

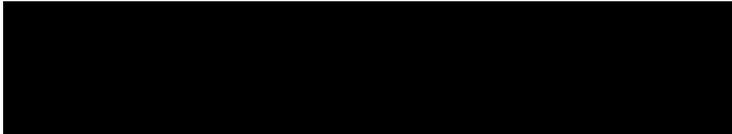
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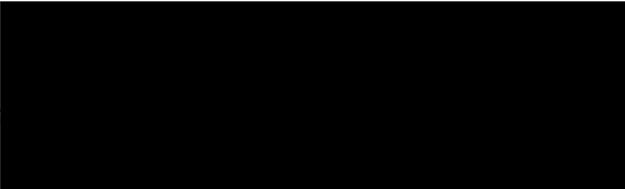


FILE: WAC-01-289-51729 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2005

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

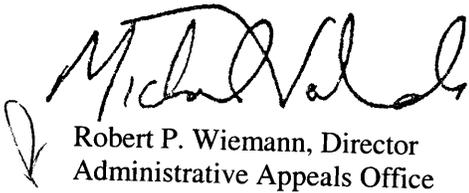
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter was subsequently appealed to the federal district court for the central district of California, Western division, which stipulated dismissal conditioned upon the AAO's re-adjudication of the record of proceeding after receipt of additional evidence. The AAO will sustain the appeal and overturn its prior decision. The petition will be approved.

The petitioner is a general dental practice. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director and the AAO 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.

Although the parties to this proceeding agreed in federal district court on November 10, 2004 to dismiss that appeal without prejudice so that the AAO could reevaluate the petitioner's claims on appeal after receipt of additional evidence and/or brief, no additional documents, evidence, or litigation pleadings have been received in this matter. More than six months have elapsed. The appeal will thus be re-adjudicated based on the record of proceeding as it is currently constituted.

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 January 2, 1998. The proffered wage as stated on the Form ETA 750 is \$11.56 per hour, which amounts to \$24,044.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 1996.

On the petition, the petitioner claimed to have been established in November 1991, to have a gross annual income of \$800,000, and to currently employ four workers. In support of the petition, the petitioner submitted its 1999 corporate tax return and proof that it sought an extension of its 2000 corporate tax return.

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 February 5, 2002, 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 sought evidence pertaining to 1998 and 2000 and copies of the petitioner's quarterly wage reports for the last four quarters.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 1998 and 2000. The petitioner's tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>
Net income ¹	\$24,904	-\$14,754	-\$2,679
Current Assets	\$103,144	\$5,679	\$6,767
Current Liabilities	\$30,000	\$37,667	\$58,027
Net current assets	\$73,144	-\$31,998	\$51,260

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the four quarters in 2001. The quarterly wage reports reflect that the petitioner paid total wages to the beneficiary of \$16,947.29 in 2001, which is \$7,097.51 less than the proffered wage.

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 June 19, 2002, denied the petition, citing the petitioner's negative net income and lack of cash assets in 1999.

On appeal, counsel asserted that the petitioner is a cash basis taxpayer for income tax purposes, which means that "income is only reported when the taxpayer receives the check or funds from the insurance company or patients." Counsel further asserted that "Y2K" delayed insurance billings in 1999 showing a lower gross income in that year and greater in 2000. Counsel also stated that the beneficiary was already paid partial wages in each relevant year and that adding back depreciation expenses would demonstrate the petitioner's ability to pay the difference. Counsel also stated that the petitioner pays into a discretionary employee pension plan that it would not do if it did not have the ability to pay the proffered wage and notes that its contributions were \$23,592 and \$56,767 in 1999 and 2000, respectively, of which portions were paid into the beneficiary's employee pension plan.

On appeal, the petitioner submitted a letter from [REDACTED] ([REDACTED] a certified public accountant, the content of which was largely summarized by counsel on appeal; copies of Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary reflecting that the petitioner paid the beneficiary \$18,273.79 in 1998, \$19,533.42 in 1999 and \$19,338.56 in 2000, which is \$5,771.01 less than the proffered wage in 1998, \$4,511.38 less than the proffered wage in 1999 and \$4,706.24 less than the proffered wage in 2000. The petitioner also submitted its internally generated contribution report evidencing payments made on behalf of the beneficiary.

The AAO dismissed the appeal on June 5, 2003, citing the petitioner's negative net income in 1999 and 2000.

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 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 petitioner did not establish that it employed and paid the

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

beneficiary the full proffered wage in 1998, 1999, 2000, or 2001. The petitioner demonstrated that it paid the beneficiary \$18,273.79 in 1998, \$19,533.42 in 1999, \$19,338.56 in 2000, and \$16,947.29 in 2001. Thus, the petitioner must demonstrate that it can pay the difference between the wages actually paid and the proffered wage in each year, which is \$5,771.01 in 1998, \$4,511.38 in 1999 and \$4,706.24 in 2000, and \$7,097.51 in 2001².

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, contrary to counsel's appellate assertions. 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.

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 assets³. 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.⁴ 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 petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1998. In 1998, the petitioner shows a net income of \$24,904 and net current assets of \$73,144 and has, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or its net current assets, since \$24,904 and \$73,144 are both greater than the remaining wage of \$5,771.01 in that year.

² The AAO's prior decision erroneously failed to consider the wages that were actually paid by the petitioner to the beneficiary.

³ The AAO's prior decision erroneously failed to consider the petitioner's net current assets.

⁴ 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 petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1999. In 1999, the petitioner shows a net income of -\$14,754 and net current assets of -\$31,998 and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or its net current assets, since -\$14,754 and -\$31,998 are both less than the remaining wage of \$4,511.38 in that year.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2000. In 2000, the petitioner shows a net income of -\$2,679 but net current assets of \$51,260, and has, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net current assets, since \$51,260 is greater than the remaining wage of \$4,706.24 in that year.

The petitioner did not demonstrate that it paid the full proffered wage to the beneficiary in 2001, but it only has to prove it could pay \$7,097.51 in that year. The record of proceeding does not contain a tax return, audited financial statement, or annual report for 2001, which presumably were unavailable at the time the director requested additional evidence in February 2002.

The petitioner cannot establish its ability to pay the proffered wage in 1999 out of wages actually paid, its net income, or its net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage in that year. Counsel referenced contributions made to the beneficiary's employee pension plan in 1999 and submitted unaudited, internally-generated evidence from the petitioner that the amount was \$1,953.34. That amount, even if it could be validated and considered beyond a benefit the petitioner pays all employees and is included in compensation already considered, does not cover the remaining wage of \$4,511.38 in that year anyway.

Counsel also referenced "Y2K" as a reason why the petitioner's 1999 net income was so low; however, he presented no evidence to corroborate that assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

CIS uses a totality of circumstances analysis to determine whether or not the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Sonogawa* 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.

In the instant case, the petitioner's gross receipts in 1998, 1999, and 2000, were \$773,370, \$693,179, \$798,131, respectively, and in each year reported officer compensation of \$156,000. The dip in the petitioner's gross receipts in 1999 could be explained by counsel's Y2K theory despite the fact that the petitioner has not provided any corroborating evidence or statement from the petitioner concerning its lowered financial performance in that year. The AAO, upon review of the record of proceeding in its entirety, and exercising favorable discretion based on the limited and unique factual circumstances of this case, will find in the petitioner's favor since the shortfall in 1999 is so minimal, its gross receipts substantial in three consecutive years, significant officer compensation in each year, sufficient net income and/or net current assets in two other years, and a plausible explanation set forth concerning 1999's minimal shortfall. Therefore, the petitioner has established that it has 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 met that burden.

ORDER: The appeal is sustained. The prior decision of the AAO, dated June 5, 2003, is withdrawn. The petition is approved.