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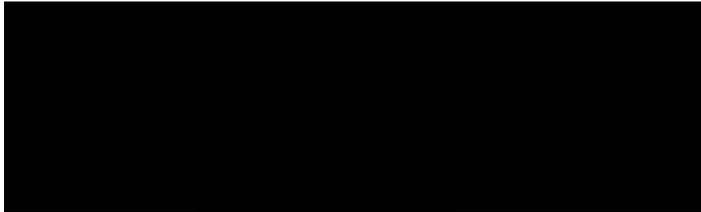
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



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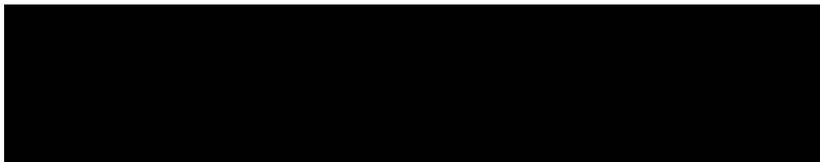
Petitioner:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer-consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer 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.

Former counsel filed a motion to reconsider the case. On December 7, 2004, the director determined that the grounds for denial of the petition had not been overcome and reaffirmed the denial of the petition.

On appeal from the director's decision of December 7, 2004, former counsel submitted additional evidence and asserted that the director erred in his analysis. She maintained that the petitioner has demonstrated its continuing financial ability to pay the proffered salary.

It is noted that the petitioner filed a subsequent Immigrant Petition for Alien Worker (Form I-140) for the same position on behalf of the same beneficiary. That petition was approved on May 31, 2006, with the same third preference visa classification that is sought here. The underlying labor certification, however, bears a priority date of May 14, 2003. The priority date of the labor certification supporting the I-140 in the current proceedings is November 16, 2000. The beneficiary was offered as a substitution for the original beneficiary named on the ETA 750 in both cases. Based on current counsel's request for the continuance of the appeal, and because the priority dates are not current for this visa classification at this time, the AAO will render a decision on this case.¹

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) provides:

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

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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, this Form ETA 750 was accepted for processing on November 16, 2000. The proffered wage as stated on the Form ETA 750 is \$85,000 per year.² On the Form ETA 750B, signed by the beneficiary on January 20, 2004, the beneficiary claims to have worked for the petitioner since November 2003.

On Part 5 of the I-140, filed on February 5, 2004, the petitioner claims that it was established in 1997, has gross annual sales of \$2,500,000, and currently has twenty-five employees.

In support of its ability to pay the beneficiary's proposed wage offer of \$85,000 per year, the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2000 and 2001. They reflect that the petitioner files its taxes using a standard calendar year. The returns contain the following information:

	2000	2001
Ordinary Income	\$201,204	\$181,786
Current Assets (Sched. L)	\$135,720	\$215,758
Current Liabilities (Sched. L)	none listed	\$ 8,178
Net Current Assets	\$135,720	\$207,580

It is noted that besides net taxable income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of reviewing a petitioner's ability to pay a proffered salary. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

On February 25, 2004, the director acknowledged that the petitioner's 2000 and 2001 tax returns showed sufficient funds to pay the proposed wage offer, but he requested additional evidence relevant to the petitioner's

² The amount of \$83,110.56 is specified as the proffered wage on the labor certification supporting the petitioner's I-140 that was approved on May 31, 2006.

³ According to *Barron'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 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.

continuing ability to pay the proffered salary beyond these two years. He advised the petitioner that such evidence must include either annual reports, federal tax returns, or audited financial statements, and may include other additional evidence such as audited profit/loss statements, complete bank account records, and/or personnel records. He specifically requested a copy of the petitioner's federal tax returns for 2002 and 2003 (if available), as well as copies of any Wage and Tax Statements (W-2s) issued to the beneficiary for 2002 and 2003 if it employed the beneficiary during that period. The director also requested the petitioner to provide a complete list of its pending immigrant petitions, as well as the offered wage for each.

In response, the petitioner, through counsel, provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2002. It reflects the following information:

	2002
Ordinary Income	\$ 9,758
Current Assets (Sched. L)	\$ 61,738
Current Liabilities (Sched. L)	none listed
Net Current Assets	\$ 61,738

The petitioner's response also included a copy of a letter, dated April 19, 2004, from its accountant, [REDACTED]. [REDACTED] claims that the 2003 tax return is not available and that an extension had been filed. He further states that except for a bad debt of \$32,184, the petitioner's income would have been higher in 2002, but cash basis reporting does not reflect the bad debts. [REDACTED] also notes that the petitioner's income would have been increased if the director's salary expense of \$144,000 had not been deducted as officer's compensation.

While no W-2s were submitted with the response, counsel provided copies of two payroll records from March and April 2004. They show that as of April 30, 2004, the petitioner had paid \$25,920 to the beneficiary. A copy of a 2001 W-2 issued by the petitioner to the original beneficiary, [REDACTED] is also included, as well as petitioner's list of four pending immigrant petitions. Counsel's transmittal letter accompanying the response indicates that the beneficiary replaces [REDACTED] and that [REDACTED] salary should be included in the review of the petitioner's ability to pay the proffered wage.

In concluding that the petitioner failed to demonstrate its continuing ability to pay the proffered wage, the director found counsel's assertion that [REDACTED]'s 2001 W-2 represented available funds to be paid to the beneficiary, to be unpersuasive given the lengthy gap of time between 2001 and November 2003 when the beneficiary first claimed employment with the petitioner. The director declined to add back the \$32,184 representing a bad debt and \$144,000 in officer's compensation to the petitioner's available income in 2002, as suggested by the petitioner's accountant, as the bad debt still represented a tangible loss and the officer's compensation had already been dispersed. The director also determined that while the petitioner had employed the beneficiary in 2004, his earnings appeared to be at a rate less than the proffered wage and observed that the other pending petitions with proposed wages running from \$57,500 to \$70,000 lent further doubt to the petitioner's ability to pay. Finally, the director found that the petitioner's 2002 tax return failed to demonstrate sufficient net income or net current assets to cover the proposed wage offer in that year. The director denied the petition on June 18, 2004.

Counsel submitted a motion to reconsider on July 20, 2004. Relying on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel explains that [REDACTED] departure from the petitioner in 2002 represented a decrease in income until his replacement was hired in 2003 and supports the petitioner's expectation of increasing profits. Counsel also provides copies of unaudited financial statements and graphs by way of illustrating the petitioner's increasing growth in the first six months of 2004. She further provides copies of the 2004 resignation letters of two of the three beneficiaries of the pending I-140's who left the company following the approval of their immigrant visas. Counsel asserts that their salaries are no longer tied up and would become available for support of the beneficiary's proffered wage. Counsel finally emphasizes that the 2002 tax return shows gross income of \$1,773,921 and gross profit of \$519,529 and demonstrates the petitioner's viability, in addition to the possibility of decreasing the officer's compensation to provide additional funds for the proffered wage.

As counsel's motion to reconsider was submitted with additional evidence, the director treated it as a motion to reopen pursuant to 8 C.F.R. § 103.5. He found that the grounds for denial had not been overcome and reaffirmed the previous denial of the petition on December 7, 2004. The director noted that *Matter of Sonogawa* is not entirely appropriate as the petitioner's gross income did not increase but decrease during the 2000 to 2002 period. As shown by the submitted corporate tax returns, its reported gross receipts or sales were \$2,800,117 in 2000; \$2,677,240 in 2001; and \$1,773,921 in 2002. The tax return for 2003 had not been submitted. The director determined that counsel's reliance on *Matter of Sonogawa* was misplaced as it could not be concluded that the petitioner's gross sales could support expectations of an increase in revenue.

The director further noted that although the argument is that the beneficiary, hired in 2003, was a replacement for [REDACTED] who had left in 2002, only a 2001 W-2 was provided showing actual wages paid to [REDACTED]. No evidence had been provided to demonstrate that the petitioner paid the substituted beneficiary in 2002 or paid wages to the current beneficiary in 2003, when he began employment. The director also concluded that no evidence of actual wages paid to the two employees who resigned in 2004 was offered and even if their relevant salaries were considered, an additional pending I-140 still raised the question as to the petitioner's ability to pay the offered wage for multiple beneficiaries. He further concluded that the assertion that officer's compensation, which was already distributed, could have been reduced to pay the proffered wage in 2002, as conjecture.

This instant appeal arises from the director's decision of December 7, 2004. Counsel resubmits a copy of the petitioner's 2002 corporate return, as well as an incomplete copy of the petitioner's 2003 corporate tax return, with omissions including Schedule A (Cost of Goods Sold) and other referenced statements and attachments. The 2003 return shows that the petitioner declared ordinary income of \$24,847. Schedule L reflects that the petitioner reported \$83,184 in current assets, no current liabilities, yielding \$83,184 in net current assets.

Counsel also provides a copy of the beneficiary's pay stub for December 2004 showing that he was ultimately compensated with \$86,065 in annual salary for that year.

Additionally supplied is a copy of a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), in support of the proposition that a petitioner may establish its ability to pay a given wage through an examination of the petitioner's net current assets. Counsel cites two AAO cases from 1992 and 1995 in which appeals were sustained under various factual circumstances. Such cases may offer

guidance for the review of a current petition under consideration, but they are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

For the year 2002, counsel refers to the petitioner's cash on hand in 2002 as being \$211,058 at the beginning of the year and \$55,398 at the end of the year, along with retained earnings of \$123,168. He states that the "total net current assets of the company at the beginning of the year were \$288,308, and at the end of the year they were \$133,168," thus satisfying the Yates memo. (emphasis added). The AAO does not concur with this characterization because it confuses current assets with total assets as shown on Schedule L of the 2002 tax return. As stated above, the petitioner's end of the year current assets consist of the items listed on line 1(d) "cash" through 6(d) "other current assets." In this case, the petitioner's cash is given as \$55,398 and other current assets are specified as \$6,340, totaling \$61,738 as current assets. Together with current liabilities, which include line 16(d) "accounts payable," line 17(d) "mortgages, notes bonds payable in less than 1 year," and line 18(d) "other current liabilities," the total may be characterized as net current assets. In this case, there are no current liabilities stated, so the combined total of \$61,738 represents the petitioner's net current 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. The petitioner's "capital stock, additional paid-in capital, and retained earnings" as referenced on line(s) 22-24 of Schedule L are not listed among the petitioner's current assets and cannot be considered as an isolated figure, which establish the petitioner's ability to pay the certified salary. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on Schedule L of a corporate tax return and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of the shareholders' equity and also represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources.⁴

For the year 2003, counsel states that although the beneficiary joined the company in November 2003, he took time off and did not receive a paycheck until 2004. Counsel provides a copy of the petitioner's 2003 corporate tax return and emphasizes the totals shown for cash, retained earnings, and total assets. The tax return contains the following information:

2003	
Ordinary Income	\$ 24,847
Current Assets (Sched. L)	\$ 83,184
Current Liabilities (Sched. L)	none listed
Net Current Assets	\$ 83,184

Counsel also provides copies of the petitioner's bank statements from Comerica for 2002 and 2003 and emphasizes the large cash flow maintained by the petitioner during this period. Bank statements are not among

⁴ In reviewing a petitioner's ability to pay a certified wage, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), noted [CIS] had fully considered the petitioner's assets as shown on Schedule L and also specifically rejected the need to credit other amounts such as unappropriated retained earnings or common stock.

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 for a given period. 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 provides an inaccurate financial portrait of the petitioner. Bank statements, alone, generally show only a portion of a corporate petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. In this respect, the bank statements from 2002 and 2003, respectively, will not be considered as a substitution for the evidence prescribed by the regulation. In this instance, there is additionally no direct evidence that demonstrates how such assets somehow represent additional available funds that would not already be encompassed within the pertinent tax return.

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 a given period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period. In this proceeding, the beneficiary's earnings received from the petitioner ultimately established the ability to pay the certified wage in 2004.

CIS will also review the net taxable 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. 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. Depreciation as the decreased value of the assets of a business is considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

In this case, with reference to 2002 and 2003, the AAO concurs with the director's conclusion that neither the petitioner's net income, nor net current assets were sufficient to meet the proffered salary in each of those years. Moreover, the additional consideration of the one additional pending immigrant petition, as noted in the director's December 7, 2004, decision, still remains to cause doubt as to the petitioner's ability to pay the beneficiary's \$85,000 wage during this period. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay beginning at the priority date. In this case the evidence fails to demonstrate this ability beginning at the November 16, 2000, 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.