

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

*B6*



FILE:



Office: VERMONT SERVICE CENTER

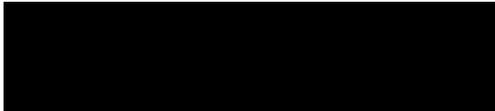
Date:

**JAN 27 2005**

EAC 02 255 50441

IN RE:

Petitioner:



Beneficiary:

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a telecommunications company. It seeks to employ the beneficiary as an accountant. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel provides a brief.

In pertinent part, 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.

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.

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 April 18, 2001. The proffered salary as stated on the labor certification is \$74,339 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 and 2001 Forms 1120S, U.S. Income Tax Return for an S Corporation, a copy of the beneficiary's 2001 Form 1040, U.S. Individual Income Tax Return, and a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement. These petitioner's 2000 tax return reflected an ordinary income of -\$2,497,892 and net current assets of -\$5,395,439. The petitioner's 2001 tax return reflected an ordinary income of -\$4,510,326 and net current assets of -\$9,647,383. The beneficiary's 2001 Form W-2 and tax return reflected wages earned of \$31,506.30. The director considered this documentation insufficient and on June 27, 2003, he requested additional evidence pertinent to the petitioner's

continuing ability to pay the proffered wage from the priority date of April 18, 2001 and continuing to the present. The director specifically requested financial documentation for the tax years 2001 and 2002 to be in the form of copies of annual reports, copies of federal tax returns including all schedules and tables (with appropriate signature(s)), or audited financial statements.

In response, counsel submitted copies of the petitioner's previously submitted 2000 and 2001 tax returns, a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and copies of the beneficiary's 2001 and 2002 Form W-2, Wage and Tax Statement. The 2002 tax return reflected an ordinary income of \$670,917. Schedule L was not submitted with the 2002 tax return, and, therefore, net current assets cannot be determined. The beneficiary's 2002 Form W-2 reflected wages earned of \$37,157.20.

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 August 13, 2003, denied the petition.

On appeal, the petitioner, through counsel, states:

- ❖ Please be advised that the beneficiary was working on H1B from 2000-2003 with the approved salary of \$37,157 as per the ETA 9035.
- ❖ The law is [sic] I-140 is purely based on future employment, see 20C.F.R. 656.3, enclosed for reference.
- ❖ With reference to offered salary of [REDACTED] as Tel star International is capable of paying the salary as they run the Payroll of around \$500,000 annually.
- ❖ [REDACTED] will be employed as an the [sic] Accountant, and considered a permanent employee after she receives her green card, as per 20CFR 656.3 at an offered salary.
- ❖ The petitioner is replacing two persons in the accounting department with the beneficiary, which will cover the offer[ed] salary of \$74,339.
- ❖ The company's need for her services are crucial to the economic welfare of the company.

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 in 2001 and 2002 at a salary equal to or greater than the proffered wage.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.<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's net current assets during 2000 and 2001 were -\$5,395,439 and -\$9,647,383, respectively. The petitioner's net current assets during 2002 are unknown. The petitioner could not have paid the proffered wage in 2000 or 2001 from its net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and

---

<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.

clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided any evidence that unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2000 and 2001 were uncharacteristically unprofitable years for the petitioner. In addition, the petitioner has not provided any evidence that explains its reputation within the industry.

Furthermore, even though counsel advised that the beneficiary will replace two other workers in the accounting department, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions held by the other two employees involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

Counsel asserts that the petitioner will pay the beneficiary the proffered wage after she receives her green card, as per 20 C.F.R. § 656.3. However, 20 C.F.R. § 656.3 deals with whether a job is full-time and permanent. The regulation at 20 C.F.R. § 656.20(c)(1) reflects that the employer must have the ability to pay the proffered wage as does CIS regulation 8 C.F.R. § 204.5(g)(2). The regulation at 8 C.F.R. § 204.5(g)(2) states, "The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."

The 2000 tax return reflects an ordinary income of -\$2,497,892 and net current assets of -\$5,395,439. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of -\$4,510,326 and net current assets of -\$9,647,383. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

The 2002 tax return reflects an ordinary income of \$670,917. The petitioner could pay the proffered wage from its ordinary income in 2002.

While the petitioner has established its ability to pay the proffered wage in 2002, it has not established its ability to

pay the proffered wage in 2001 at 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.