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U.S. Citizenship and Immigration Services

[redacted]

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APR 07 2004

FILE: WAC 02 142 51088 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a home care facility for the disabled. It seeks to employ the beneficiary permanently in the United States as a live-in resident manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date.

On appeal, the petitioner, through counsel, maintains that its financial data demonstrates sufficient ability to pay the proffered salary.

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 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) also provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter is based upon the petitioner's ability to pay the wage offered as of the petition's priority 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. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is $11.50 per hour for a 40-hour week or $23,920 per year. The visa petition reflects that the petitioner has fifteen employees.

The petitioner initially submitted insufficient evidence to support the petitioner's ability to pay the beneficiary's wage offer of $23,920 per year. On May 10, 2002, the director requested additional evidence to support the petitioner's ability to pay the proffered wage. The director specifically advised the petitioner to submit copies of its annual reports, signed federal tax returns, or audited financial statements for 1998 through 2001. The director also instructed the petitioner to submit copies of its state quarterly wage reports for the last four quarters filed and copies of its W-3 Transmittal of Wage and Tax Statements for 1998 through 2001.

Counsel's response included copies of an unaudited combined income statement for the period ending December 31, 2001, copies of the petitioner's W-3s and state quarterly wage reports, and copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1998, 1999, and 2000. A copy of a Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for the 2001 tax year was also included.

The state quarterly wage reports reflect that the petitioner had ten employees as of the quarter ending March 31, 2002. The petitioner's corporate tax returns reveal that the petitioner files its tax returns based on a standard calendar year. They show that the petitioner's taxable income before net operating loss deduction (NOL) and special deductions as:

Year	Taxable Income (before NOL and special deductions)
1998	$ 18,491
1999	89,740
2000	14,690

The petitioner's taxable income could meet the proffered wage in 1999. As shown on Schedule L of the 1998 corporate tax return, the petitioner declared $74,003 in current assets and no current liabilities. The difference between current assets and current liabilities reflects that the petitioner had $74,003 in net current assets that year, which was sufficient to cover the beneficiary's wage offer of $23,920. CIS will review a petitioner's net current assets in some cases because it reflects the level of liquidity a petitioner has as of the date indicated by Schedule L of the tax return. It represents the amount of cash or cash equivalents that would reasonably be available to pay the beneficiary's proffered salary during the year covered by the balance sheet. In the year 2000, the petitioner declared $40,633 in current assets and $80,341 in current liabilities, producing net current assets of -$39,708. In 2000, neither the petitioner's taxable income of $14,690, nor its net current assets were sufficient to cover the beneficiary's proffered wage of $23,920.

The director reviewed the figures reflected on the petitioner's corporate tax returns and denied the petition, finding that the petitioner had not established its continuing ability to pay the beneficiary's salary beginning at the priority date of January 14, 1998.

On appeal, counsel submits a copy of the petitioner's 2001 corporate tax return, which shows $69,189 in taxable income before the NOL and special deductions. Although this is sufficient to cover the proffered wage during that period, it does not overcome the petitioner's lack of sufficient funds to cover the beneficiary's wage in 2000. As set forth above, the regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay the proffered salary beginning on the priority date. In determining the petitioner's ability to pay the proffered wage, CIS will review the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

Counsel suggests that the petitioner's unappropriated retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer. Counsel cites no authority for this proposition. It is noted that the court in *Sitar v. Ashcroft,* (2003 WL 22203717 (D. Mass)) specifically rejected this line of reasoning, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet.

After a review of the federal tax returns and other financial information the petitioner provided, as well as the evidence and arguments offered on appeal, the AAO cannot conclude that the petitioner demonstrated a continuing financial ability to pay the proffered wage as of the visa 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.