

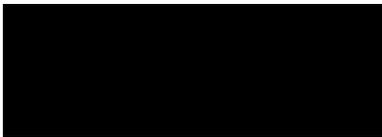
PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

B6

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 032 57198 Office: CALIFORNIA SERVICE CENTER

Date: **DEC 13 2003**

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: SELF-REPRESENTED

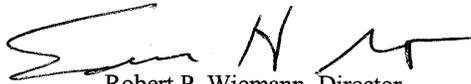
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 a manufacturer of converted limousines. It seeks to employ the beneficiary permanently in the United States as a limousine body customizer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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 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.

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 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$15.58 per hour, which equals \$32,406.40 per year.

With the petition the petitioner submitted an unaudited income statement for the eight months ending August 31, 2001. The

petitioner submitted no other evidence pertinent to its ability to pay the proffered wage at that time.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 21, 2002, issued a Request for Evidence pertinent to that ability.

The Service Center specified that the petitioner must show the ability to pay the proffered wage beginning on the priority date and during each ensuing year. The Service Center stipulated that the evidence must consist of copies of annual reports, federal tax returns, or **audited** financial statements. The Service Center also stated that if the petitioner could demonstrate that it employed 100 or more workers, it could show the ability to pay the proffered wage with a statement from a financial officer of the company.

In response, counsel submitted **unaudited** financial statements, including a balance sheet and an income statement, for the 2001 calendar year.

The Director, California Service Center, noted that unaudited financial statements are not among the types of documentation listed in 8 C.F.R. § 204.5(g)(2) as competent evidence of the ability to pay 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. On August 7, 2002, the director denied the petition.

On appeal, the petitioner states that additional evidence had not been readily available when it filed its response to the Request for Evidence. The petitioner states that it is submitting copies of its 1995, 1996, 1997, 1998, 1999, and 2000 income tax returns and audited financial statements for 2002.

The petitioner does, in fact, submit copies of its 1996, 1997, 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. This office notes that, because the priority date is January 13, 1998, information from the 1996 and 1997 income tax returns is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

The petitioner also submits **unaudited** financial statements for the first half of 2002. The petitioner submits no additional evidence pertinent to 2001.

The 1998 tax return shows that the petitioner declared a loss of \$28,224 as its taxable income before net operating loss deduction

and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$3,508,777 and current liabilities of \$2,873,657, which yields net current assets of \$635,120.

The 1999 tax return shows that the petitioner declared a loss of \$300,296 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 tax return shows that the petitioner declared a loss of \$724,289 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In determining the petitioner's ability to pay the proffered wage, the Service will first 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 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 Service 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 Service should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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.

The priority date is January 13, 1998. The proffered wage is \$32,406.40. During 1998, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due had the petitioner hired the beneficiary on the priority date. On the priority date, 12 days of that 365-day year had elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 353 days. The proffered wage times $353/365^{\text{th}}$ equals \$31,340.98, which is the amount the petitioner must show the ability to pay during 1998.

During 1998, the petitioner declared a loss of \$28,224. The petitioner has not demonstrated the ability to pay the proffered wage out of its income. However, the petitioner had net current assets of \$635,120 at the end of that year. The petitioner could have paid the proffered wage during 1998 out of its assets.

During 1999 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1999, the petitioner declared a loss of \$300,296 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its assets during 1999.

During 2000, the petitioner declared a loss of \$724,289 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its assets during 2000.

As to 2001, the petitioner submitted an unaudited financial statement for the first eight months of that year with the petition. Subsequently, the petitioner submitted unaudited financial statements for the entire year. Unaudited financial statements are not among the three types of documents recognized by 8 C.F.R. § 204.5(g)(2) as competent evidence of a petitioner's ability to pay a proffered wage. The petitioner submitted no other evidence pertinent to its ability to pay the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

On appeal, counsel declares that he is submitting audited financial statements for 2002. Counsel submits financial statements for the first half of 2002. The accountant's report that accompanies those financial statements, however, emphasizes that it was produced pursuant to a compilation, not an audit.

The duties of an accountant producing financial statements pursuant to a compilation are limited to arranging representations of management into the standard form of financial statements. The figures in a compiled financial statement are the representations of management and nothing more. 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and **audited** financial statements. The unaudited financial statements submitted by the petitioner will not be considered.

The petitioner submitted no competent evidence of its ability to pay the proffered wage during the first half of 2002.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, and the first half of 2002. Therefore, the petitioner has not established that it had 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 not met that burden.

ORDER: The appeal is dismissed.