

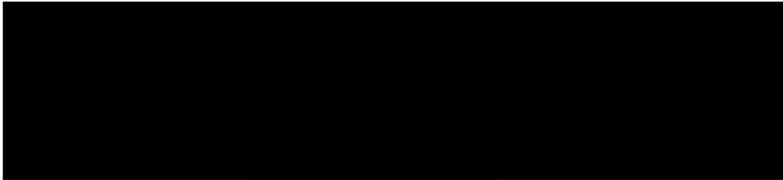


U.S. Citizenship
and Immigration
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File: [Redacted]
EAC-04-136-50035

Office: VERMONT SERVICE CENTER

Date: JAN 07 2008

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

IN 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 Center Director (Director), Vermont Service Center, denied the immigrant visa petition. The matter 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 computer software (systems software) engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 8, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The instant petition is for a substituted beneficiary.¹ Here, the original Form ETA 750 was accepted on March 4, 2001. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. Form ETA 750 requires a Bachelor's degree or equivalent in Computer Science, Mathematics or Engineering and either two years of experience in the job offered or two years of experience in related occupations of Programmer Analyst, Senior Software Programmer or Software Programmer. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$260,000, and to currently have four employees. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on March 11, 2004, the beneficiary did not claim to have worked for the petitioner.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Relevant evidence in the record includes the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 through 2004, bank statements for the petitioner's business account covering October –December 2003 and August 2004, and the beneficiary's W-2 forms and paystubs. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, counsel asserts that the petitioner had the ability to pay the proffered wage and submits new evidence to support his assertions.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

instant case, the petitioner submitted the beneficiary's W-2 forms for 2003, however, neither of them was issued by the petitioner but by Cisco Systems, Inc. and American Unit Inc. The beneficiary's submitted paystubs show that the petitioner paid the beneficiary \$18,750 from September 1, 2004 until November 30, 2004. Although the paystubs show that the petitioner paid the beneficiary at the rate of \$3,125 semimonthly which equals the proffered wage of \$75,000 per year, counsel does not provide the beneficiary's W-2 form for 2004, and thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2004. Therefore, the petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001 through 2003, and also to demonstrate that it could pay the difference of \$56,250 between wages actually paid to the beneficiary and the proffered wage in 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). Counsel asserted in response to the director's request for evidence that the petitioner grossed more than \$927,000 in 2001 and \$266,000 in 2002 and paid more than \$392,000 in 2001 and \$137,000 in 2002 in wages. Counsel's reliance on the petitioner's gross income and wage expenses is misplaced. Showing that the petitioner's gross sales and profits 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's tax returns for 2001 through 2004. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$75,000 per year from the priority date in 2001 to 2003 and the difference of \$56,250 between wages actually paid to the beneficiary and the proffered wage in 2004:

- In 2001, the Form 1120 stated a net income³ of \$46,833.
- In 2002, the Form 1120 stated a net income of \$(97,654).
- In 2003, the Form 1120 stated a net income of \$(297,795).
- In 2004, the Form 1120 stated a net income of \$119,141.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the proffered wage, however, the petitioner has established that it had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2004.

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. The petitioner's reliance on net assets in determining its ability to pay the proffered wage is also misplaced. 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.⁴ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$(34,883)⁵.
- The petitioner's net current assets during 2002 were \$(109,154).
- The petitioner's net current assets during 2003 were \$(227,995)⁶.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁴According 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.

⁵ The petitioner did not submit its complete tax return for 2001. We take the figures from the petitioner's 2002 tax return Schedule L and treat the figures for beginning of the 2002 tax year as the one at the end of 2001 tax year.

⁶ The petitioner did not submit its complete tax return for 2001. We take the figures from the petitioner's 2002 tax return Schedule L and treat the figures for beginning of the 2002 tax year as the one at the end of 2001 tax year.

of the priority date in 2001 to 2003 through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. On appeal counsel also submits the petitioner's bank statements for its business checking accounts covering some months of 2003 and August 2004. Counsel's reliance on the balances in its bank checking 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 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

In addition, the petitioner filed another six Immigrant Petitions for Alien Worker (Form I-140) for five more workers in 2004 and 2005⁷ and one of them has been approved. The petitioner must show that it had sufficient income to pay all the wages from each of the priority dates to the date each of the sponsored beneficiaries obtains permanent residence. However, the petitioner failed to establish its continuing ability to pay the proffered wage not only to all five beneficiaries, but also to the instant beneficiary. Furthermore, the petitioner claimed on the I-140 form that it employed 4 workers at that time while in the response to the request for evidence counsel mentioned in one place that the petitioner "currently employs 30 employees" but in another place said "15-20 employees." However, CIS records show that the petitioner has filed 383 non-immigrant and immigrant cases for recent years from 2003 to 2006. That casts doubt not only on the petitioner's ability to pay but also on the petitioner's reliability with respect to its material representation.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), 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 2001 through 2003 were uncharacteristically unprofitable years for the petitioner in its

⁷ EAC-04-091-50587 on February 2, 2004; EAC-05-056-53188 on December 13, 2004; EAC-05-252-52734 on August 31, 2005; EAC-06-003-50920 on September 26, 2005; EAC-06-005-50384 on September 27, 2005; and EAC-06-036-50332 on November 15, 2005 which was approved on May 24, 2006.

framework of profitable or successful years. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and does not have the ability to pay the proffered wage.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.