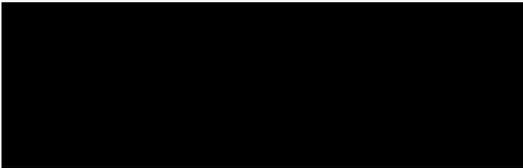


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**U.S. Citizenship
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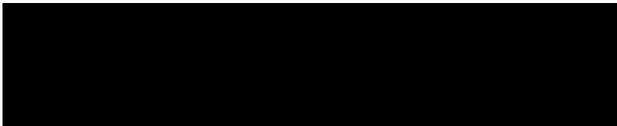
Office: CALIFORNIA SERVICE CENTER

Date: JUN 22 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

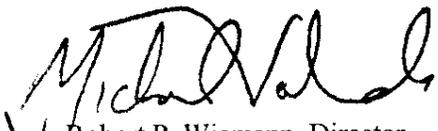
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


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 petitioner is an audio post-production facility. It seeks to employ the beneficiary permanently in the United States as an audio engineer. 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 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 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 August 2, 2001. The proffered wage as stated on the Form ETA 750 is \$30.33 per hour (\$63,086.40 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications and the petitioner's financial documents.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary had the requisite two years work experience, the California Service Center on December 16, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence¹ of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested in pertinent part:

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 (with appropriate signature(s)), or audited financial statements....

The petitioner is requested to provide this evidence from August 2001 to the present....

Submit any of the aforementioned documents as evidence of ability to pay for tax year 2002.

Submit IRS W2² printouts for the beneficiary for tax years 2001 and 2002.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted or resubmitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$63,086.40 per year from the priority date.

- In 2001, the Form 1120 stated taxable income³ of \$20,729.00.
- In 2002, the Form 1120 stated taxable income of \$43,935.00.

On appeal, counsel asserts:

"Company had the ability to pay the wage offered in 2001, pursuant to tax returns & bank statements...."

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence, in this case W-2 Wage and Tax Statements,⁴ 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 2000 the W-2 Wage and Tax Statement submitted stated wages paid of \$29,658.63.
- In 2001 the W-2 Wage and Tax Statement submitted stated wages paid of \$29,643.75.
- In 2002 the W-2 Wage and Tax Statement submitted stated wages paid of \$31,289.45.

¹ The petitioner submitted unaudited financial statements for the period March 2002 through March 2003. The Service will not recognize unaudited financial statements as evidence of ability to pay the prevailing wage.

² Internal Revenue Service, W-2 Wage and Tax Statements.

³ IRS Form 1120, Line 28.

⁴ The W-2 Wage and Tax Statements were from [REDACTED] It is presumed that the petitioner bears the full cost of the beneficiary's wages paid by this staffing company.

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 the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the years 2000 through 2002 for which petitioner's tax returns are offered for evidence.

- In 2001, the Form 1120 stated taxable income of \$20,729.00. In 2001 the W-2 Wage and Tax Statement submitted stated wages paid of \$29,643.75. The sum of the taxable and wages paid is \$50,372.75. Since the proffered wage is \$63,086.40, this sum is less than the proffered wage.
- In 2002, the Form 1120 stated taxable income of \$43,935.00. In 2002 the W-2 Wage and Tax Statement submitted stated wages paid of \$31,289.45. The sum of the taxable and wages paid is \$75,224.45. Since the proffered wage is \$63,086.40, this sum is more than the proffered wage.

Therefore, for the year 2002, the petitioner could pay the beneficiary the proffered wage.

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.⁵ 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.

⁵ 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.

Examining the three Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2002, petitioner's Form 1120 return stated current assets of \$18,168.00 and \$341,624.00 in current liabilities. Therefore, the petitioner had <\$323,456.00> in current net assets for 2002. Since the proffered wage was \$63,086.40 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of 8,565.00 and \$429,519.00 in current liabilities. Therefore, the petitioner had a <\$420,954.00> in current net assets for 2001. Since the proffered wage was \$63,086.40 per year, this sum is less than the proffered wage.

Therefore, for the period 2000 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 current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through an examination of the petitioner's total assets, and the monthly account balance in petitioner's bank account. Counsel cites no legal precedent for the additive calculation, and, according to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

We reject the petitioner's assertion that the petitioner's total assets should have been 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.

Counsel's reliance on the balances in the petitioner's bank account as proof of the ability to pay must be examined. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

However, in this case, evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements reflect additional available funds. The regulation above recited allows additional material "in appropriate cases." A close reading of the petitioner's bank statement in this case demonstrates why the documentation specified at 8 C.F.R. § 204.5(g)(2) is applicable to prove the ability to pay the proffered wage on the priority date.

A close reading of the bank account information states that the account is "a "Checking Account and ... Money Market Fund" Therefore, the fund is both a business checking account and a savings account. Counsel points out, and, the fund balances show, that " ... the company retained a balance ... of over \$100,000.00⁷ consistently for every month in the year 2001." It is important to restate that bank accounts and their balances are not generally probative of the ability to pay the proffered wage. A company's savings accounts may be considered as a source of funds to pay the proffered wage. In the particular facts of this case, the fund balance per month of

⁶ 8 C.F.R. § 204.5(g)(2), *Supra*.

⁷ Actually the monthly balance approximated \$141,424.00.

approximately \$141,424.00 was 27 times the amount per month (i.e. \$5,257.00) of the proffered wage. Therefore, the petitioner through funds in the company savings account had the ability to pay the proffered wage.

Counsel has forthrightly provided tax returns and wage statements that demonstrate that the petitioner is financially viable with positive taxable income for years 2001 and 2002. It had sufficient taxable income, plus wages paid the beneficiary, to pay the proffered wage in year 2002. Therefore, the petitioner had established that it had the ability to pay the beneficiary the proffered wage during 2002.

Also, while not normally considered as probative of the ability to pay, gross sales averaged approximately \$2.4 Million for those two years⁸ that indicated that the finances of the petitioner were sound. *Matter of Sonogawa*, 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 *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.

Counsel by submitting complete tax and payroll records has established a case for application of *Matter of Sonogawa*. The petitioner is a viable business. It could pay paying the beneficiary the proffered wage on taxable income alone in 2002. This evidence coupled with the corporate savings evident in the money market fund, demonstrates the ability to pay the proffered wage from the priority date.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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.

⁸ Gross profits remained constant at \$1.6 Million.