

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

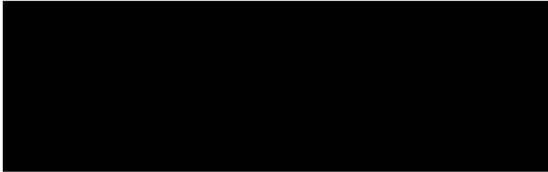
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

PUBLIC COPY

B5



FILE:



Office: TEXAS SERVICE CENTER Date:

APR 15 2009

SRC 07 267 50023

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on certification pursuant to 8 C.F.R. § 103.4. The director's decision will be affirmed.

The petitioner is an interior shutter manufacturer. It seeks to employ the beneficiary permanently in the United States as a marketing manufacturing interface strategist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from 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 and denied the petition accordingly. The director reaffirmed that decision on motion and certified that decision to the AAO pursuant to 8 C.F.R. § 103.4. In accordance with that provision, the petitioner was advised that it could submit a brief to the AAO within 30 days. 8 C.F.R. § 103.4(a)(2).

On certification, counsel submits a brief and additional evidence. Primarily, counsel asserts that the petitioner should have been permitted to add back depreciation deductions to its net income and that the director should have taken into account that the petitioner was amending its taxes. For the reasons discussed below, we affirm the director's decision.

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 either 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 the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 27, 2004. The proffered wage as stated on the Form ETA 750 is \$45,219 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2002.

On the petition, the petitioner claimed to have an establishment date in 1989. The petitioner did not list its gross annual income or net income. The petitioner indicated that it had 45 employees. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for the years 2004 through 2006.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 6, 2008, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested evidence of wage payments made to the beneficiary.

In response, the petitioner submitted IRS Form W-2 Wage and Tax Statements issued by the petitioner to the beneficiary in 2004 through 2007. The petitioner also submitted its 2007 tax return. Finally, the petitioner submitted a joint letter from its Chief Financial Officer (CFO) and controller addressing the company's finances as stated on the tax returns.

The tax returns reflect the following information for the following years:

	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Net income	(\$71,835)	(\$373,097)	(\$68,830)	(\$73,464)
Current Assets	\$819,701	\$816,090	\$688,063	\$781,273
Current Liabilities	\$645,616	\$1,205,854	\$675,752	\$987,824
Net current assets	\$174,085	(\$209,764)	\$12,321	(\$206,551)

The Forms W-2 reflect the following:

	<u>Wages Paid</u>	<u>Proffered Wage Less Wages Paid</u>
2004	\$35,189.44	\$10,029.56
2005	\$22,355.48	\$22,863.52
2006	\$33,375.80	\$11,843.20
2007	\$35,942.81	\$9,276.19

The joint letter from [REDACTED] the petitioner's CFO and [REDACTED], the petitioner's controller, address the petitioner's net losses and high current liabilities in 2005. Specifically, they state that the loss of \$373,097 included a deduction of \$151,723 "that required no cash outlay in the tax year." Regarding the petitioner's current liabilities, the letter asserts that the liabilities include a \$184,317 customer deposit that represents unearned income, and not a liability. In addition, the letter asserts that the current liability of \$380,000 represents an automatically renewable \$425,000 line of credit loan that would not have been expected to be immediately repayable. The letter explains that in 2006, the loan was converted to long term debt and placed on an amortization schedule over seven years. Finally, the letter asserts that the remaining amount on the credit line could have been advanced to pay the proffered wage. The petitioner submitted a January 6, 2005 \$200,000 line of credit and a November 8, 2006 extension on a September 30, 2002 loan with a balance of \$200,000 after a payment of \$200,000.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage in 2005 and 2007, and, on November 6, 2008, denied the petition.

On December 8, 2008, the petitioner filed a motion to reopen and reconsider the director's decision asserting that the total circumstances, including the petitioner's actual income, accounting practices, cash flow, line of credit and ability to generate income, should be taken into consideration. The petitioner submitted six expert opinions in support of the motion.

██████████, former Chief Counsel Attorney for the IRS, asserts that non-cash deductions, such as depreciation, should be added back to taxable income. In addition, ██████████s asserts that non-allowable expenditures, such as 50 percent of travel and entertainment costs, should be subtracted. ██████████ explains that the IRS performs such an analysis in determining a taxpayer's ability to pay in collection actions. ██████████, Oklahoma Bankers Association Chair of Commercial Bank Management at Oklahoma State University, asserts that adding back depreciation is an acceptable practice to determine cash flow and is used in determining loan eligibility. ██████████, an accounting professor at Oklahoma State University, asserts that cash flow is more relevant than net income in determining a company's ability to meet its obligations. ██████████ President of ██████████, asserts that the petitioner had liquidity of \$20,211.42 at ██████████ in 2005. ██████████ notes that the line of credit was refinanced from long term to short term debt in 2006.

██████████, the petitioner's certified public accountant (CPA), asserts that errors were made on the petitioner's tax returns and that he will be filing amended returns to reflect those errors. Notably, ██████████ asserts that the customer deposits listed as current liabilities were generally nonrefundable, have never been refunded in the last ten years and, thus, should have been recorded as sales in the year received. Finally, ██████████ attests to the beneficiary's importance to the petitioning company.

The director concluded that it was not appropriate to add back depreciation and that the petitioner had not demonstrated that 2005 and 2007 were unusual years or that the losses resulted from nonrecurring events.

On certification, the petitioner submits a new letter from ██████████ asserting that the federal court cases cited by the director are not on point, unaudited statements of cash flows and amended federal tax returns. The amended returns for 2005 and 2007, the two years at issue, now provide:

	2005	2007
Net income	(\$71,409)	\$875
Current Assets	\$816,090	\$682,734
Current Liabilities	\$841,537	\$694,281
Net current assets	(\$25,447)	(\$11,547)

The cash flow statements, however, reflect higher “indicated cash flow” by adding back in depreciation.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any year. The difference between the proffered wage and wages paid were \$10,029.56 in 2004, \$22,863.52 in 2005, \$11,843.20 in 2006 and \$9,276.19 in 2007.

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, USCIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner’s ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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. 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 USCIS, 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.

On certification, [REDACTED] asserts that the federal cases cited by the director and above are not on point. In *River Street Donuts, LLC*, 2009 WL 531874 (1st Cir. 2009), the employer asserted that the AAO had abused its discretion by not adding back depreciation to the net income reflected on the tax returns. *Id.* at *3. The court noted that the AAO had explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. *Id.* at *6. The court concluded that the AAO had articulated a rational explanation for not adding back depreciation. *Id.*

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a proffered wage. 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, USCIS will review the petitioner’s assets. We reject, however, any argument that the petitioner’s total assets should be 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 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, USCIS 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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.

In 2004 and 2006, the petitioner shows sufficient net current assets to cover the difference between wages paid and the proffered wage. The petitioner must demonstrate an ability to pay the difference of \$22,863.52 in 2005 and \$9,276.19 in 2007. In 2005, even if we consider the amended returns, the petitioner shows a net loss and negative net current assets. In 2007, even if we consider the amended returns, the petitioner shows a net income of only \$875 and negative net current assets. The amount of \$875 cannot cover the \$9,276.19 difference between the proffered wage and wages paid in 2007. For the reasons stated above, we will not add back the depreciation deductions.

In addition, the petitioner's line of credit will not be considered. The petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and *audited* cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l. Comm'r. 1977). Regardless, the credit line has only been advanced as available to pay the proffered wage in 2005, not 2007.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg'l. Comm'r. 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

¹ 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.

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.

The petitioner in this case has not demonstrated that 2005 and 2007 were unusual years. In fact, the petitioner shows a net loss in every year from 2004 through 2007.

In light of the above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond the petitioner's net income and net current assets.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005 and 2007. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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 sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The petition is denied.