U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 168 54484 Office: CALIFORNIA SERVICE CENTER Date: SEP 16 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[redacted]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a travel and tour services company. It seeks to employ the beneficiary as a secretary II. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel provides a brief.

In pertinent part, Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on November 10, 1998. The proffered salary as stated on the labor certification is $2,454.40 per month or $29,452.80 per year.

With the petition, counsel submitted a copy of the petitioner's 1998, 1999, and 2000 Forms 1120S, U.S. Income Tax Return for an S Corporation. These tax returns reflected ordinary incomes of $22,098, $23,977, and $26,740, respectively. They also reflected net current assets of $64,072, $54,094, and $65,128, respectively. The director considered this documentation insufficient and on July 5, 2002, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of November 10, 1998 and continuing to the present. The director specifically requested financial documentation for the tax years 1998, 1999, and 2001 to be in the form of copies of annual reports, copies of federal tax returns including all schedules and tables (with appropriate signature(s)), or audited financial statements. The director also requested copies of the petitioner's Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the state of California as well as job titles and descriptions for each employee.

In response, counsel submitted signed copies of the petitioner's previously submitted tax returns, a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, and copies of Forms DE-6 for the quarters ended September 30, 2001, December 31, 2001, March 31, 2002, and June 30, 2002. The 2001 tax return reflected an ordinary income of $23,139 and net current assets of $99,576. The Forms DE-6 reflected two employees during that time period.

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 December 23, 2002, denied the petition. The director noted that Service records show that the petitioner filed another I-140 in 1999 with a priority date of August 2, 1995 that had already been approved and that the wages for that beneficiary must be deducted from the ordinary income on the tax returns.

On appeal, counsel states:

> The regulations' endorsement of use of tax returns appears to be a statement of long practice which has been endorsed by the courts. See Tongatapu Woodcraft Hawaii v. Feldman, 736 F.2nd 1305 (9th Cir 1984); Elatos Restaurant v. Sava, 632 F.Supp. 1049 (SDNY 1986). However, the Service is not to slavishly follow the "bottom line" on the tax returns; it is possible for a petitioner to show ability to pay the proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612 (Acting Reg. Comm. 1967).
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> The business has clearly made a profit sufficient to pay the proffered wage. However, it is reasonable to assume that the owner would want to pay herself a living wage from those profits. Fortunately, Congress has stated in the Act what it considers to be a reasonable sum: 125% of the Federal Poverty Guidelines. This is now $11,075 per year for a single person. Even when deducting this amount, the profit of the business is sufficient to pay all or nearly all the proffered salary.
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> The petitioner has claimed depreciation deductions. However, it should be noted that the tax returns show that the deductions are in large part **not** for business fixtures and equipment; rather they are for automobiles. This is a deduction which is susceptible to manipulation without difficulty. Although the petitioner had to have the **ability** to pay the proffered wage from November 1998, they were not **allowed** to actually pay the wage for a simple reason: the alien beneficiary could not be lawfully employed during that time. Due to this simple fact, the money available for the **unavailable** employee could be diverted to other uses.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at the priority date and continuing to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Counsel cites *Matter of Sonegawa, supra.* as a means of determining the ability to pay the proffered wage. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* 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 *Sonegawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner.

The 1998 tax return reflects an ordinary income of $22,098 and net current assets of $64,072. The petitioner could pay the proffered wage from the net current assets.

The 1999 tax return reflects an ordinary income of $23,977 and net current assets of $54,094. The petitioner could pay the proffered wage from the net current assets.

The 2000 tax return reflects an ordinary income of $26,740 and net current assets of $65,128. The petitioner could pay the proffered wage from the net current assets.

The 2001 tax return reflects an ordinary income of $23,139 and net current assets of $99,576. The petitioner could pay the proffered wage from the net current assets.

While it appears that the petitioner has established its ability to pay the proffered wage from the priority date and continuing to present, there is the issue, as noted by the director, of the ability to pay the beneficiary petitioned for in 1999. The priority date for the prior beneficiary is August 2, 1995, and since the Forms DE-6 do not show the prior beneficiary as being employed by the petitioner, it must be assumed that the prior beneficiary has not begun work for the petitioner. Therefore, the petitioner must show that it had sufficient income to pay both of the wages at the priority date and continuing to present. In addition, since the petitioner has failed to respond to this issue in the director's denial, the petitioner has not established its ability to pay the proffered wages from the priority date and continuing to the present.

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.