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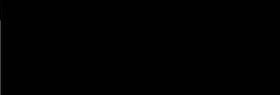
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: DEC 28 2006

WAC 04 027 52797

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an internet technology company. It seeks to employ the beneficiary permanently in the United States as a computer software engineer-applications. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 September 20, 2004 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, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.¹

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 DOL. 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 DOL 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 May 29, 2001. The proffered wage as stated on the Form ETA 750 is \$83,810.00 per year. The Form ETA 750 states that the position requires five years of college, a masters degree in engineering, computer science or math, and one year of experience in the job offered.

¹ On the petition, the petitioner indicated that the petition was being filed for a skilled worker or professional.

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 appeal.² On appeal, counsel submits a brief, the beneficiary's previously submitted IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2001, 2002 and 2003, the beneficiary's paystubs for May 2001 through September 2004 issued by the petitioner, the petitioner's bank statements for May 2001 through September 2004, a spreadsheet detailing the beneficiary's salary from the petitioner and the petitioner's bank balances, a letter from the petitioner's controller detailing the health benefit costs the petitioner paid on behalf of the beneficiary in 2001, 2002, 2003 and 2004, copies of billing statements for the beneficiary's health benefits paid by the petitioner for 2004, a copy of an Interoffice Memorandum dated May 4, 2004 by William R. Yates, Associate Director of Operations, Citizenship and Immigration Services (CIS), entitled *Requests for Evidence (RFE)*, the petitioner's quarterly payroll records dated June 30, 2004 and the petitioner's previously submitted IRS Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, for 2003. Relevant evidence in the record includes a letter dated April 21, 2004 from the petitioner's Chief Financial Officer, an undated letter from the petitioner's Chief Executive Officer, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2001 and 2002, and the petitioner's audited financial statements for 2000, 2001 and 2002.³ 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. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$500,000.00, and to currently employ 18 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 15, 2001, the beneficiary claimed to have worked for the petitioner as a software engineer from June 2000 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the beneficiary's IRS Forms W-2 do not reflect the beneficiary's entire gross pay because of certain non-taxable deductions. Counsel states that the beneficiary's actual compensation was \$80,000.00 per year for each relevant year. Counsel also asserts that its bank balances representing its cash on hand should be considered in the determination of the petitioner's ability to pay the proffered wage. Further, counsel asserts that the petitioner made health and life insurance payments for the benefit of the beneficiary and that these payments should be considered in the determination of the petitioner's ability to pay the proffered wage. Citing an Interoffice Memorandum dated May 4, 2004 by William R. Yates, Associate Director of Operations, CIS, entitled *Determination of Ability to Pay Under 8 CFR § 204.5(g)(2)*, counsel states that the director's denial of the petitioner's petition where the petitioner has established that it paid the beneficiary less than the full proffered wage, but has documented its ability to pay with cash resources, was an abuse of discretion. Citing *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), counsel also states that the totality of the circumstances supports the conclusion that the petitioner is a viable entity

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).

³ This office notes that the petitioner's financial statements are consolidated statements and include the accounts of the petitioner and its wholly-owned subsidiary, Sentius International Corporation. Further, the petitioner's tax returns are consolidated returns and include the accounts of the petitioner's wholly-owned subsidiary, Sentius International Corporation.

that has and will continue to have the capability of employing the beneficiary. Counsel asserts that the petitioner was established in 1993, that it employs 22 workers, that its 2003 payroll was in excess of \$1,200,000.00 and that approximately \$18,000,000.00 has been invested in the petitioner to fund the development of software applications. Counsel also cites two non-precedent AAO cases for the proposition that cash on hand in bank accounts may establish the petitioner's ability to pay the proffered wage. Finally, counsel states that two cases cited by the director in his decision, *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), have little similarity to the instant case.

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, 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 instant case, the beneficiary's IRS Forms W-2 and payroll records for 2001, 2002 and 2003 show compensation received from the petitioner, as shown in the table below.⁴

- In 2001, the Form W-2 and payroll records stated compensation of \$79,166.70.
- In 2002, the Form W-2 and payroll records stated compensation of \$80,000.04.
- In 2003, the Form W-2 and payroll records stated compensation of \$80,000.04.

Therefore, for the years 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$83,810.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$4,643.30, \$3,809.96 and \$3,809.96 in 2001, 2002 and 2003, respectively.

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

⁴ On appeal, counsel asserts that the petitioner made health and life insurance payments for the benefit of the beneficiary and that these payments should be considered in the determination of the petitioner's ability to pay the proffered wage. Pursuant to a letter from the petitioner's controller detailing the health benefit costs the petitioner paid on behalf of the beneficiary, the beneficiary received the petitioner's standard benefits package, including paid health, dental and life insurance. Therefore, these payments will be considered in the determination of compensation received by the beneficiary from the petitioner for each relevant year.

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).⁵ Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 22, 2004 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny.⁶ The petitioner's income tax return for 2002 is the most recent return provided by the petitioner. The petitioner's tax returns demonstrate its net income for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$4,385,527.00.
- In 2002, the Form 1120 stated net income of -\$2,770,542.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the 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, CIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 tax returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$2,061,777.00.

⁵ On appeal, counsel states that two cases cited by the director in his decision, *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), have little similarity to the instant case. However, both cases stand for the proposition that CIS may rely on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage.

⁶ This office notes that despite the director's request that the petitioner provide its 2003 federal income tax return, the petitioner did not provide its 2003 return and stated that it was unavailable. The petitioner's 2003 federal income tax return was due on March 15, 2004, and the petitioner provided no evidence to establish that it had requested an extension of time to file the return. Therefore, the petitioner's net income and net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 2003.

⁷ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2002, the Form 1120 stated net current assets of -\$2,313,335.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that its bank balances representing its cash on hand should be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel cites two non-precedent AAO cases for the proposition that cash on hand in bank accounts may establish the petitioner's ability to pay the proffered wage.⁸ Citing an Interoffice Memorandum dated May 4, 2004 by William R. Yates, Associate Director of Operations, CIS, entitled *Determination of Ability to Pay Under 8 CFR 204.5(g)(2)*, counsel states that the director's denial of the petitioner's petition where the petitioner has established that it paid the beneficiary less than the full proffered wage, but has documented its ability to pay with cash resources, was an abuse of discretion. Counsel's reliance on the balances in the petitioner's bank accounts 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 paints an inaccurate financial picture of the petitioner. Further, 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 returns, 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.

Counsel also states on appeal that the totality of the circumstances supports the conclusion that the petitioner is a viable entity that has and will continue to have the capability of employing the beneficiary. CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the

⁸ 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).

occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner was established in 1993, that it employs 22 workers, that its 2003 payroll was in excess of \$1,200,000.00 and that approximately \$18,000,000.00 has been invested in the petitioner to fund the development of software applications. However, the petitioner has not established the historical growth of its business, as its petitioner's gross receipts were \$328,954.00 in 2001 and \$304,155.00 in 2002. The petitioner's payroll and tax records show that it had between 15 and 22 employees in the second quarter of 2004, and that it paid salaries and wages of \$2,413,540.00 in 2001, \$1,729,721.00 in 2002 and \$1,238,017.23 in 2003. The record does not establish the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry. Further, while the petitioner's Chief Executive Officer claims that the petitioner closed on \$10,000,000.00 in equity financing in 2000, that it has currently received \$4,500,000.00 in funded stock subscriptions and that it has \$2,000,000.00 in subscribed capital left for distribution, the petitioner has provided no evidence, such as executed stock subscription agreements, to support this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Finally, while the petitioner's Chief Executive Officer states that its investors will provide the petitioner with operating capital until the petitioner becomes profitable, CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage.⁹ Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel'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 DOL.

The evidence submitted does not establish that the petitioner 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 met that burden.

ORDER: The appeal is dismissed.

⁹ The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."