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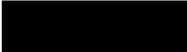
U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



APR 21 2003

File:  Office: Texas Service Center

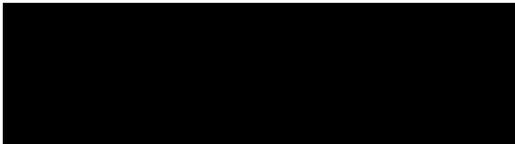
Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



PUBLIC COPY

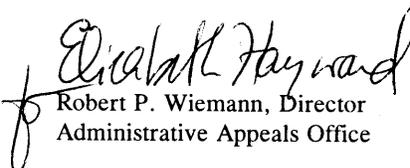
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner seeks classification of the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner is a flavor/scent/cosmetic research and manufacturing company. It seeks to employ the beneficiary permanently in the United States as a manager, customer technical services at an annual salary of \$56,910. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director accepted that the beneficiary qualifies as a member of the professions holding an advanced degree, but determined that the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel asserts that the losses reflected at the end of 1999 and 2000 are due to the petitioner's merger with the company formed to build a new building for the company. The merger was undertaken for tax purposes to offset the petitioner's taxable income with the construction company's losses.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is June 4, 1999. The beneficiary's salary as stated on the labor certification is \$56,910 annually.

The petitioner initially submitted its combined Balance Sheet as of December 31, 2000. The balance sheets provides the following information for 2000 and 1999:

	2000	1999
Total current assets	\$5,173,557.08	\$4,002,192.88
Total current liabilities	\$2,076,490.90	\$4,966,184.93

Based on the above information, the net current assets as of December 31, 2000 was \$3,097,066.18 and as of December 31, 1999 was negative \$963,992.05. In addition, the petitioner also submitted its

Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1999 that reflect a net loss of \$298,713.

In response to a request for additional documentation, the petitioner submitted its 2000 tax return reflecting a net loss of \$712,573. The petitioner also submitted payroll documentation for the beneficiary, reflecting that in 2001, he earned \$52,516.42 plus commissions. While the beneficiary claims on the Form ETA-750B to have worked for the petitioner since 1998, the petitioner did not submit the beneficiary's Forms W-2 for 1999 or 2000. The director denied the petition based on the petitioner's net loss. The director also questioned the organization of the petitioner in light of several complicated relationships expressed on the tax returns.

On appeal, counsel asserts that the petitioning company was incorporated in 1976 and generated a profit up until October 1999, at which time its year to day profit was \$683,795. Counsel further asserts that BGI Industries, Inc. was incorporated in 1996 in order to purchase and develop land as the petitioner's headquarters. In 1999, the petitioner decided to merge with BGI Industries to offset its own profits with BGI Industries' losses for tax purposes. In support of these assertions, the petitioner submits its tax returns for January through October 1999 reflecting a net income of \$683,795. The tax return includes an explanation of the merger as well as articles of merger filed with the State of Florida on October 26, 1999.

In determining the petitioner's ability to pay the proffered wage, the Bureau 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 both Bureau (previously the Immigration and Naturalization Service) and 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 the Bureau 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

That said, the petitioner may also demonstrate its ability to pay the proffered wage by submitting the beneficiary's Forms W-2 reflecting that it actually paid the proffered wage. Even if the petitioner did not pay the proffered wage, any wages it did pay to the beneficiary may be reduced from the amount the petitioner must show was available to pay the proffered wage. While the petitioner has apparently employed the beneficiary since 1998, the petitioner has never submitted any evidence of the beneficiary's wages prior to 2001, although, we note that the director did not request such documentation. Finally, a petitioner may also demonstrate its ability to pay the

proffered wage if its net current assets are equal to or above the proffered wage. While the balance sheets reflect that the petitioner meets this test in 2000, they reflect negative net current assets in 1999.

Nevertheless, the Bureau may consider whether the petitioner suffered an uncharacteristic loss. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner must explain why the year in question was uncharacteristically unprofitable and demonstrate that the petitioner's prospects for a resumption of successful business operations are reasonable.

In the present case, the petitioner is a corporation that had been in business for over twenty years at the time the labor certification was filed. Prior to the merger, the petitioner was generating a net income well above the proffered wage. Not only has counsel provided a reasonable explanation for the loss in 1999 and 2000, the petitioner has supported that explanation with credible documentation. Further, in 2000, the petitioner sold a piece of property purchased in 1997 for a loss of \$816,929. This is clearly a one-time loss and represents a loss of money spent in 1997. On appeal, the petitioner submits an independent accountant's review report for 2001 by KPMG, LLP reflecting net earnings of \$457,584. Thus, a review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Accordingly, after a review of the federal tax returns submitted, it is concluded that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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.