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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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Washington, D.C. 20536



File: WAC 02 130 53741 Office: CALIFORNIA SERVICE CENTER

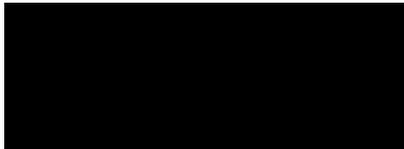
Date: **DEC 13 2003**

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:



**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 vendor of magnetic engineering products. It seeks to employ the beneficiary permanently in the United States as a product manager. 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, counsel submits a statement.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 14, 1998. The proffered wage as stated on the Form ETA 750 is \$70,187.52 per year.

With the petition counsel submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$30,916 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.

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 May 10, 2002, requested additional evidence pertinent to that ability for 1997, 1998, 1999, and 2000. The Service Center also specifically requested copies of the petitioner's tax returns for those years and copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous two quarters. That request was remailed on June 21, 2002.

In response, counsel submitted the petitioner's California Form DE-6 Quarterly Wage Reports for the last quarter of 2001 and the first quarter of 2002 as requested. Those reports show that the petitioner did not employ the beneficiary during those quarters.

Counsel also submitted the petitioner's 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Returns as requested. The 1997 return shows that during that year the petitioner's declared a loss of \$52,060 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

This office notes that the priority date of the petition is January 13, 1998. As such, information on the petitioner's 1997 tax return is not directly relevant to the petitioner's ability to pay the proffered wage, notwithstanding that the Service Center requested that return.

The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$58,087 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 1999 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$18,320 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 director determined that the evidence submitted did not establish that the petitioner had the ability to pay the

proffered wage and, on August 31, 2002, denied the petition.

On appeal, counsel stated that,

(The petitioner's) projected income for the next several years should be more than adequate to cover the salary of \$70,187.52.

and

It is expected that, in the event (the petitioner) is authorized to employ the beneficiary, the beneficiary will increase (the petitioner's) annual income significantly, at least sufficiently enough (sic) to cover the salary of \$70,187.52. This is so because the beneficiary has extensive business contacts in the field of magnetics engineering, (the petitioner's) core business, and, accordingly, it is expected that said contacts will generate substantial additional business for (the petitioner.)

Merely projecting future profits is insufficient to establish eligibility. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to show that it had the ability to pay the proffered wage on the priority date and during each ensuing year.

If counsel had provided evidence from which an increase in profits due to hiring the beneficiary might be calculated or estimated, this office could have considered that evidence pursuant to *Masonry Masters v. Thornburgh*, 875 F.2d 898 (C.A.D.C. 1989). That counsel asserts that hiring the beneficiary will result in greater profits is insufficient, absent evidence in support of that assertion.

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.

The proffered wage is \$70,187.52. The priority date is January 14, 1998. The petitioner is not obliged to show the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if the petitioner had employed the beneficiary beginning on the priority date. On the priority date, 13 days of that 365-day year had already passed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 352 days. The proffered wage times  $352/365$  is \$67,687.69. The petitioner has not demonstrated the ability to pay that portion of the proffered wage out of its income or its assets.

The petitioner is obliged to demonstrate the ability to pay the entire proffered wage during 1999 and each ensuing year. During 1999 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$18,320 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its income or its assets during 1999.

During 2000 the petitioner declared a loss of \$30,916 and finished the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its income or its assets during 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998, 1999, or 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel may have intended to imply on appeal that, in view of the petitioner's projected future earnings, the Service may overlook the petitioner's failure to demonstrate its ability to pay the proffered wage during some years. Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. Here, however, the petitioner has submitted no evidence to show that it has ever posted a large profit, and has submitted no evidence of the future success counsel postulates on appeal. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.