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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2005
WAC 03 003 51757

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

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

ON BEHALF OF PETITIONER:
[REDACTED]

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 petitioner is a manufacturer of plastisol screen printing inks. It seeks to employ the beneficiary permanently in the United States as a supervisor, color-paste mixing. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 noting also that the letters submitted to document the beneficiary's employment history appeared questionable.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on October 23, 1997. The proffered salary as stated on the labor certification is \$3,754.40 per month or \$45,052.80 per year.

With the petition, the petitioner, through counsel, failed to submit any evidence of its ability to pay the proffered wage. On January 2, 2003, the director requested evidence of the petitioner's ability to pay the proffered wage from the priority date to the present. The director specifically requested complete, signed copies of the petitioner's 1997 through 2001 federal income tax returns, copies of the petitioner's Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California, and copies of the job titles and description of the duties for each employee listed on the Forms DE-6. The director also requested evidence that the beneficiary possesses the experience listed on the Form ETA 750.

In response, counsel provided two letters of experience for the beneficiary, copies of the petitioner's 1997 through 2000 Forms 1120, U.S. Corporation Income Tax Returns, a copy of Form 7004, Application for Automatic Extension of Time To File Corporation Income Tax Return, for the fiscal year October 1, 2001 through September 30, 2002 (this appears to be for a different company as it has a different address), and copies of Forms DE-6 for the last quarter of 2001 and the first three quarters of 2002. It is noted that the Forms DE-6 also appear to be for a different company as they have a different address as well. The 1997 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$3,103 and net current assets of \$134,896. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of \$13,357 and net current assets of \$115,507. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of \$68,743 and net current assets of \$122,391. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$75,543 and net current assets of \$125,763. There is no evidence that the beneficiary worked for the petitioner from 1997 through 2000.

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 May 21, 2003, denied the petition. In his denial, the director also mentioned that the evidence provided as proof of the beneficiary's experience did not appear to be reliable. The director did not specifically indicate that the petition would be denied for this reason. It is noted, however, that the director could have asked for clarification of the evidence or requested an investigation into the reliability of the evidence. He chose not to do so. The AAO does not concur with the director with regard to the letters. The letters follow the guidelines as stated on the request for evidence in that they were submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying the information, and they state the beneficiary's title, duties, and dates of employment/experience. The letter from [REDACTED] is an original and while the letter from [REDACTED] appears to be a photocopy, there is no reason to believe that the letter is not authentic. The director may request additional evidence or an investigation before the Form I-485, Application to Register Permanent Resident or Adjust Status, is adjudicated.

On appeal, counsel submits a brief and a letter from the president of the petitioner. The president's letter states:

In the years where our profitability is in question by the Immigration Service, the company could have and would have borrowed funds, if necessary, to pay [REDACTED]. Alternatively, the investors could have supplied additional capital.

However, I believe that such additional funds would not have been necessary as Mr. [REDACTED] would have been a profit center for us. He would have helped us cut costs and increase efficiency and, thus, assisted profitability.

As a start-up company and as investors, we expected all along to have to subsidize operations, if necessary. We are fortunate, indeed, to have been somewhat profitable from the beginning. Our borrowing has been minimal. In 1997, our

stockholders loaned the company \$157,667. In 1998, these loans were paid down by about \$30,000 to \$127,748. In 1999, the loans were paid down by over \$50,000 to \$76,846. In the year 2000, the loans were paid off completely. However, in September 2001, a small loan of \$14,000 existed prior to year end.

In each year of our existence, we could have afforded Mr. [REDACTED] salary by simply not paying back stockholders loans and by borrowing additional funds if necessary.

Counsel states:

Petitioner tendered copies of its Financial Statements for year 2000 and for the first 9 months of 2001. The Balance Sheets in these statements show substantial current assets (\$145,610 and \$173,755.06, respectively) and minimal total current liabilities (\$19,846.74 and \$27,334.05, respectively).

Although these statements are not audited, they are consistent with results produced in prior years. The 1998, 1999, and 2000 tax returns show total current assets of \$146,642, \$172,609 and \$145,610, respectively, and total current liabilities of \$31,135, \$50,218, and \$19,847, respectively. Thus, the Service should have found this to be an "appropriate Case" to accept petitioner's unaudited financial statements as reliable evidence, since a tax return or audited statement was obviously not available. 8 C.F.R. § 204.5(g)(2).

* * *

Finally, the evidence shows, as petitioner's President attests in his attached letter (see **Exhibit B**), that the company has always been able to pay the proffered salary. The company simply could have refrained from paying back loans to stockholders and, if necessary, could have borrowed additional sums or obtained additional capital. However, petitioner's President believes that such additional funding would not have been necessary because the Beneficiary would have produced savings that would have paid his salary.

In Masonry Masters, Inc. v. Thornburgh, 875 F. 2d.898 (D.C. Cir. 1989), the court held that "the INS' interest in the income statement appears to assume that the worker will contribute nothing to income. This seems wholly unrealistic; one would expect an employer to hire only workers whose marginal contribution to value of the company's production equals or exceeds their wages."

In the present case, petitioner wants to hire the Beneficiary precisely because of his skills and the likelihood that he will benefit the firm and make it more profitable. Petitioner contends that it is in a far superior position than the Service to make such an assessment.

* * *

The evidence then as now supplemented establishes that petitioner had the ability to pay the proffered wage to the Beneficiary in all years from 1997 through and including 2001. Thus, petitioner is entitled to the approval of its Immigrant Petition for Alien Worker.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) to show that a company's expectation of future growth based on the company's goodwill establishes the petitioner's ability to pay the proffered wage. *Sonogawa* 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 *Sonogawa*, nor has it been established that 1997 through 2000 were uncharacteristically unprofitable years for the petitioner.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a color-paste mixing supervisor will significantly increase profits for a manufacturer of plastisol screen printing inks.

The president of the petitioner states that if it had been necessary, the petitioner could have borrowed money to pay the proffered wage. However, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1997 through 2000.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.¹ 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's net current assets during the fiscal years in question,

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.

1997 through 2000 were \$134,896, \$115,507, \$122,391 and \$125,763, respectively. The petitioner could have paid the proffered wage in fiscal years 1997 through 2000 from its net current assets.

The fiscal year 1997 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$3,103 and net current assets of \$134,896. The petitioner could pay the proffered wage in fiscal year 1997 from its net current assets.

The fiscal year 1998 tax return reflects a taxable income before net operating loss deduction and special deductions of \$13,357 and net current assets of \$115,507. The petitioner could pay the proffered wage in fiscal year 1998 from its net current assets.

The fiscal year 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of \$68,743 and net current assets of \$122,391. The petitioner could pay the proffered wage in fiscal year 1999 from either its taxable income or its net current assets.

The fiscal year 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of \$75,543 and net current assets of \$125,763. The petitioner could pay the proffered wage in fiscal year 2000 from either its taxable income or its net current assets.

In summary, the petitioner has established that it had the ability to pay the proffered wage at the priority date, October 23, 1997, and continuing.

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.