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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 210 50356 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Herbalife products distributor corporation. It conducts recruitment and training of distributors. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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.

On appeal, the petitioner submits a brief and additional evidence.

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, 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. 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).

Here, the Form ETA 750 was accepted on October 7, 1999. The proffered wage as stated on the Form ETA 750 is $62,940.80 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 1999, 2000, and 2001; a letter of support; a tax registration; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director issued a notice of intent to deny the petition on May 12, 2004, and, requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

In response to the notice of intent to deny, the petitioner submitted an explanatory letter from petitioner, and, documentation relating to the Alien Employment Application and its certification.

The director denied the petition on June 21, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that even though that the petitioner does not have the taxable income to pay the proffered wage, in the factual circumstances of the case, U.S. Citizenship and Immigration Services (CIS) should analyze the totality of the petitioner's circumstances to determine the ability to pay the proffered wage. The petitioner contends that the denial of the preference petition will cause extreme hardship for petitioner in its business. The petitioner states that he would use his personal assets to pay the proffered salary as well as use cash for items now expensed by the corporation.

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. No evidence was submitted to show that present wages of the beneficiary although he was in H1B1 status at the time of the preparation of the petition and employed as a market research analyst.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $62,940.80 per year from the priority date of October 7, 1999:

- In 1999, the Form 1120 stated taxable income[1] of $39,464.00.
- In 2000, the Form 1120 stated taxable income of $14,618.00.
- In 2001, the Form 1120 stated taxable income of $16,962.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage as demonstrated above. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 1999 through 2001 for which the petitioner's tax returns are offered for evidence.

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[1] Form 1120, Line 28.

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.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 1999, petitioner's Form 1120 return stated current assets of $9,423.00 and $14,733.00 in current liabilities. Therefore, the petitioner had <$5,310.00>[3] in net current assets. Since the proffered wage was $62,940.80 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of $11,078.00 and $4,000.00 in current liabilities. Therefore, the petitioner had $7,078.00 in net current assets. Since the proffered wage was $62,940.80 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of $16,295.00 and $9,068.00 in current liabilities. Therefore, the petitioner had $7,227.00 in net current assets. Since the proffered wage was $62,940.80 per year, this sum is less than the proffered wage.

Therefore, for the period 1999 through 2001 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets. According to regulation,[4] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner asserts on the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date by employing the beneficiary and replacing existing advertising agencies and Internet services that the petitioner utilized. Compensation already paid to others is not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the services involve the same duties as those set forth in the Form ETA 750. If the outside contractors performed other kinds of work, then the beneficiary could not have replaced them. Further, in this instance, the corporation has provided no detail or documentation to explain how the beneficiary's employment as a market research analyst will significantly increase petitioner's profits since the beneficiary has been employed by the petitioner in that position since February 1999. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Proof of ability to pay begins on the priority date, that is October 7, 1999, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor.

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items havi (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Curre liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payabl and accrued expenses (such as taxes and salaries). *Id.* at 118.

[3] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

[4] 8 C.F.R. § 204.5(g)(2).

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 1999, 2000 and 2002. For the years 1999 through 2001, the taxable income for the petitioner varied from $1.5 million in 1999, to $1.3 million in 2000, and, to $1.4 million in 2001. The net current asset value for those years was negligible, with compensation of officers amounting to approximately 45% of gross revenues. No employee listing was provided but the I-140 petitioner stated that the company had three employees in November 2002. There is evidence that salary expense doubled during those years, but relative to officer compensation of up to $792,300.00/year, the total of all salaries paid averaged $45,632 during the three reported years or $15,210.67 for each of the three employees. The beneficiary is now employed in H1B status with the company in the preference occupation above noted. The proffered wage of $62,940.80 per year is almost four times the current average salaries paid. According to the petitioner, the company is experiencing "rapid growth", but according to the gross revenues reported, its sales have been in the $1.4 million range for three years with no growth apparent.

Matter of Sonegawa, 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 *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.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. By the evidence presented is not a viable business that has proved its ability to pay the proffered wage.

The petitioner's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of 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.