

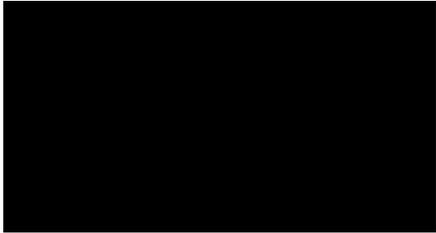
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U.S. Citizenship  
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Services

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FEB 18 2005

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER  
WAC 03 036 50752

Date:

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

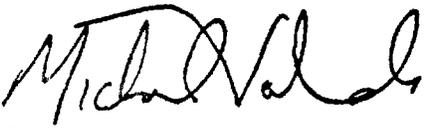
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a data networking and voice connection solutions company. It seeks to employ the beneficiary permanently in the United States as test engineer. 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 in his decision, the director failed to consider the petitioner's bank statements and its reasonable expectations of continued increases in business and profits, when considering the petitioner's ability to pay the proffered wage. Counsel submits further documentation.

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.

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 July 17, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$36.96 an hour, or annual salary of \$76,877. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since February 2001.

On the petition, the petitioner claimed to have been established in 1997 and to have a net annual income of -\$66,430. The petitioner has 7 employees. The petitioner submitted documentation on the beneficiary's academic credentials, a copy of the petitioner's IRS Form 1120S for 2001, and copies of the state of

California Form DE-6, Quarterly Wage and Withholding Report, for quarters ending in September 2001, December 2001, March 2002, and June 2002. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 13, 2003, the director requested additional evidence pertinent to that ability. In addition, in accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide evidence that the beneficiary possessed the work experience listed on ETA 750, Part A. The director requested such evidence to be submitted in letter form on the previous employer's letterhead showing the name and title of the person verifying the information, as well as beneficiary's duties, dates of employment, and the number of hours worked per week. The director also asked that the petitioner submit copies of W-2s issued by the petitioner to the beneficiary from 2001 to 2003. With regard to the petitioner's ability to pay the proffered wage, the director requested evidence of such ability from 2001 onward. The director also stated that the evidence submitted to date did not demonstrate the ability to the proffered wage, since the petitioner had not paid the beneficiary the full proffered wage.

In response, counsel submitted a revised employment verification letter from ACA Security Systems, Hayward, California, dated March 31, 2003; the beneficiary's W-2 forms from the petitioner for the years 2001 and 2002; a dealership certificate from ADT Security Services, Inc.; and the petitioner's bank statements from October 2002 to March 2003. Counsel stated that these monthly statements showed a consistent monthly deposit of \$50,000 from ADT Security Systems, Inc. for the petitioner's services. Counsel also submitted the petitioner's 1120S federal income tax forms for 2001 and 2002; and a copy of an AAO non-precedent decision, EAC 94 145 52233, that cited *Matter of Sonogawa* 12 I&N Dec. 612 (reg. Comm. 1967).

On May 6, 2003, the director issued a Notice of Intent to Deny (NOID). In his notice, the director stated that the beneficiary's salary combined with either the petitioner's ordinary income or net current assets did not equal the proffered wage in either 2001 or 2002. Thus, the director determined that the petitioner did not have the ability to pay the proffered salary.

On June 5, 2003, counsel submitted a rebuttal to the NOID. Counsel identified the issues of the petition as involving 1) whether the petitioner's actual total ordinary income should include taxes, licenses, and depreciation; (2) whether salaries and wages already paid evidenced the ability of the petitioner to pay wages steadily; (3) whether the total income and ordinary income of the petitioner indicated a continued increase in business and profits; (4) whether commissions or subcontractor fees paid under the tax category of other deductions can be considered blanket sources of income available for the beneficiary's salary; and (5) whether the petitioner's bank statements from January 2003 to March 2003 indicated cash available for the beneficiary's wage since fiscal year 2002. Counsel resubmitted the AAO non-precedent decision and the petitioner's IRS 1120S tax returns for 2001 and 2002, and the petitioner's bank statements from October 2002 to March 2003. Counsel also submits the petitioner's bank statements from April to June 2003 and a copy of *Matter of Sonogawa*.

Counsel stated that losses shown on some tax returns, such as the taking of depreciation, bad debts, or other deductions are artificial losses taken to reduce the tax consequences to the employer. Counsel maintained that Citizenship and Immigration Services (CIS) should include taxes, licenses, and depreciation in the calculation

of actual total ordinary income. Based on the inclusion of taxes, licenses, and depreciation, counsel calculated that the petitioner's actual total ordinary income in 2001 was -\$42,639 and in 2002, was \$38,032. Counsel also stated that the annual average of \$130,000 paid in salaries and wages for 2001 and 2002 showed the ability of the petitioner to pay wages steadily for the past two years. Counsel stated that the increase in both total income and ordinary income also indicated a continued increase in business with potential to grow.

Counsel further stated that although the original income alone from 2001 and 2002 could not establish the petitioner's ability to pay the proffered wage, a continued increase in business and profits are reasonable expectations for the petitioner's operation, and would consequently strengthen its ability to pay proffered wage. Counsel also noted the \$197,026 listed in other deductions in the 2002 tax return as commissions, and the amount of \$37,476 listed as other deductions in the 2001 tax return which were subcontractor fees. Counsel stated that expenses paid as commissions and sub-contractor fees by the petitioner could have been used as a blanket source of income with which to compensate the beneficiary. Finally counsel stated that the petitioner received an average of \$50,000 a month from ADT Security Service as an authorized independent dealer. Counsel noted that the monthly bank statement indicate an average monthly ending balance of \$29,000, which would have been readily available for the petitioner to expend on the proffered salary. Although counsel noted that the director in his NOID stated that the petitioner's cash was already examined during the analysis of the Schedule L of the 2002 tax form, counsel stated that the CIS did not consider that the bank statements from January to March 2003, when compared with the petitioner's bank statements of late 2002, show a gradual increasing trend. Counsel stated that this signified that more cash would be available for the beneficiary's salary.

On June 19, 2003, the director denied the petition. In his decision, the director reiterated his statements from the NOID that the petitioner had not established it had the ability to pay the proffered wage from the priority date onward. In addition, the director stated that the record indicated the petitioner used the services of both the beneficiary and independent contractors in 2001 and 2002. The director stated that it was not clear that the petitioner would replace independent contractors with the beneficiary, and that the funds used to pay independent contractors could have been used to pay the beneficiary's wage. Finally, the director noted counsel's statement with regard to taxes and depreciation being considered funds available to pay the proffered wage. The director stated that the record included no evidence that the petitioner's taxes, depreciation, and other such deductions could easily be converted into cash for the purpose of paying the proffered wage.

On appeal, counsel asserts that the director failed to consider the petitioner's reasonable expectations of continued increase in business and profits. Counsel further asserts that the director failed to consider that the petitioner's bank statements indicated cash available as of the priority date which showed the petitioner's ability to pay the proffered wage from the time the priority date was established and up to the present time. Counsel finally asserts that the petitioner's most current financial statements January 1, 2003 to June 30, 2003 show that the petitioner's expectations of continued increase in business and increasing profits are reasonable. Counsel resubmits the petitioner's financial statements for the period from January 1, 2003 to March 2003, and submits as new evidence the petitioner's bank statements from April and June 30, 2003.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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," 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, as the director correctly noted, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Although counsel stated in the response to the director's request for further evidence, that the bank statements reflected a consistent monthly payment of \$50,000 from ADT Security, the bank statements did not reflect any such payment, but rather a series of payments into the petitioner's banking account from ADT Security throughout each month. Of more probative value to the proceedings would be documentation of the terms of any service contracts between the petitioner and ADT Security or other similar companies that would more substantively establish the petitioner's claimed present or future business or profit increases.

Although counsel asserts that funds used in 2001 to pay subcontractors and used in 2002 to pay commissions would have been available to pay the beneficiary, counsel offers no further documentation or explanation as to how these funds would have been available. Counsel's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

In his rebuttal to the director's proposed denial, and on appeal, counsel refers to *Matter of Sonogawa*, and also to a non-precedent AAO decision that referred to *Matter of Sonogawa*. However, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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 that 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 have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. In addition, counsel also refers to the reasonable expectations of the petitioner with regard to increased profits and business as a rationale for approving the instant petition. The petitioner has not, however, provided any standard or criterion for the evaluation of such increased profits or business. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase its service contracts, or other customers. Counsel's statement that the petitioner's bank statements from 2003, when compared with the petitioner's bank statements of late 2002, show a gradual increasing trend, is not sufficient to establish the petitioner's ability to pay the proffered wage from April 17, 2001 to the present time. *Ramirez-Sanchez*. Even if the petitioner did show a reasonable expectation of increased profits and business based on its late 2002 and 2003 bank statements, this still would not change the 2001 and 2002 financial figures provided by the petitioner as to its net income and net current assets in those years. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 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. The petitioner submitted W-2 salary statements for the beneficiary for the years 2001 and 2002. These documents establish that the petitioner paid the beneficiary \$33,605.45 in 2001, and \$30,000 in 2002. Both of these salaries are less than half of the petitioner's proffered wage of \$76,877. In 2001, the petitioner would have had to pay an additional \$43,272 to meet the proffered wage (\$76,877 minus \$33,605). In 2002, the petitioner would have had to pay an additional \$46,877 to meet the proffered wage (\$76,877 minus \$30,000). Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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 return, 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.

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 IRS Form 1120S. Although counsel in his rebuttal of the director's notice of intent to deny, proposed that the petitioner's actual total

ordinary income should include taxes, licenses and depreciation, as stated previously, this method of analysis is not utilized in these proceedings. The petitioner's net income is considered to be the sum obtained after the petitioner's liabilities, such as taxes, licenses and depreciation, have been deducted from the petitioner's gross income. The petitioner's tax return for 2001 shows the following amount of ordinary income: -\$66,430. In 2002, the petitioner's federal income tax return reflects an ordinary income of \$15,125. Neither of these ordinary income figures is sufficient to establish the ability of the petitioner to pay the proffered wage of \$76,877.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will 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.<sup>1</sup> 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 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 submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ -66,430	\$ 15,125
Current Assets	\$ 17,965	\$ 27,979
Current Liabilities	\$ 19,378	\$ 17,429
Net current assets	\$ -1,413	\$ 10,550

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a negative net income, and net current assets of only -\$1,413 in the year 2001, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage, that is \$43,272, out of its net income or net current assets. In 2002, the petitioner shows a net income of \$15,125, and net current assets of \$10,550, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage, that is \$46,877, out of its net income or net current assets.

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date to the present time.

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.