

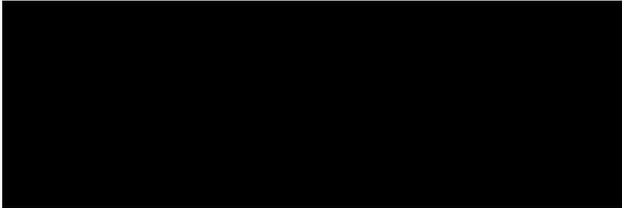
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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FILE: WAC 03 078 52937 Office: CALIFORNIA SERVICE CENTER Date JUN 03 2005

IN RE: Petitioner:
Beneficiary



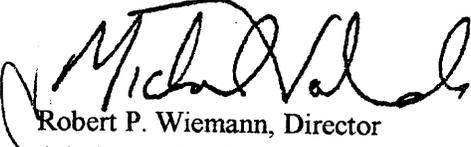
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 is a fire protection systems firm. It seeks to employ the beneficiary permanently in the United States as a plumbing drafter. 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 contends that the director erred in finding that the petitioner failed to demonstrate a continuing ability to pay the certified wage.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$3,500 per month, which amounts to \$42,000 per annum. On the Form ETA 750B, signed by the beneficiary on January 10, 1998, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims to have been established in 1986, to currently employ thirty-five workers, and to have a gross annual income of four million dollars. In support of its ability to pay the proffered salary, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Returns for 1997 and 2001. They reflect that the petitioner files its returns using a fiscal year running from September 1st to August 31st of the following year. Thus, the 1997 return presents the petitioner's financial information

covering the period from September 1, 1997 to August 31, 1998. The two corporate tax returns initially provided with the petition reveal the following:

Year	1997	2001
Taxable Income before net operating		
Loss (NOL) deduction	\$ 25,946	\$ 47,212
Current Assets	\$16,628	\$ 25,468
Current Liabilities	\$ 48,056	\$203,281
Net current assets	-\$31,428	-\$177,813

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net income, CIS will examine a petitioner's net current assets as a measure of liquidity during a given period and as an alternative method of reviewing the ability to pay a proffered salary. A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and lines 16(d) through 18(d) on Schedule L of its federal tax return. If a corporation's year-end 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 petitioner also initially provided copies of Form 1099, Miscellaneous Income for 1997 and 1998. They show that the petitioner paid the beneficiary, as an independent contractor, \$36,676 in 1997 and \$40,179.25 in 1998.

The director requested additional evidence from the petitioner on May 12, 2003. The director advised the petitioner that its financial ability to pay the proffered wage must be established through the submission of copies of annual reports, federal tax returns, or audited financial statements. The director requested the petitioner to provide this evidence for the period from 1998 to 2002, including all corresponding tables and charts.

In response, the petitioner, through counsel, resubmitted copies of its 1997 and 2001 corporate tax returns. In addition, it also provided copies of its corporate tax returns for 1998, 1999, and 2000. These returns reflect the following:

Year	1998	1999	2000
Taxable income before net operating			
loss (NOL) deduction	\$62,084	\$ 35,884	\$ 4,919
Current Assets	\$48,431	\$ 15,425	\$ 2,846
Current Liabilities	\$49,132	\$136,327	\$103,690
Net current assets	-\$ 701	-\$120,902	-\$100,844

¹ 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.

The director denied the petition on September 2, 2003. The director reviewed the financial data contained in the petitioner's federal tax returns and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of the petition. The director denied the petition on September 2, 2003.

On appeal, counsel submits letters from two accountants and a letter from the petitioner's general manager. An accountant, [REDACTED] states that the petitioner's gross profit has increased every year for the last five years and that it has been able to loan shareholders over \$120,000. She also asserts that the company currently contracts engineering work out on an as-needed basis and that the charge is much higher than having a full-time employee in the office. Ms. [REDACTED] further states that when depreciation expense is added back to the net income, the petitioner's net income is sufficient to pay the proffered wage.

The petitioner's accountant [REDACTED] submits a letter on appeal stating his belief that the petitioner can support the beneficiary's wages. He states that the petitioner has grown to 44 employees. He also states that the petitioner's retained earnings totaled approximately \$903,000 as of August 2002. He further asserts that if one uses the accrual basis of accounting, as opposed to the cash basis methodology used for income tax purposes, the petitioner's net worth is better represented and shows assets in excess of liabilities. Mr. [REDACTED] states that he is attaching a copy of the petitioner's August 2002 financial statement. It is noted that this statement is not among the documents submitted on appeal.

Counsel additionally offers a letter from the petitioner's general manager, [REDACTED] Mr. [REDACTED] states that the outside drafting contractors that the petitioner used cost more than a full-time employee. He asserts that during the 2002 tax year, the petitioner spent about \$40,000 on engineering services and about the same the following year.

Counsel adopts Ms. [REDACTED]'s and Mr. [REDACTED]'s arguments on appeal and further cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his assertion that the petitioner has established its financial ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the facts reveal that the petitioner paid the beneficiary as an independent contractor in 1997 and 1998. The 1099s contained in the record show that she received compensation of \$36,676 in 1997 and \$40,179.25 in 1998.

CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses added back to net income as asserted here on appeal. CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. The reliance on the petitioner's election of a particular accounting methodology is unconvincing. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology. No legal authority in support of this proposition has been cited. Reliance on federal

income tax returns, however, as a basis for reviewing a petitioner's ability to pay a 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 reached a particular level or exceeded 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. Noting that the depreciation, or decreased value of the assets of a business is a relevant factor in reviewing the financial viability in a business, the court in *Chi-Feng Chang v. Thornburgh*, *supra* at 536, stated:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and *net income figures* in determining petitioner's ability to pay.

With regard to the consideration of other assets and liabilities reflected on Schedule L of a petitioner's tax return such as retained earnings or shareholder loans, it is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) found that "[CIS] fully considered the assets section of Schedule L" and was not compelled to credit other amounts such as unappropriated retained earnings or common stock.²

The contention that replacing an engineering services expense of \$40,206 taken on the petitioner's 2001 tax return would be more convincing if the petitioner had documented the position, duties, wages and termination of the unidentified worker who performed the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Moreover, expenses already paid out are not generally available to prove the ability to pay the beneficiary's wage offer as of the priority date of the petition.

As set forth above, if the beneficiary's remuneration, if treated as directly convertible to a monthly wage, were prorated for the months in 1998 that she rendered services to the petitioner, then the petitioner's net taxable income of \$25,946 reported on its 1997 tax return would have provided sufficient funds to cover the \$16,054 difference between the proffered salary and the actual compensation paid to her. Similarly, the petitioner's net taxable income reported in 1998 and in 2001 was sufficient to cover the proposed wage offer of \$42,000.

² It is also noted that retained earnings are reflected as longer-term liabilities on the Schedule L balance sheet and may represent the non-cash value of the business and/or income that has been reinvested into the business as opposed to distributed among the shareholders.

Neither the petitioner's net taxable income, nor its net current assets, however, was enough to pay the additional \$6,116 needed to pay the proffered salary in 1999 or the additional \$37,081 needed in 2000. As the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay a proffered wage, it cannot be concluded that the petitioner's federal tax returns have established this ability.

In the context of the financial information contained in the record, counsel asserts that the petitioner's 16-year history of operation supports its future prospects for success and establishes its ability to pay the proffered wage. Similar principles were enumerated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. Although the evidence suggests that the petitioner has experienced good years as well as slow years, the AAO cannot conclude that the petitioner has sufficiently demonstrated that such unique analogous circumstances have been shown to exist in this case, which parallel those in *Sonogawa* and persuasively demonstrate that the petitioner has had the continuing ability to pay the proposed wage offer.

Based on the evidence contained in the record, the AAO concludes that the petitioner has failed to convincingly demonstrate its continuing financial ability to pay the proffered as of the priority date of the petition.

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.