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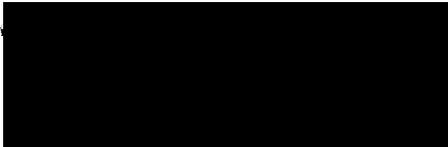
FEB 10 2005

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC 02 248 53669

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

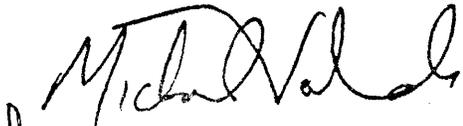
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer parts wholesaling firm. It seeks to employ the beneficiary permanently in the United States as a credit analyst. 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 additional evidence and asserts that the director failed to adequately analyze the petitioner's financial ability to pay the proffered salary.

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 May 19, 1997. The proffered wage as stated on the Form ETA 750 is \$34,000 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On Part 5 of the petition, filed August 2, 2002, the petitioner claims to have been established in 1995, to have a gross annual income of \$900,000, and to currently employ sixteen workers. In support of its ability to pay the proffered annual salary of \$34,000 per year, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998, 1999, and 2000. They indicate that the petitioner files its taxes using a fiscal year running from September 1st to August 31st of the following year. Thus its 1998, 1999, and 2000 encompass a period beginning September 1, 1998 to August 31, 2001. They contain the following information for the following years:

	1998	1999	2000
Net income	-\$ 34,624	\$67,147	\$ 67,083
Current Assets	\$2,182,051	\$2,963,119	\$3,200,995

Current Liabilities	\$2,606,647	\$3,368,640	\$3,327,577
Net current assets	-\$ 424,596	-\$ 405,521	-\$ 126,582

Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

The petitioner also initially included copies of its federal quarterly financial data for the fourth quarter of 2001 and the first quarter of 2002, as well as copies of its state quarterly wage report for the last quarter of 2001 and the first quarter of 2002. Neither of the state quarterly reports shows that the petitioner paid any wages to the beneficiary during the two quarters covered by the reports.

On October 22, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and continuing until the present. The director advised the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements in support of its ability to pay the proffered wage. The director also specifically requested the petitioner to provide this evidence for the fiscal year 1997 and 2001, as well as all schedules and tables accompanying any submitted tax return.

In response, the petitioner submitted the corporate tax return for 1997 as evidence of its financial ability to pay the proffered wage during the period from September 1, 1997 until August 31, 1998. It shows that the petitioner reported a net income of \$19,524. Schedule L of the return reflects that the petitioner had \$1,736,343 in current assets and \$1,615,623 in current liabilities, resulting in \$120,720 in net current assets.

In addition, counsel submitted copies of the petitioner's state quarterly wage reports for the quarters ending June 30, 2002 and September 30, 2002, respectively, as well as copies of its federal quarterly financial information for the second and third quarter of 2002.

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 June 11, 2003, denied the petition.

On appeal, counsel asserts that the director untimely demanded the petitioner's 2001 tax return when it was not yet available. Counsel submits a partial copy of the petitioner's 2001 tax return on appeal, as well as a copy of a Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, signed on November 15, 2002. Counsel does not explain why this document was not submitted to the director in response

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.

to the earlier request for evidence. Nevertheless, it is noted that either the petitioner's 2001 reported net income or its net current assets could cover the proposed salary of \$34,000 per year.

For the reasons discussed below, the AAO concurs with the director's decision to deny this petition, but it is noted that CIS' electronic records suggest that this petitioner has filed over twenty petitions for immigrant alien workers in the last few years. The AAO can find no indication in the record that the director considered any of these other petitions for multiple beneficiaries relevant to the petitioner's continuing ability to pay the proffered wage in this case beginning on the priority date of May 19, 1997, but note that it is the petitioner's burden to demonstrate its ability to pay the proffered wage for petitions filed on behalf of multiple beneficiaries. Without more information, no further opinion on this issue will be addressed.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record does not indicate that the petitioner 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 income figure reflected on the petitioner's federal income tax returns, if they are submitted as evidence of the ability to pay the proffered wage, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 the Service should have considered income before expenses were paid rather than net income.

It is the petitioner's burden to show that the petition is eligible for approval as of the date of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this case, the petitioner failed to submit any financial information encompassing the priority date of May 19, 1997. Further, as noted above, neither its net income nor its net current assets for 1998 were sufficient to cover an annual proffered wage of \$34,000 per year. Although counsel asserts that the 1997 - 1999 years was a period of research and development, the AAO does not find that this assertion overcomes the evidence suggested by the tax return submitted. 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). As noted by the director, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a continuing ability to pay the certified wage beginning at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

In the context of the financial information contained in the record, counsel asserts that the petitioner's growth of total income and increasing salaries support its future prospects for success and establish its ability to pay the proffered wage. Similar principles were enumerated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, relates 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, although the tax returns submitted show that the petitioner's gross receipts and sales have generally grown, its gross income declined in 2000 and its declared net income (before the net operating loss deduction) has declined since 1999. The AAO cannot conclude that the petitioner has sufficiently demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not persuasively 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.