



U.S. Citizenship
and Immigration
Services

B6

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE: LIN-03-208-50144 Office: NEBRASKA SERVICE CENTER Date: **MAR 24 2006**

IN RE: Petitioner:
Beneficiary:

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:



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 markets computer hardware components and peripheral products. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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 additional evidence.

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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$35,547.20 per year. 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 in 1996, to have a gross annual income of \$700,000, and to currently employ four workers. The record reflects that its fiscal year runs from July 1 through June 30 of each year. In support of the petition, the petitioner submitted its corporate tax returns for 2000, which covers July 1, 2000 through June 30, 2001, its priority date year, its 2001 tax return, and bank statements.

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 February 6, 2004, the director requested additional evidence pertinent to that ability. The director requested audited profit/loss statements, bank account records, and/or personnel records.

In response, the petitioner submitted its 2002 Form 1120-A short-form corporate tax return, additional bank statements, and copies of pay stubs issued by the petitioner to the beneficiary from December 2003 through March 2004.

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 April 23, 2004, denied the petition.

On appeal, counsel asserts that the petitioner has demonstrated its ability to pay the proffered wage since the beneficiary is being paid the proffered wage since December 2003 and it has sufficient net assets and cash in its bank account. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and asserts that the beneficiary has already increased revenues for the petitioner's business. The petitioner submits a letter stating that the beneficiary generated revenues of over \$40,000 from one customer, Direct Link International (Direct Link), and has generated interest from other potential customers. The petitioner also submits a letter from [REDACTED] certified public accountant, who states that the petitioner, like any business, had a sales decline in its 2002 fiscal year, but that its sales are rising again. CPA [REDACTED] references the petitioner's net assets, bank balances, sales generation, and that it has not taken any loans as evidence that it can pay the proffered wage. CPA [REDACTED] also states that the petitioner's 2003 tax return is not available yet but that she ran a balance sheet in her computer that showed that its net assets and income had increased. An unaudited balance sheet for March 1, 2004 accompanies her letter.

On appeal, the petitioner also submits letters from [REDACTED] and Direct Link. Willamette's letter states that the petitioner's products and the beneficiary's assistance may help them achieve their sales goals in China, and if so, they would pay the petitioner \$100,000 annually. Direct Link's letter recommends the petitioner's business. The petitioner resubmits its corporate tax returns for 2000 through 2002; copies of checks made payable to [REDACTED], the petitioner's trade name, from Direct Link in 2004; a W-2 form issued by the petitioner to the beneficiary in 2003 reflecting wages paid in the amount of \$2,960; copies of pay stubs issued by the petitioner to the beneficiary in 2004 reflecting wages paid from January through May of that year totaling \$15,046.61 at a pay rate of \$2,960 every month; and additional bank statements.

The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Net income ¹	\$5,048	-\$5,634	-\$5,554
Current Assets	\$59,814	\$58,427	\$37,419
Current Liabilities	\$42,792	\$46,913	\$31,469
Net current assets	\$17,022	\$11,514	\$5,950

At the outset, the unaudited balance sheet for March 2004 submitted with CPA [REDACTED] letter is not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Additionally, counsel's reliance on the balances in the petitioner's bank accounts 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

¹ The petitioner's net income is its taxable income before net operating loss deduction and special deductions as reported on line 28 for 2000 and 2001 and on line 24 for 2002.

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, Citizenship and Immigration Services (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 the petitioner's 2000, 2001, or 2002 fiscal years. The petitioner demonstrated that it paid the beneficiary \$18,006.61 in its 2003 fiscal year, including its December 2003 wages and January through May 2004.

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.

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 and CPA [REDACTED] 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

² According to *Barran'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

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 has not demonstrated that it paid the full proffered wage to the beneficiary in its 2000, 2001, or 2002 fiscal years. In all of those years, its net income and net current assets are either negative or lower than the proffered wage. For its 2003 fiscal year, it was paying the beneficiary at a pay rate equivalent to \$34,872, which is close to but a little lower than the proffered wage of \$35,547.20. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000, 2001, 2002, or 2003.

Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. at 612 for support of the petitioner's ability to pay. *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 2000, 2001, or 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. The record of proceeding does not contain evidence that the petitioner's sales increased in its 2003 fiscal year since only an unaudited balance sheet was submitted. Even if it had, there is no evidence that its sales increase is a result of hiring the beneficiary. The letter from Willamette does not state that it will pay the petitioner \$100,000 but that it might if the petitioner and the beneficiary successfully achieve their goals for them³. Direct Link provides a generic recommendation and discusses its historical relationship with the petitioner with only one brief mention of the beneficiary. There is no evidence that Direct Link hired the petitioner because of the beneficiary, and even if it did so, the only evidence of

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.

³ This basis for establishing ability to pay is also too speculative. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is not demonstrated at the priority date, with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

sales received by the petitioner from Direct Link occurred in 2004, which does not benefit the analysis of the petitioner's fiscal years in 2000, 2001, or 2002⁴.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2000, 2001, or 2002 fiscal years. 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.

⁴ See reference to *Katigbak, supra*, note 3. Also the regulation at 8 C.F.R. § 204.5(g)(2) requires demonstrating ability to pay beginning on the priority date.