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



U.S. Citizenship  
and Immigration  
Services



FILE: WAC 02 217 54270 Office: CALIFORNIA SERVICE CENTER Date: **NOV 01 2004**

IN RE: Petitioner:   
Beneficiary:

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

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.

For  
Robert P. Wiemann, Director  
Administrative Appeals Office

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**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 zipper manufacturer. It seeks to employ the beneficiary permanently in the United States as a chemical engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on October 22, 1998. The proffered salary as stated on the labor certification is \$4,763.20 per month or \$57,158.40 per year.

With the petition, counsel submitted a copy of a compiled balance sheet for the petitioner for the year ended July 31, 2001 and a copy of the petitioner's payroll report, dated May 8, 2002, showing that the petitioner employed the beneficiary at that time.

The director considered this documentation insufficient, and, on October 10, 2002 and on November 26, 2002, he requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director specifically requested that the petitioner provide federal tax returns with the appropriate signatures and copies of the beneficiary's 1998 through 2001 Forms W-2, Wage and Tax Statements. The petitioner was informed that if it employed more than 100 employees, it could provide a statement from a financial officer of the organization that establishes the prospective employer's ability to pay the proffered wage.

In response, counsel provided copies of the petitioner's Form 1120, U.S. Corporation Income Tax Returns for the years 1998 through 2000, copies of the beneficiary's 1998 through 2001 Forms W-2, Wage and Tax Statements, a copy of an unaudited financial statement for the year ended July 31, 2002, and copies of the beneficiary's payroll record for 2002 up to October 19, 2002. The 1998 federal tax return reflected a taxable income before net operating loss deduction and special deductions of -\$111,553 and net current assets of -\$113,822. The 1999 federal tax return reflected a taxable income before net operating loss deduction and special deductions of -\$7,655 and net current assets of \$299,787. The 2000 federal tax returns reflected a taxable income before net operating loss deduction and special deductions of \$144,775 and net current assets of \$926,302. The beneficiary's Forms W-2 reflected wages earned of \$31,015.32 in 1997, \$42,611.49 in 1998, \$57,861.75 in 1999, \$66,040.00 in 2000, and \$33,020.00 in 2001. The beneficiary's 2002 payroll records reflected wages earned of \$53,340.00 through October 19, 2002.

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 April 7, 2003, denied the petition.

On appeal, counsel submits copies of previously submitted material, a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, a declaration from [REDACTED] Secretary of the petitioner, and a declaration from [REDACTED]. The 2001 federal tax return reflected a taxable income before net operating loss deduction and special deductions of \$9,900 and net current assets of \$1,060,641. Counsel states:

. . . the Service did not properly consider the accounting data set forth in the various corporate income tax returns previously tendered by the petitioner or its agents. When properly considered, the petitioner meets the test articulated in 8 C.F.R. § 204.5(g)(2).

\* \* \*

Please see the accompanying declaration under penalty of perjury of [REDACTED] C.P.A. Apparently the Service simply misconstrued or misunderstood some of the accounting data provided by the petitioner. [REDACTED] calculations show that at all times [REDACTED] had a year-end cash balance of more than \$100,000 for each year and the corporate net income without considering depreciation and amortization was also always at least \$100,000.

Specifically, please see the conclusion drawn by [REDACTED] in his paragraph 8: "Based on the foregoing, and considering the test set forth in 8 C.F.R. § 204.5(g)(2), [REDACTED] -- the prospective employer --- does have the ability to pay the proffered wage from October 22, 1998 to the foreseeable future. (Emphasis added.)

\* \* \*

It is a "given" that the beneficiary has been paid his entire proffered wage for each year of the relevant time period. Ultimately, the question is whether the petitioner meets the test articulated in 8 C.F.R. § 204.5(g)(2). According to Mr. Ybarra's expert opinion, they do - the petitioner is sufficiently solvent that it has the ability to pay Mr. Zeng to any date in the foreseeable future.

Counsel submitted a declaration from [REDACTED] dated May 5, 2003, as proof of the ability to pay the proffered wage for the years 1998 through 2001. [REDACTED] indicates that he reviewed the petitioner's corporate tax returns. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. At no time is the declaration referred to an audited financial statement. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1997, 1998, and 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS 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." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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 assets. 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.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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's net current assets during the years in question, 1998, 1999, and 2001 were -\$113,822, \$299,787 and \$1,060,641. The petitioner could not have paid the proffered wage in 1998 from its net current assets; however, the petitioner has established its ability to pay the proffered wage from its net current assets in 1999 and 2001.

The 1998 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$111,553 and net current assets of -\$113,822. The petitioner could not pay the proffered wage in 1998 from either its taxable income or its net current assets. In addition, the wage earned by the beneficiary in 1998 was below the proffered wage.

The 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$7,655 and net current assets of \$299,787. The petitioner could pay the proffered wage in 1999 from its net current assets. Furthermore, it is noted that the beneficiary earned more than the proffered wage in 1999.

The 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of \$144,775 and net current assets of \$926,302. The petitioner could pay the proffered wage in 2000 from either its taxable income or its net current assets. Furthermore, it is noted that the beneficiary earned more than the proffered wage in 2000.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of \$9,900 and net current assets of \$1,060,641. The petitioner could pay the proffered wage in 2001 from its net current assets.

In summary, the petitioner has not established that it had the ability to pay the proffered wage at the priority date, October 22, 1998.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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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.