

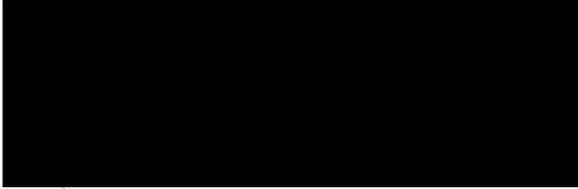
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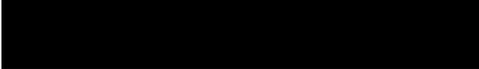


**U.S. Citizenship  
and Immigration  
Services**

*BDO*



FILE: EAC 02 167 50824 Office: VERMONT SERVICE CENTER Date **AUG 03 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a travel agency manager. 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, counsel 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.

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 April 9, 2001. The proffered salary as stated on the labor certification is \$45,000 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$2,513 and net current assets of \$17,911. The director considered this evidence to be insufficient and on July 26, 2002, the director requested additional evidence pertinent to the petitioner's continuing 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 a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return and copies of the petitioner's bank statements for the period January 1, 2002 through September 30, 2002. The tax return reflected a taxable income before net operating loss deduction and special deductions of

-\$9,303 and net current assets of \$5,108. Although the bank statements reflected a substantial cash flow, the first three months showed a negative balance.

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 February 13, 2003, denied the petition.

On appeal, counsel submits a copy of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected a taxable income before net operating loss deduction and special deduction of \$7,347 and net current assets of \$157,064. Counsel states:

With regard to the appeal filed for the above-mentioned case, please see attached the tax returns for the year 2002, which shows that the Petitioner Corporation has an equity of \$1,61,670.00 [sic] which establishes that fact that the petitioner corporation has the ability to pay the beneficiary's proposed salary.

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 provide evidence that it employed the beneficiary from 2001 to the present or that the beneficiary was compensated at a salary equal to or greater than the proffered wage in those years.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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 (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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during

the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 2001 tax return reflects a taxable income of -\$9,303 and net current assets of \$5,108. The petitioner could not pay the proffered wage out of either the taxable income or the net current assets.

The 2002 tax return reflects a taxable income of \$7,347 and net current assets of \$157,064. The petitioner could pay the proffered wage out of the net current assets. However, as stated in 8 C.F.R. § 204.5(g)(2), the petitioner must establish its ability to pay the proffered wage from the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In the instant case, the priority date is April 9, 2001, and the petitioner has not established its ability to pay the proffered wage in 2001.

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.