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

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



File: WAC-02-216-52687 Office: California Service Center

Date: **JUL 10 2002**

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:



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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an after-school Korean language program. It seeks to employ the beneficiary permanently in the United States as a director at an annual salary of \$46,508.80.¹ As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined 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 director erred by failing to consider the petitioner's gross income, depreciation, and the deposits into the petitioner's bank account.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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 April 25, 2001. The beneficiary's salary as stated on the labor certification is \$22.36 per hour that equates to \$46,508.80 annually.

With the original petition, the petitioner submitted its tax returns for 1999 and 2000. In response to the director's request for additional documentation, the petitioner submitted its tax return for 2001, Forms 1099, quarterly wage reports for 2002, and bank statements.

¹ The director concluded that the proffered wage was \$42,931.20 per year. The director reached this conclusion by multiplying the hourly wage, \$22.36 by 40 to determine a weekly wage, multiplying that wage by four to determine a monthly wage, and multiplying that wage by 12 to determine an annual wage. Such a calculation, however, assumes a 48-week year. In fact, a year has 52 weeks. The weekly wage multiplied by 52 equals \$46,508.80.

The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for the tax year ending 2001 contained the following information:

Officers compensation	\$0
Salaries	\$0
Gross income	\$129,960
Net income (loss)	\$18,765
Assets	\$51,131
Current assets	\$1,419
Current liabilities	\$0
Shareholder loans	\$26,060

The petitioner also submitted six Forms 1099-MISC for its part-time teachers for 2001 and four Forms 1099-MISC for 2000, including one on behalf of the beneficiary reflecting compensation of \$12,000. Further, the petitioner submitted wage and withholding reports for the first and second quarters of 2002 reflecting that the petitioner had no employees the first quarter and employed the beneficiary as a direct employee for \$3,000 in the second quarter. Finally, the petitioner submitted its bank statements for February 2002 through August 2002. The statements reflect ending balances between \$229 and \$2,905. A bank letter dated October 3, 2002 reflects a balance of \$3,043.12.

The director considered the petitioner's net income, net current assets, wages paid, and bank statement balances and concluded that the petitioner did not have an ability to pay the proffered wage as of April 25, 2001.

Counsel argues on appeal:

In the instance [sic] case, the taxable income of \$129,960 is higher than the pro-offered [sic] wage on the I-140 petition. In addition, indicated by the Director of CSC, there were no liabilities accrued to the petitioner and thus the ratio of assets to liabilities would be that the assets of \$51,131 is favorable and sufficient to meet the pro-offered [sic] wage requirements. The amount of depreciation of \$13,940.00 can also be considered in determining the ability to pay the wage.

* * *

A careful review of the bank accounts established that monthly deposits of \$12,235.75, \$10,400.75, \$11,383.75, \$21,612.00, \$15,095.65 which is a far cry from an average balance of \$1,056.19. The deposits should be considered when determining whether or not the company has the ability to pay the wage. Additional documentation submitted with this brief indicates that there are steady deposits being made on a monthly basis equaling \$12,968, \$15, \$180, \$11,865.00.

* * *

The paystubs indicated that the company has paid the alien beneficiary more than the pro-offered [sic] wage. She has been paid \$4000 per month in wages.

Some of counsel's arguments are factually incorrect; the remaining arguments are not persuasive.

The petitioner's "taxable income" in 2001 was not \$129,960 as claimed by counsel on page two of her brief. Rather, that amount was the gross income listed on line 1C of the petitioner's 2001 Form 1120S. A corporation is not taxed on its gross income, but its net income. The Bureau does not consider gross income in determining a petitioner's ability to pay the proffered wage. The petitioner's gross income is not helpful as a petitioner is likely to have many other expenses that it is obligated to pay in addition to the beneficiary's wage. Rather, the Bureau looks at the petitioner's net income. The petitioner's net income in 2001 was \$18,765, as listed on line 21 of its 1120S, far less than the proffered wage. The Bureau will not add depreciation to the net income of a company for purposes of determining ability to pay the proffered wage. Even if we did, the petitioner deducted \$13,940 of depreciation from its gross income. The net income and depreciation equal \$32,705, less than the proffered wage. Moreover, we cannot add the income earned that year by the beneficiary since she is the sole owner of the petitioning company and her earnings from that company in 2001, according to the tax return, which shows no wages or officer compensation, and schedule K, comprised of the \$18,765 net profit already considered. We cannot count the \$18,765 twice.

If a petitioner is unable to demonstrate an ability to pay the proffered wage through sufficient net income, the Bureau will also examine the petitioner's net current assets. The director correctly noted that the net current assets in 2001 were \$1,419. The \$51,131 referenced by counsel constitutes the petitioner's *total* assets, not *current* assets. The total assets include buildings and other depreciable assets that are not liquid and, thus, not available to pay the proffered wage. Moreover, while we only consider current assets and current liabilities in calculating net current assets, we note in response to counsel's implication that the petitioner had net total assets of \$51,131, that the petitioner did have a long-term liability in 2001, a \$26,060 shareholder loan owed to the beneficiary.

Counsel's argument regarding the bank statements is not persuasive. Just as we must look at *net* income and *net* current assets, looking at deposits without looking at the average balances that take into account the withdrawals is not useful. Such an examination would ignore the petitioner's other expenses just as looking at gross income does. Moreover, the petitioner did not submit its bank statements for April 2001, the month of the priority date of the petition. We concur with the director that the petitioner has not demonstrated bank balances that could demonstrate an ability to pay the proffered wage in 2001.

Finally, on appeal, the petitioner submitted pay stubs for the beneficiary reflecting that she earned \$2,000 during the pay period February 1, 2003 through February 15, 2003 and another \$2,000 from February 16, 2003 through February 28, 2003. We note that the first pay period is 14 days while the second pay period is only 12 days. Regardless of the credibility of these documents,² whatever the

² The pay stubs are somewhat self-serving since the beneficiary is the sole shareholder of the petitioning company, a closely held corporation.

petitioner is paying the beneficiary in 2003, we cannot conclude that the petitioner was able to pay the beneficiary the proffered wage in 2001.³

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 sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.

³ The record also suggests another reason why the job offer was not a real offer in that it was not clearly open to qualified U.S. workers as required by 20 C.F.R. § 656.20(c)(8). Where the alien is the owner (president and sole shareholder) of the petitioning company, it is extremely unlikely that anyone else would be hired for the position. *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992); *In the Matter of Olivia Garden Int'l, Inc.*, 1992 WL 384051 (Bd. Alien Lab. Cert. App.).