



U.S. Citizenship
and Immigration
Services

identification, data related to
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invasion of personal privacy



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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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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:



PUBLIC COPY

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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a general **maintenance worker**. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

Counsel's transmittal letter submitted with the appeal and dated March 16, 2005, includes a request for oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, no unique factors or issues are advanced to support a request for oral argument. Consequently, the request for oral argument is denied.

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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.02 per hour, which amounts to \$37,481.60 annually. The ETA 750B, signed by the beneficiary on April 19, 2001, does not indicate that he has worked for the petitioner.

On Part 5 of the visa petition, filed on October 23, 2003, it is claimed that the petitioner was established in 1997, has gross annual income of \$366,966, and currently employs nine workers. As evidence of its continuing financial ability to pay the certified wage of \$37,481.60 per year, the petitioner provided copies of the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. These returns reflect that the petitioner files its tax returns using a standard calendar year. The tax returns contain the following information relevant to the corporate petitioner's income, assets and liabilities:

	2001	2002
Gross Receipts or Sales	\$454,529	\$366,926
Total Income	\$454,529	\$366,926
Compensation of Officers	none listed	none listed
Salaries and Wages	\$62,726	\$ 51,863
Ordinary Income ¹	-\$72,721	-\$ 63,622
Current Assets (Sched. L)	\$ 6,254	none listed
Current Liabilities (Sched. L)	\$ 651	\$ 188
Net Current Assets	\$ 5,603	-\$ 188

As noted above, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of 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 corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Along with the tax returns, the petitioner provided two letters from Bank One relating to lines of credit. The earlier letter, dated October 3, 2002 is from an assistant vice president, [REDACTED], who states that the petitioner's principal shareholder, [REDACTED] has two lines of credit totaling \$173,267. [REDACTED] adds that [REDACTED] is in the motel business, owns several motels, one of which is the Days Inn, Gopi Inc. The other letter, dated October 20, 2003, is from a banking center manager, [REDACTED] who affirms that [REDACTED] has maintained a home equity line of credit since March 1999 and currently has a line of credit for \$141,000.

The petitioner, through counsel, also provided copies of its bank statements from The Huntington Bank covering 2001, 2002, and the first eight months of 2003. Counsel further provided a copy of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and a copy of the American Immigration Lawyers Association's (AILA) liaison minutes consisting of a series of questions and answers with the Vermont Service Center, one of which relates to lines of credit. Finally, counsel submitted copies of three AAO decisions from 1992 and 1995 in which appeals were sustained despite modest incomes.

Upon review of the petitioner's net income figure of -\$63,622 revealed on the petitioner's 2002 corporate tax return, the director determined that it failed to represent a sufficient resource to pay the proffered wage. Citing the relevant guidelines set forth in the regulation and judicial precedent, the director found that the bank statement balances did not overcome the weight of the evidence as shown on the petitioner's federal tax returns. The director denied the petition on January 22, 2005.

¹ For the purpose of this review, ordinary income will be treated as net income.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel provides a copy of the petitioner's 2003 corporate tax return, which reflects that it reported net income of \$42,247. As this is sufficient to pay the proffered wage of \$37,481.60, the petitioner has established its ability to pay the certified salary in 2004.

Counsel also provides copies of unaudited financial statements covering the period ending December 31, 2004, prepared by "[REDACTED]s." An accompanying letter from [REDACTED] confirms that the financial statements represent a compilation of the petitioner's financial information. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). As noted in the accompanying letter from [REDACTED] it is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 37071 (3rd ed. 2000). As such, the 2004 unaudited financial cannot be considered as determinative of the petitioner's ability to pay a proffered salary during this year.

Counsel asserts that the director should have requested additional evidence of the petitioner's ability to pay the proffered wage in accordance with guidelines set forth in a *Memorandum by William R. Yates, Associate Director of Operations*, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (February 16, 2005), (hereinafter "Yates Memorandum"), which had rescinded an earlier memo from May 4, 2004. Counsel contends that the director failed to provide the petitioner with a reasonable opportunity to allay any of his concerns as to the petitioner's ability to pay the proffered wage, further relying on *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). Counsel states that pursuant to this memo, he would have submitted a letter from the petitioner's president and a pay stub, now provided on appeal, that would have established that the petitioner had the ability to pay the proffered wage because it had been employing the beneficiary but "has also paid or currently is paying the proffered wage" and would thus require a positive determination of the ability to pay.

This letter, dated February 1, 2005, is signed by [REDACTED], the petitioner's president, and states that the beneficiary was employed from June 1, 2004 until January 25, 2005 and has been paid \$18.02 per hour until the termination of his employment authorization on January 25, 2005. According to [REDACTED] a copy of the beneficiary's pay stub dated January 31, 2005, is attached and which represents payment of wages of \$2,450.72 for seventeen days employment during January 2005.

These assertions are not persuasive. As set forth above, there were two memos issued on May 4, 2004, by William Yates. HQOPRD 90/16.45 dealt with requests for evidence specific to employment-based petitions, as well as other adjudicative issues. The other memo was simply titled, "Requests for Evidence (RFE)," and was also dated May 4, 2004. The latter was rescinded by the February 16, 2005, Yates memorandum.

It is further noted that CIS jurisdiction includes a determination of whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to the 2005 Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.³ This similarly applies to the selected AAO cases and the American Immigration Lawyers Association (AILA) 2003 minutes from a teleconference with the Vermont Service Center, cited by counsel in support of his contentions relating to the petitioner's bank statements and credit lines provided for consideration. Moreover, in this matter, we do not find that the director should have necessarily requested additional evidence because counsel provided ample documentation, pursuant to 8 C.F.R. § 204.5(g)(2) and 8 C.F.R. 102.2(b)(8), sufficient to render a decision where there was evidence of ineligibility.

As noted above, the Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel also asserts that the director failed to properly review the petitioner's bank statements and available credit lines, which exceeded the proffered wage. Counsel contends that various earlier AAO decisions from 1992 – 2002 provide a sufficient basis to approve a petition based on bank balances and that the courts in *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985) did not bar CIS from considering additional evidence.

Counsel's reliance on the petitioner's bank statements is misplaced. 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, passed in final form in 1991, 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 other than to assert that the bank balances ought to be substituted. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements,

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

which correlate to the periods covered by the tax returns, somehow show additional available funds that would not already be reflected on the corresponding tax return.

Regarding the lines of credit referred to in the underlying record, two observations must be made. First, a line of credit that could be utilized in order to supplement the corporate petitioner's operation may, at a minimum, show a petitioner's ability to borrow money, but it cannot be considered probative evidence, standing alone, of a sustainable ability to pay a beneficiary's wage offer because it represents a potential obligation that must be repaid if it is utilized. Second, neither of the two letters submitted to the record from Bank One specifically state that any of the credit lines are held by the corporate petitioner, rather than by [REDACTED] individually. This particularly applies to [REDACTED] discussion of [REDACTED]'s home equity line of credit. The petitioner is not a sole proprietorship, but a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of Mr. [REDACTED] or any other shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.

Nor do we disagree with the director's analysis of the evidence that was provided to the underlying record. 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 the relevant 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. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no indication that the petitioner employed the beneficiary until 2004. The only first-hand evidence of the amount of wages paid to the beneficiary was provided on appeal representing his pay stub issued on January 31, 2005.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, *supra*).

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.

A second letter, dated February 1, 2005, signed by [REDACTED] and provided on appeal, also claims that a full-time general maintenance worker has been sought since 2001 because a number of part-time and independent contractors hired in the past had either proven unreliable or could not meet schedules. He explains that in 2001, approximately \$25,000 of the amount taken for salaries and wages was paid to part-timers, and that approximately \$10,000, taken as "outside services" on the tax return was paid to independent contractors, with the same being true in 2002. It is noted that before a suggestion that monies paid to various other direct employees and independent contractors could be attributed toward payment of the proffered wage, the record must clearly corroborate the identities, positions, duties, and dates and reason for termination of such employees. In this case, the record contains no specific evidence supporting such a theory. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts that pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's ability to pay the certified wage may be based on the expectations of increasing business. Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner, a six-year operation at the time of filing the petition, has presented three tax returns showing a profit in the most recent year, but significant losses in the earlier two years. It cannot be concluded that this represents a framework of success such as that discussed in *Sonogawa* or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

In this case, as noted above, the petitioner established its ability to pay the proffered wage in 2003. As referenced by the director, however, neither the petitioner's ordinary income of -\$72,721, nor its net current assets of -\$5,603 could meet the proffered wage of \$37,481.60 in 2001. In 2002, both the -\$63,622 in ordinary income and the -\$188 in net current assets could not meet the certified wage. The evidence failed to establish the petitioner's continuing ability to pay the proposed wage offer in two of the three relevant years.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning priority date of the petition as required by 8 C.F.R. § 204.5(g)(2).

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.