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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6

FILE:

[REDACTED]  
LIN-03-088-52983

Office: NEBRASKA SERVICE CENTER

Date: JAN 07 2005

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

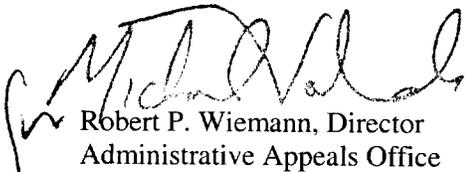
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a supervisor. 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 a brief and previously submitted evidence.

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) 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$36.39 per hour, which amounts to \$75,691.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on August 29, 1997, to have a gross annual income of \$1,065,848, and to currently employ seven workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2000.<sup>1</sup>

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 January 27, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested bank account records, monthly balance sheets, quarterly wage reports, and personnel records.

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<sup>1</sup> The petitioner's 2000 tax return is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date since 2000 precedes the priority date on April 30, 2001.

In response, the petitioner submitted its 2001 Form 1120 Corporate tax returns. The tax return reflects the following information:

	<u>2001</u>
Net income <sup>2</sup>	-\$49,149
Current Assets	\$44,286
Current Liabilities	\$20,020
Net current assets	\$24,266

In addition, counsel submitted copies of the petitioner's checking account statements for the period from May 2002 through December 2002 reflecting an average ending balance of \$32,392.77<sup>3</sup>. Counsel also submitted copies of the petitioner's various city income tax returns, charitable contributions to religious organizations, net profits tax return, annual bank interest statements, and the petitioner's 2000 tax return.<sup>4</sup> Finally counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), in her accompanying cover letter for the proposition that the petitioner had unusual expenses in the form of loan and mortgage debt owed by the petitioner. However, counsel asserts that the petitioner could have held cash assets in abeyance to pay the proffered wage instead of paying the mortgage and loans. Counsel also states that the petitioner fails to show a profit on its tax returns to avoid double taxation.

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 20, 2003, denied the petition.<sup>5</sup>

On appeal, counsel asserts that the petitioner need only demonstrate an ability to pay a pro-rated proffered wage in 2001, that depreciation should be added back, and that the director erroneously ignored evidence of unusual expenses in 2001. Counsel suggests that the petitioner would not have purchased depreciable assets and instead would have paid the proffered salary if the beneficiary was a lawful permanent resident when the ETA 750 was filed. Additionally, counsel states that the petitioner's owner could have foregone rent payments to pay the proffered wage. The petitioner submits previously submitted evidence.

At the outset, counsel requests that Citizenship and Immigration Services (CIS) prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record or proceeding contains evidence of net income or payment of the beneficiary's wages specifically covering the

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

<sup>3</sup> The average was calculated by adding each month's ending balance and dividing by the total number of monthly statements. Counsel states in her accompanying cover letter that the average monthly balance was \$43,190.50. She does not detail how that figure was calculated. Counsel also referred to a "total rounded average" of \$260,000 per year, which lacked further explanation. None of the documents submitted refer to such a figure and the AAO is unable to ascertain the significance of counsel's reference.

<sup>4</sup> None of these documents are specified under the regulation at 8 C.F.R. § 204.5(g)(2) or cover the relevant timeframe.

<sup>5</sup> The director references a letter from the petitioner's accountant in his decision. However, no such letter is included in the record of proceeding as currently constituted.

portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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, 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.

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 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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

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 petitioner's reported loss of -\$49,149 could not cover the proffered wage of \$75,691.20. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage beginning on the date of the priority date out of its net income.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 year in question, 2001, however, were only \$24,266, which does not cover the proffered wage of \$75,691.20. As such, the petitioner cannot establish its continuing ability to pay the proffered wage beginning on the date of the priority date out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a loss and net current assets of only \$24,266 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Contrary to counsel's assertions, *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 *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. The AAO concurs with the director that payments made for use of property are not unusual. Counsel's new assertion on appeal, that the petitioner purchased depreciable assets such as new equipment, which it would not if it knew it needed the funds to pay the proffered wage, is without merit. First of all, there is no evidence or statement from the petitioner to corroborate that assertion. The 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). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). No explanation was provided concerning the unusual nature of purchasing depreciable assets such as equipment. Depreciable assets are

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<sup>6</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.

not the type of assets considered by CIS or the AAO in evaluating a petitioning entity's continuing ability to pay the proffered wage as was discussed in detail above.

Counsel's final argument that the petitioner's owner could have foregone payments from the petitioner for the use of property is also without merit since those funds were already expended and are no longer available. Counsel's assertion requires too much speculation to overcome the evidence of the petitioner's financial standing as represented in its tax return at the time of filing the petition. 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). *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.