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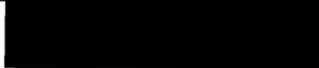
U.S. Citizenship  
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FILE:



Office: NEBRASKA SERVICE CENTER

**JUN 12 2007**

Date:

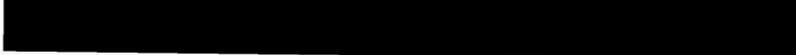
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IN RE:

Petitioner:



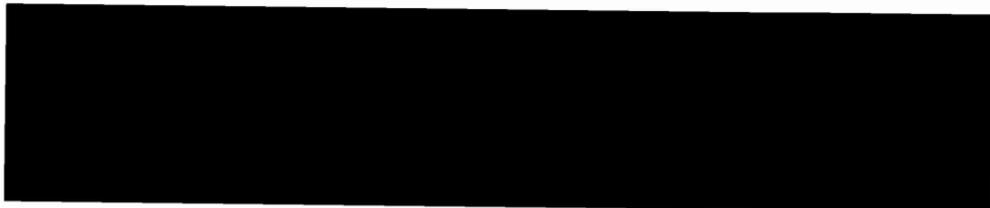
Beneficiary:



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:



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 healthcare firm. It seeks to employ the beneficiary permanently in the United States as a dental assistant. 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 director erred in failing to determine the petitioner's continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who 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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year. The ETA 750B, signed by the alien beneficiary on April 11, 2001, indicates that she has worked for the petitioner since November 1989.

The visa petition was filed on June 22, 2005. As evidence of its continuing financial ability to pay the certified wage of \$25,000 per year, the petitioner provided copies of the principal shareholder's individual 2001-2003 tax returns, as well as copies of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, and 2004. They indicate that the petitioner files its taxes using a standard calendar year. The tax returns contain the following information:

	2001	2002	2003	2004
Net taxable income before				
net operating loss and special deductions <sup>1</sup>	-\$7,724	-\$2,810	\$3,081	-\$ 377
Current Assets (Schd. L)	\$8,977	\$6,315	\$9,732	\$4,520
Current Liabilities (Schd. L)	\$ -0-	\$ -0-	\$ -0-	\$ -0-

<sup>1</sup> For the purpose of this review, net taxable income before net operating loss and special deductions will be treated as net income.

Net Current Assets	\$8,977	\$6,315	\$9,732	\$4,520
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As noted in the above table, besides net income and 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.<sup>2</sup> Net current assets are the difference between the petitioner’s current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner’s year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. 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.

In response to a request for additional evidence from the director, the petitioner additionally submitted copies of selected bank statements for four months in 2001, 2002, 2003 and 2004, and for three months in 2005. These statements are accompanied by a list of medical supplies and a list of office furniture and equipment valued at \$87,525 and \$36,893, respectively as of September 28, 2005. Finally, the petitioner provided a copy of a preliminary opinion of value of its building shown to be \$450,000 in 2003.<sup>3</sup>

The director denied the petition on November 2, 2005. He determined that the petitioner had failed to establish its continuing ability to pay the proffered wage beginning at the priority date because either its net income or net current assets were insufficient to demonstrate that it had sufficient funds to pay the certified salary in 2001, 2002, 2003, and 2004. The director further noted that the copies of the selected bank statements provided do not provide a sustainable demonstration of the petitioner’s ability to pay the proffered wage and, with the documentation of the petitioner’s other assets, are considered to be already included on the Schedule L balance sheet of the relevant tax return listing the petitioner’s assets.

On appeal, counsel asserts that the petitioner’s bank statements make a clear showing that it has had the continuing ability to pay the proffered wage on a monthly basis. Counsel also asserts that the petitioner’s real property assets should be considered as substantial evidence of the petitioner’s financial viability.

Relying on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel also contends that the petitioner may reasonably assume that its business will continue to increase, as well as its profits. Counsel maintains that the petitioner is undergoing significant growth in that the expansion of the office will accommodate a larger number of patients and will increase profit.

Counsel cites *Matter of Sonogawa* for the proposition that the petitioner is experiencing significant growth and should be able to establish its ability to pay the proffered wage because its expectations of increasing profits support its future prospects for success. In *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner’s ability to pay the proffered wage. That case, however, related 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

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

<sup>3</sup> Counsel’s transmittal letter also notes that its present value is \$600,000.

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 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 matter, the record does not support counsel's contention that the petitioner is experiencing significant growth. Between 2001 and 2004, its gross income increased from approximately \$97,000 to \$105,000 or approximately 7.5 percent. It has reported negative net income in three out of the four years of tax returns provided to the record and its net current assets have declined from approximately \$9,000 in 2001 to \$4,500 in 2004. The four tax returns submitted to the record do not form a framework of profitable years analogous to the situation in *Sonegawa*. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Counsel's reliance on the petitioner's selected 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 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 portrait of the petitioner's financial profile. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. 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. As referenced above, cash assets and inventory 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, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding 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 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will also be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this matter, the record indicates that the petitioner has employed the beneficiary, but did not provide any documentation of the amount of compensation which has been paid.

If the petitioner does not establish that it may have 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 (or net current assets) 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 (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)). 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.

In addition to net income, CIS will review a petitioner's net current asset as explained above. We reject, however, counsel's assertion that the petitioner's building, which is considered a longer term and real property asset and not readily available to pay the proffered wage 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, such as the building, 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, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

As set forth above, in 2001, neither the petitioner's net income of -\$7,724 nor its net current assets of \$8,977 was sufficient to cover the proffered wage of \$25,000. The petitioner has not demonstrated its ability to pay the proposed wage offer in this year.

In 2002, neither the petitioner's -\$2,810 in reported net income nor its \$6,315 in net current assets could have covered the certified wage. The petitioner has not established its financial ability to pay the proffered wage for this year.

In 2003, neither the petitioner's reported \$3,081 in net income nor its \$9,732 in net current assets could provide sufficient funds to pay the beneficiary's proposed wage offer of \$25,000. The petitioner did not establish its ability to pay the proffered salary in 2003.

Finally, in 2004, the petitioner's declared net income of -\$377 was insufficient to pay the proposed wage. Similarly, its net current assets of \$4,520 was \$20,480 less than the proffered wage. The petitioner did not demonstrate its ability to pay the proffered wage in 2004.

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 beginning as of 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.