

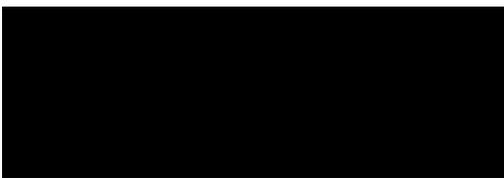
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U.S. Citizenship  
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FILE: WAC 03 130 55261 Office: CALIFORNIA SERVICE CENTER Date: 7/22/2009

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 dismissed.

The petitioner is a hotel, restaurant, fitness, and conference facility. It seeks to employ the beneficiary permanently in the United States as a public relations representative. 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.

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 July 17, 2000. The proffered salary as stated on the labor certification is \$21.88 per hour or \$45,510.40 per year.

With the petition, counsel submitted copies of the petitioner's 2000 and 2001 Forms 1120, U.S. Corporation Income Tax Returns. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$140,637 and net current assets of \$5,161. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$38,307 and net current assets of \$3,577. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on June 16, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present to be in the form of copies of annual reports, signed and dated federal tax returns with appropriate signature(s), or audited financial statements. The director specifically requested the petitioner's IRS-certified tax returns for 2000 through 2002, a copy of the petitioner's current valid business license, and

copies of the petitioner's Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California.

In response, counsel provided copies of the petitioner's 2000 through 2002 Forms 1120, U.S. Corporation Income Tax Returns, a copy of the petitioner's 2002 California Corporate Income Tax Return, copies of the petitioner's Employer's Quarterly State Report of Wages Paid to Each Employee, copies of income statements for 2000 through 2002, and a copy of the petitioner's business license. The 2002 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$215,322 and net current assets of \$69,716.

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. On September 10, 2003, the director denied the petition.

On appeal, counsel submits previously submitted documentation and bank statements for the period January 12, 2001 through January 11, 2002. The bank statements reflect balances ranging from a low of \$296.06 to a high of \$12,493.93. Counsel states:

The Western Inn, Inc. is a dynamic company that has successfully survived the fallout in the tourism and hotel industry as a result of the economic down turn in 2001 combined with the severe traumatic drop in travel and corresponding hotel bookings after the terrorist attacks of September 11, 2001. This is the direct result of its management and staff's focus on growth through redevelopment and its being included into the Best Western chain of hotels (although it is independently owned). In fact, the Western Inn has not only survived, it is now thriving.

\* \* \*

Perhaps most importantly, the beneficiary's efforts will be critical to our future growth and development as she will be responsible for further marketing of the inn and should be able to utilize her contacts and marketing experience to develop new tourism customers for our inn.

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 2000 through 2002.

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 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 2000 were \$5,161. The petitioner could not have paid the proffered wage in 2000 from its net current assets. The petitioner's net current assets during 2001 were \$3,577. The petitioner could not have paid the proffered wage in 2001 from its net current assets. The petitioner's net current assets during 2002 were \$69,716. The petitioner could have paid the proffered wage in 2002 from its net current assets.

Counsel points to the petitioner's bank statements as evidence of the petitioner's ability to pay the proffered wage. 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

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<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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In this instance, no detail or documentation has been provided to clearly explain how the beneficiary's employment as a public relations representative will significantly increase profits for the petitioner. Counsel has provided no evidence that the beneficiary has sufficient contacts or marketing experience to develop new tourism customers. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel contends, "These [the petitioner's] carry over losses, which are in accordance with recognized accounting practices reflect a loss of over \$1 million. If the company did not report those losses, its taxable income would far and away exceed the salary offer[ed] in question and there would be no doubt that the Petitioner is fully capable of paying the proffered wage." Counsel is mistaken. When determining the petitioner's ability to pay the proffered wage, CIS looks at the taxable income before net operating loss deduction and special deductions (line 28) and not the taxable income (line 30) on Form 1120, U.S. Corporation Income Tax Return. The taxable income before net operating loss deduction and special deductions was \$140,637, \$38,307, and -\$215,322, respectively, in 2000, 2001, and 2002.

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 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 only provided tax returns for three years, 2000 through 2002, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. While the petitioner may have been affected by the tragedy of September 11, 2001, the petitioner has provided no verifiable evidence of its loss (amount of loss in figures compared to previous years or subsequent years).

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$140,637 and net current assets of \$5,161. The petitioner could have paid the proffered wage from its taxable income in 2000.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$38,307 and net current assets of \$3,577. The petitioner could not have paid the proffered wage from its taxable income or its net current assets in 2001.

The petitioner's 2002 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$215,322 and net current assets of \$69,716. The petitioner could have paid the proffered wage from its net current assets in 2002.

The petitioner has established its ability to pay the proffered wage in 2000 and 2002, but not in 2001. The petitioner must show its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not done so.

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.