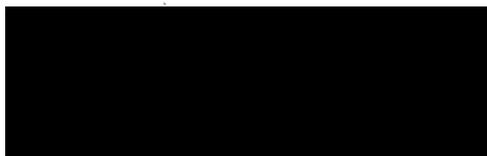


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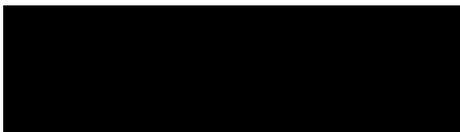
B6

FILE: WAC 02 141 51309 Office: CALIFORNIA SERVICE CENTER Date: DEC 16 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

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 sustained. The petition will be approved.

The petitioner is a custom and hand embroidery firm. It seeks to employ the beneficiary permanently in the United States as a market analyst. 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 August 10, 1998. The proffered wage as stated on the amended Form ETA 750 is \$37,604 per annum. On the Form ETA 750B, signed by the beneficiary on August 4, 1998, the beneficiary claims to have worked for the petitioner since August 1998.

On Part 5 of the visa petition, filed on March 21, 2002, the petitioner claims to have been established in 1992, have a gross income of \$2.5 million, and to currently employ 100 workers. In support of its ability to pay the beneficiary's proposed wage offer of \$37,604 per year, the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998, 1999 and 2000. These returns indicate that the corporate petitioner files its taxes using a standard calendar year. They contain the following information:

| | 1998 | 1999 | 2000 |
|---------------------------------|-------------|-------------|-------------|
| Gross Receipts or Sales | \$2,368,544 | \$2,528,712 | \$2,520,437 |
| Gross Income | \$ 457,636 | \$ 448,580 | \$ 395,980 |
| Net taxable income ¹ | \$ 101,878 | -\$ 117,984 | \$ 36,761 |
| Current Assets | \$ 45,574 | -\$ 7,939 | \$ 3,523 |
| Current Liabilities | \$ 76,229 | \$ 125,374 | \$ 135,869 |
| Net current assets | -\$ 30,655 | -\$ 133,313 | -\$ 132,346 |

As set forth above, besides net taxable income, as an alternative method of evaluating a petitioner's ability to pay a proffered salary, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period and a possible source out of which a proposed wage offer could be paid.² A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal tax return. If its 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.

With the petition, the petitioner submitted copies of payroll records for the year 2001. The records suggest that during that year, the petitioner had employed a total combination of approximately 280 part-time and full-time workers. The beneficiary's year-to-date wages for 2001 are stated as \$13,373.02.

Because the petitioner submitted insufficient evidence in support of its continuing ability to pay the proffered salary, the director requested additional documentation. On May 15, 2002, the director advised the petitioner of the regulatory requirements at 8 C.F.R. § 204.5(g)(2), and requested the petitioner to submit additional evidence in support of its continuing financial ability to pay the proffered wage as of the priority date and continuing until the present. The director requested this evidence for 2001. The director also requested that the petitioner provide copies of its Transmittal of Wage and Tax Statements (W-3s) for 1998 – 2001.

In response, the petitioner provided the required W-3s for 1998-2001. The 2001 W-3 was issued by an employer organization named "Pacpro," accompanied by a letter from this company's customer service manager, "William Wang." Mr. Wang explains that the petitioner outsourced its administrative functions to Pacpro in 2001, in order to prepare and file employee taxes, but that the petitioner controls the hiring, firing, rate of pay, and supervision of its employees. He affirms that the petitioner paid his company over one million dollars as a professional fee in return for these services.

In addition to the W-3s, the petitioner submitted, through counsel, a copy of an Internal Revenue Service (IRS) Form 7004, indicating that the petitioner had requested an extension of time to file its 2001 taxes. Instead, the petitioner

¹ For purposes of this review, the petitioner's ordinary income listed on line 21 of the tax return will be treated as its net taxable income.

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

offered copies of some financial statements suggesting that it had \$204,963 in net taxable income and \$118,760 in net current assets as of the end of the 2001 tax year.

The director denied the petition on September 27, 2002. He determined that neither the petitioner's net taxable income, nor its net current assets were sufficient to pay the proffered wage of \$37,604 in 1999 or 2000. Because these two years failed to demonstrate sufficient resources out of which the proposed wage offer could be paid, the director concluded that the petitioner's evidence had failed to demonstrate that it had maintained a continuing ability to pay the certified wage.

On appeal, counsel provides a copy of the petitioner's 2001 corporate tax return. It shows that the petitioner reported gross receipts or sales of \$2,530,106, gross income of \$396,522 and net taxable income of \$63,487. Schedule L reflects that the petitioner had -\$48,369 in current assets and \$71,878 in current liabilities, yielding net current assets of -\$120,247.

On appeal, counsel also submits copies of the beneficiary's Wage and Tax Statements (W-2s) issued by the petitioner, showing that it paid her \$14,400.87 in 2000 and \$14,321.39 in 2001. Counsel further offers a letter, dated October 28, 2002, from [REDACTED] the petitioner's president, in conjunction with the regulatory guidelines allowing the financial officer of a prospective U.S. employer to offer a letter assuring the employer's ability to pay the proffered wage. [REDACTED] explains that his company was severely impacted in 1999, when a client stopped doing business with them and appropriated a prototype design and samples. Although he states that the company recovered, two lawsuits were filed against this former client in 1999 and 2000. Copies of these complaints are also submitted on appeal. [REDACTED] additionally claims that his company has consistently employed more than 100 employees and that a company of this size will be able to absorb an additional expense of paying the beneficiary's proposed wage offer. Also offered in support of the firm's ability to pay the proffered wage are copies of two commercial real estate and equipment appraisals owned by the petitioning corporation, as well as copies of its bank statements for 1999 and 2000. Finally, a copy of a weekly payroll register has been submitted, showing the names and wages of over 100 of the petitioner's employees, with the wages totaling approximately \$33,000.

It is noted that 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 provides an inaccurate financial portrait of the petitioner. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the 1999 and 2000 tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

Similarly, the petitioner's commercial property and equipment appraisals offer little probative value of the petitioner's ability to pay a given wage. As discussed above, CIS will review a petitioner's net current assets in evaluating its ability to pay a proffered wage because they represent assets that are readily convertible to cash and measure a petitioner's

liquidity during a given period. The petitioner's equipment and real property represent assets that are not considered current assets and are not readily available to pay a proffered salary. Moreover, it is not reasonable to attribute the value of such assets to the petitioner's ability to pay a certified wage because they are an intrinsic part of the petitioner's trade or business operations.

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. Case law clearly establishes that CIS is reasonable in requiring that a petitioner's net income reflect an ability to pay the proffered salary. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983). CIS also examines whether a petitioner's net income or net current assets can cover the difference between any actual wages paid to the beneficiary and the proffered wage. With regard to the latter, it is noted that the petitioner's net taxable income of \$36,761 could cover the \$23,282.61 difference between the beneficiary's 2000 wages and the proffered wage. CIS electronic records, however, reveal that the petitioner filed five other preference petitions with three having been approved with 1998 priority dates, so this kind of analysis may not be valid without more information about the other beneficiaries' salaries.

That said, where a petitioner's net income or net current assets might be insufficient to cover the proffered wage, a petition is not automatically deniable if other relevant factors are present, which show that there is a reasonable expectation of increasing profits. In *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the petitioner 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 sustained substantial business reverses involving changed business locations, 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, based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the evidence of the petitioner's business setback and subsequent initiation of legal proceedings, which may have temporarily affected its business operations in 1999 and 2000, is sufficiently persuasive to apply the principles enunciated in *Matter of Sonogawa*, *supra*. The year the loss was reported in 1999 was presented within a framework of profitable years. It was a fairly unusual event, from which the petitioner subsequently recovered and reported increased profitability. The petitioner's subsequent tax returns in 2000 and 2001 showed a steady improvement in net income.

In conjunction with the above, is the fact that the petitioner is a fairly large operation, as shown by the W-3s submitted to the underlying record. In 1998, 1999 and 2000, total wages, tips and other compensation of \$1,338,962, \$1,605,160.54, and \$1,310,645.81, respectively, were reported on the petitioner's W-3s. The regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). This alternative recognizes that large employers may have large net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the director retains the discretion to request corroboration through other documentation. In this matter, sufficient corroborative evidence has been submitted with the appeal to allay the concerns presented by the 1999-2000 figures for net income and net current assets.

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.