to the director. As it reflected a request to incorporate an earlier letter and legal discussion from counsel, submitted to the underlying record as the brief to be considered on appeal, the assertions in that letter are addressed below.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 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 January

25, 1996.¹ The proffered wage as stated on the Form ETA 750 is \$16.75 per hour, which amounts to \$34,840 per annum. On the Form ETA 750B, signed by the beneficiary on January 18, 1996, the beneficiary does not claim to have worked for the petitioner.

At the outset, it is noted that the president of the petitioning business and the beneficiary bear the same last name. For the reasons explained below, the AAO agrees with the director's decision to deny the petition, but for future reference, further clarification may be sought in order to determine if any relationship between the petitioner's president and the beneficiary may have affected the underlying labor certification and petitioning procedure.²

On Part 5 of the visa petition, filed August 29, 2003, the petitioner claims to have been established in 1992, to currently employ five workers, to have a gross annual income of \$422,740, and to have a net annual income of \$11,100. With the petition, counsel submitted copies of correspondence from the petitioner's president and the DOL relating to the reasons for the credentials and skills required on the labor certification application, as well as a letter from counsel, dated August 1, 2003, asserting that the petitioner's accompanying bank statements show sufficient cash flow to pay the proffered wage. Counsel also maintains that the director should not focus on taxable income as shown on a tax return because it may exclude consideration of a company's cash-on-hand, and other liquid assets. It could also erroneously emphasize a reported loss in a year when losses from other years have been carried forward and serve to reduce the loss to zero, as well as ignoring the "paper deductions" for such items as depreciation, which do not impact the company's ability to pay the proffered wage. Counsel further discusses the impact of limiting the inquiry to a firm's taxable income when it is already employing and paying wages to an employee that would already be included in the salaries and wages before taxable income is calculated. Counsel cites several prior AAO decisions from 1992-1999 where appeals were sustained that involved a variety of factual circumstances and various business structures, as well as a Board of Alien Labor Certification Appeals (BALCA) case, and *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In support of its ability to pay the beneficiary's proposed wage offer of \$34,840 per year, the petitioner submitted incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for 1998 through 2002. Specifically, Schedule L of the 1998 tax return has been omitted, although the director uses a figure of \$26,784 for the net current assets. All the tax returns, except the 1996 return reflect that the petitioner uses a standard calendar year to file its taxes. Only the 1996 return indicates that a fiscal year running from February 1996 to January 1997 of the following year was employed. The tax returns contain the following information pertinent to taxable income

¹ CIS electronic records show that two previous petitions (WAC0111755298) and (WAC9804050665) were filed by the employer on behalf of the beneficiary. WAC9804050665 was denied on June 8, 1998, and WAC0111755298 was denied on May 20, 2002. No appeal was taken on either case.

²Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, this issue may merit additional inquiry and consultation with the DOL if additional petitions are filed involving the same parties. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

before the net operating loss (NOL) deduction and special deductions,³ current assets and liabilities, and net current assets.

	1996	1997	1998	1999	2000	2001	2002
Taxable Income before NOL	\$9,463	\$ 725	\$16,533	\$10,067	\$11,181	\$3,505	\$6,870
Deduction (Form 1040)							
Current Assets (Sched. L)	\$16,171	\$12,754	\$ 33,869	\$ 25,464	\$64,972	\$72,057	\$87,097
Current Liabilities (Sched. L)	\$ 2,326	\$ 1,538	\$ 7,085	\$ 8,898	\$37,352	\$-0-	\$-0-
Net current assets	\$13,845	\$11,216	\$ 26,784	\$ 16,566	\$27,620	\$72,057	\$87,097

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.⁴ Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets during a given period. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

It is noted that the petitioner provided some copies of its state corporate tax returns filed for the years 1996-2002. It is observed that the balance sheet (Schedule L) of the state return is virtually identical to Schedule L of the federal return. On both the federal and state Schedule L(s) of the 1996 and 1997 returns, in all respects, the petitioner's figures for assets and liabilities are listed in the same way for the same categories. As mentioned above, both the 1998 state and federal Schedule Ls are omitted. In 1999, the petitioner's state return's Schedule L is omitted. In 2001, and 2002, both the state and federal Schedule L balance sheets contain discrepancies. In 2001, on line 17 of the state tax return's Schedule L, \$34,634 is characterized as a current liability consisting of sales tax payable, federal tax payable, state tax payable, income tax payable, and loan payables. The federal return's Schedule L, which consists of the identical categories for sales tax, federal, state and income tax, and loan payables, are listed as longer-term liabilities (exceeding one year) on line 21, "other liabilities." The same difference is noted with regard to \$10,443.00 taken as either a current liability on the state tax return and as a longer-term liability on the federal return. The federal return's characterization of these liabilities served to enhance the level of net current assets. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

³ For the purpose of this review, the taxable net income before the NOL deduction will be treated as the net taxable income.

⁴ 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.

In addition to the tax returns, as mentioned above, counsel provided copies of its bank statements covering the period between February 1996 and December 2002 (excepting May 1997 and the March 1999 statements) in support of its ability to pay the proposed wage offer of \$34,840. These balances run from approximately \$3,400 to \$107,000.

The director denied the petition on July 19, 2004. He reviewed the petitioner's financial data contained within its corporate tax returns from 1996 through 2002, and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of February 25, 1996. The director also reviewed the balances shown in the bank statements but determined that they did not overcome the other evidence submitted to the record.

On appeal, counsel maintains that the petitioner had ample funds available to pay the beneficiary and that the director should have not focused solely on the tax returns in determining the petitioner's ability to pay. Counsel also states that a qualified engineer on its staff would have allowed the petitioner to obtain new business that would have paid the proffered salary.

These contentions are not persuasive. The reliance on the varying balances shown on the petitioner's bank statements is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," there is no evidence that demonstrates that the evidence specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial profile of the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns to be a poor reflection of its financial position. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on line 1 of Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

Regarding counsel's citation of previous AAO decisions and the BALCA case, as set forth in his August 2003 letter to the director, it is noted that such cases may offer guidance to the review of a current petition under consideration, but they are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. In that respect, counsel's observation offered in his 2003 letter to the director is correct. If a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in

calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, however, such a consideration is irrelevant because the record contains no evidence that the petitioner has employed the beneficiary.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. Contrary to counsel's assertion offered to the director, "[T]he [CIS] may reasonably rely on *net taxable income* as reported on the employer's return." (Emphasis added.) *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. 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.

Regarding depreciation, or the decreased value of assets in a business, as a relevant factor in determining a petitioner's ability to pay a certified wage, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

It is noted that CIS reviews a corporate petitioner's taxable income before the net operating loss deduction (line 28 of the corporate tax return) as a basis to evaluate its ability to pay the proffered wage in the year of filing because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because, as counsel earlier discussed in his 2003 letter, corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing to pay the proffered wage.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as discussed above, CIS will consider a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, as the financial data on the petitioner's 1996 corporate tax return encompasses the priority date of January 25, 1996, it shows that neither the petitioner's net taxable income of \$9,463, nor its net current assets of \$13,845, was sufficient to pay the proffered wage of \$34,840.

In 1997, the petitioner's net taxable income of \$725 was not enough to cover proffered wage. Its net current assets of \$11,216 were also not enough to pay the proffered wage of \$34,840. Neither established the petitioner's ability to pay during this period.

In 1998, the petitioner's net taxable income of \$16,533 was not sufficient to pay the certified wage. As noted above, \$26,784 in net current assets is also short of the amount needed to pay the proposed wage offer.

Similarly in 1999, both the petitioner's net taxable income of \$10,067 and its net current assets of \$16,566, each fell short of the sum necessary to cover the proposed wage offer of \$34,840.

In 2000, neither the petitioner's net taxable income of \$11,181, nor its net current assets of \$27,620, could pay the proffered wage.

In 2001 and 2002, as discussed above, the petitioner's reported liabilities are characterized differently than on its state returns. Even accepting that the petitioner's net current assets of \$72,057 and \$87,097 demonstrated its ability to pay the proffered salary in 2001 and 2002, respectively, the petitioner has not demonstrated its continuing ability to pay the proffered wage in five out of the seven relevant years.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's could attract more business. It is noted that the record contains no specific evidence of this projected increase in profits by the alien beneficiary or any information from which this asserted increase in business might be estimated. The hypothesis that the alien beneficiary will increase the petitioner's net income cannot be concluded to outweigh the other evidence set forth in the record.

In the underlying record, counsel asserted that *Matter of Sonogawa*, supports its ability to pay the proffered wage. In *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the seven tax returns contained in the record do

not represent a framework of profitable years analogous to the *Sonegawa* petitioner. Here, the petitioner's net taxable income reached a high of \$11,181 in 2000, which is still about two-thirds less than the certified wage of \$34,840. The AAO cannot conclude that the petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate its *continuing* ability to pay a proffered salary beginning at the visa priority date. Here, that date was January 25, 1996. Based on the evidence contained in the record and after consideration of the assertions presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered 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.