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

*B6*

FILE:

[REDACTED]  
EAC 03 200 50256

Office: VERMONT SERVICE CENTER

Date: **OCT 21 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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The petitioner is an electronics service firm. It seeks to employ the beneficiary permanently in the United States as an electronic technician. 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 asserts that the petitioner has established its financial ability to pay the proposed wage offer.

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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$28.21 per hour, which amounts to \$58,676.80 annually. On the Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary claims to work for the petitioner, but no dates are given.<sup>1</sup>

On Part 5 the petition, the petitioner claims to have been established in 1949, to have a gross annual income of \$550,000, a net annual income of \$250,000 and to currently employ four workers. As no evidence supporting the petitioner's ability to pay the proffered wage was initially submitted, on August 8, 2003, the director requested additional evidence pertinent to this ability. The director also specifically requested that the petitioner provide either copies of its 2001 and 2002 federal tax returns or copies of annual reports for 2001 and 2002, which are accompanied by audited or reviewed financial statements. The director further requested copies of the

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<sup>1</sup> A biographic form, (G-325), signed by the beneficiary on June 13, 2003, submitted in connection with the beneficiary's adjustment of status application, shows no employment for the past five years.

beneficiary's Wage and Tax Statement (W-2) or Form 1099/Miscellaneous Income, if the petitioner employed the beneficiary during 2001 and 2002.

In response, although counsel's transmittal letter mentions the submission of the 2001 and 2002 federal income tax returns or corresponding annual reports, the only document submitted in connection with the petitioner's ability to pay the proffered wage is a letter, dated August 29, 2003, which is signed by [REDACTED] Public Accountant. Mr. [REDACTED] states that the petitioner has been in business in New Jersey since 1949 and that its gross sales of \$325,572.61 for 2002 was consistent with prior years.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on February 20, 2004, denied the petition. The director discussed the lack of submission of the requested evidence related to the petitioner's ability to pay the proffered wage and rejected the notion that gross sales alone is determinative of a petitioner's ability to pay a wage offer.

On appeal, counsel merely asserts that her response to the notice of action already adequately addressed the petitioner's ability to pay the proffered wage and that thirty additional days would be required for the petitioner's accountant to submit additional evidence. This office notes that nothing further was received to the record. By response to a recent facsimile inquiry from this office as to the existence of a brief or additional evidence, counsel now responds with a brief and a resubmission of Mr. [REDACTED] 2003 letter.

In her most recently submitted brief, counsel states that CIS should not to judge that a business is not viable because of a couple of years of business slowdowns because all businesses experience such fluctuations. It is unclear if counsel is referring to this petitioner because there is no evidence in the record upon which to base any judgment. Counsel, however, points to Mr. [REDACTED] 2003 letter affirming the petitioner's consistent gross sales and longevity. Counsel also asserts that current Citizenship and Immigration Services (CIS) rule-making agenda reflects that the regulation at 8 C.F.R. § 204.5(g)(2) will be amended to omit specific references to an ability to pay the proffered wage and urges the approval of the petition on this basis.

At the outset, it is noted that the purpose of the request for evidence issued by the director on August 8, 2003, is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit the requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to submit any of the specifically requested evidence. Such evidence is currently defined in 8 § C.F.R. 204.5(g)(2). This regulation is currently in force and has not been amended. The rulemaking activity that counsel refers to is the unified agenda published semiannually. This regulatory agenda is a "semiannual summary of all current and projected rulemakings, as well as actions completed since the publication of the last regulatory agenda." *See* 70 Fed. Reg. 26892 (May 16, 2005). This agenda provides information about the actions of the Department of Homeland Security (DHS) and provides the public with information and opportunity to effectively participate in the Department's regulatory process. *Id.*

The purpose of the review of a petitioner's financial documentation is to ensure that the data supports the petitioner's obligation to pay the certified wage agreed upon in the approved labor certification. In determining the petitioner's ability to pay the proffered wage during a given period, 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, as noted above, the evidence appears to be somewhat conflicting as to whether the petitioner has actually employed the beneficiary. In any event, the record contains no evidence of wages paid to 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 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).

Asserting, as here, that the petitioner's gross receipts or sales have reached a certain level is not sufficient. This figure, while important, represents only a portion of a petitioner's particular financial status. As noted by the director, the expenses incurred in order to generate such revenue must also be examined. Similarly, showing that the petitioner paid cumulative 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.

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. CIS will also 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>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(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. In this case, as no evidence of the petitioner's net current assets was submitted, they cannot be considered.

In some cases, despite insufficient net income or net assets, the petitioner's financial status may be evaluated within the context of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). 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

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<sup>2</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.

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 petitioner had 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, no first-hand evidence has been submitted that adequately addresses the petitioner's financial performance over the course of a period of time.

Based on a review of the evidence contained in the record and the argument and evidence submitted on appeal, the AAO concludes that the petitioner has failed to demonstrate its continuing financial ability to pay the proffered salary.

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.