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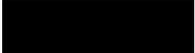
U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 22 2005

WAC-03-066-55637

IN RE:

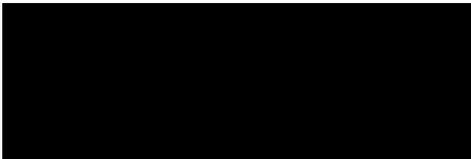
Petitioner:



Beneficiary:

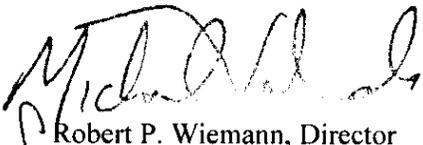
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner provides health care services and is involved in trading. It seeks to employ the beneficiary permanently in the United States as a respiratory therapist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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.

On appeal, counsel 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 27, 1997. The proffered wage as stated on the Form ETA 750 is \$18.00 per hour, which amounts to \$37,440 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$1,200,000, and to currently employ 34 workers. In support of the petition, the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Returns, for the years 1999, 2000, and 2001.

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 April 3, 2003, 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 specifically requested the petitioner's 1997-2002 corporate tax returns; evidence of the beneficiary's employment and financial status; the petitioner's quarterly wage reports for the last four quarters; and payroll records.

In response, the petitioner submitted its corporate tax returns on Form 1120 for the years 1997, 1998, 1999, 2000, and 2001, and an unaudited profit and loss statement for 2002. The tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	\$20,010	\$18,527	\$49,799	\$54,333	\$35,509
Current Assets	\$4,784	\$10,338	\$37,762	\$591,900	\$648,191
Current Liabilities	\$0	\$54,600	\$89,097	\$78,978	\$175,582
Net current assets	\$4,784	-\$44,270	-\$51,335	\$512,922	\$472,609

In addition, counsel submitted copies of [redacted] Inc.'s quarterly wage reports for the first quarter in 2003 and last three quarters in 2002 and its W-3 forms evidencing its total wages paid to employees from 1997 to 2002. The quarterly wage reports and individual income tax returns do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 July 28, 2003, denied the petition. The director determined that the petitioner had established its ability to pay the proffered wage in 2000 and 2001, but not in 1997, 1998 or 1999. In 1999, the director noted that the petitioner filed multiple petitions for other sponsored immigrants but could support one proffered wage out of its net income. The director also noted that the petitioner's related entities had multiple petitions pending.

On appeal, counsel asserts that when non-cash deductions, such as depreciation, officer's compensation, and cash assets, are added back to the petitioner's net income, the petitioner can demonstrate its ability to pay the proffered wage in 1998 and 1999. The petitioner submits an accountant's report on appeal to support that assertion. Additionally, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the premise that Citizenship and Immigration Services (CIS) should not only consider tax returns but all financial factors and circumstances of the petitioner's case. Counsel also asserts that the petitioner did not have the obligation to pay any wages until each sponsored immigrant obtains lawful permanent resident status; therefore, counsel asserts that the director erred in considering multiple pending petitions against the petitioner's net income. Finally, counsel asserts that the director erred by failing to consider the beneficiary's ability to generate income and cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

At the outset, the unaudited financial statements that counsel submitted for 2002 in response to the director's request for additional evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the petitioner's profit and loss statement for 2002 will not be considered.

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

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 1997, 1998, 1999, 2000, or 2001.

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). 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 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. Thus, contrary to counsel's assertions on appeal, CIS will not add the petitioner's non-cash deductions back to its net income.

The petitioner's net incomes in 1997, 1998, and 2001 of \$20,010, \$18,527, and \$35,509, respectively, are all less than the proffered wage. Only the petitioner's net incomes in 1999 and 2000 of \$49,799 and \$54,333, respectively, are greater than the proffered wage. Thus, the petitioner can demonstrate its continuing ability to pay the proffered wage out of its net income in 1999 and 2000, but only if it does not have too many other petitions pending. It cannot demonstrate its ability to pay the proffered wage out of its net income in 1997, 1998, or 2001 because its net incomes are less than the proffered wage in each year.

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, 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. 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.² 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 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. The

² 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.

petitioner's net current assets in 1998 and 1999, however, were negative, and only \$4,784 in 1997. Thus, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net current assets in 1997, 1998 or 1999. Depending on how many other immigrants it sponsored in 2000 and 2001, the petitioner's net current assets of \$512,922 and \$472,609 in each year respectively, may illustrate its continuing ability to pay the proffered wage.

The AAO has accessed an internal database and determined that the petitioner or its affiliated companies filed four other immigrant petitions in 1997 that are still pending; one additional immigrant petition in 1998 that was approved; filed no additional petitions in 1999, 2000 and 2001; filed two petitions in 2002 that are still pending; and filed two petitions in 2003 that were denied. Contrary to counsel's assertion, a petitioner must show its ability to pay the proffered wage beginning on a priority date and continuing until the immigrant obtains lawful permanent residence. While it may not have to actually pay those wages, it must show that it can. Thus, the petitioner must have enough funds to support the wages of all sponsored immigrants in each year, whether those petitions are pending or finally adjudicated. The AAO will assume, since it does not have files or evidence from the petitioner concerning the other cases, that the proffered wages in each of the other petitions pending are similar to the wage in the instant case. Thus, the petitioner must establish that it can pay five wages in 1997, three wages in 1998; two wages in 1999, 2000, and 2001; and four wages in 2002³.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 1997, 1998, 1999, 2000, or 2001. In 1997, the petitioner shows a net income of only \$20,010 and net current assets of only \$4,784 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets, especially since it would be obligated to pay five salaries in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997.

In 1998, the petitioner shows a net income of only \$18,527 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets, especially since it would be obligated to pay two salaries in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1998.

In 1999, the petitioner shows a net income of \$49,799 and negative net current assets. Neither its net income nor net current assets could cover two proffered wages and thus the petitioner cannot demonstrate its ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has, therefore, not shown the ability to pay the proffered wage during 1999.

In 2000, the petitioner shows a net income of \$54,333 and net current assets of \$512,922. Because its net current assets are greater than two proffered wages, it has therefore demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

³ The AAO notes that the petitioner may use other name variations for itself and its affiliated companies that were not part of the CIS database search results. Thus, there could be additional pending petitions for which the petitioner would be obligated to pay additional proffered wages.

In 2001, the petitioner shows a net income of \$35,509 and net current assets of \$472,609. Because its net current assets are greater than two proffered wages, it has therefore demonstrated the ability to pay the proffered wage out of its current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001.

There is insufficient information pertaining to 2002, but the petitioner would need to demonstrate that it could cover four proffered wages in any additional proceedings in this matter.

Counsel references *Matter of Sonegawa*, 12 I&N Dec. at 612, which 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 1997, 1998 or 1999 were uncharacteristically unprofitable years for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d at 898, in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a respiratory therapist will significantly increase its profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Additionally, counsel asserts that the director erred in failing to consider the beneficiary's contributions to future increased revenues, but that issue was never raised before the director prior to these appellate proceedings by the petitioner. In any event, even if future revenues could be considered, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998 or 1999. 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 met that burden.

ORDER: The appeal is dismissed.