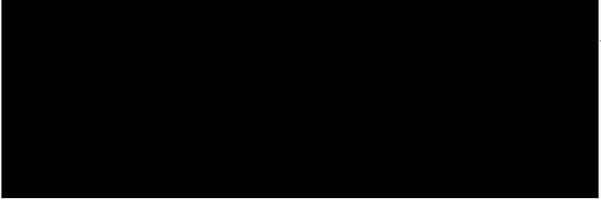


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**U.S. Citizenship
and Immigration
Services**



BDP

FILE: WAC-02-190-50757 **Office:** CALIFORNIA SERVICE CENTER **Date:** JUL 21 2004

IN RE: **Petitioner:** [Redacted]
 Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien 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.

[Signature]
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 sustained. The petition will be approved.

The petitioner is computer manufacturer and technical support company. It seeks to employ the beneficiary permanently in the United States as a computer hardware engineer. 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 denied the petition because the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel submits 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 or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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.

Eligibility in this matter hinges on 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. The petition's priority date in this instance is March 5, 2001. The beneficiary's salary as stated on the labor certification is \$4,500 per month or \$54,000 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated August 9, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's 2000 and 2001 federal income tax return and evidence of wage payments to the beneficiary, if any.

In response to the RFE, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The federal tax return for 2001 reflected gross receipts of \$1,565,531, gross profit of \$313,040, compensation of officers of \$18,600, wages and salaries of \$110,494 and ordinary income of -\$22,832. Schedule L of the return reflected current assets of \$73,059, current liabilities of \$27,971 and net current assets of \$45,088. In addition, counsel submitted the petitioner's 2000 Form 1120S income tax return, which predates the priority date of the petition and is therefore, of little probative value. Counsel also submitted the petitioner's Quarterly Tax Wage Statement for the quarter ending December 31, 2001. This report indicated that the petitioner paid the beneficiary \$26,914.56 during 2001. Counsel also submitted numerous documents indicating that the petitioner is conducting business.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a statement from the petitioner's president, who states that the beneficiary has been working for him since January 2001 at a rate of \$19.00 per hour. The petitioner states upon the approval of the I-140 petition the beneficiary will be paid the proffered wage. The petitioner cites several established lines of credit as being demonstrative of its ability to pay the proffered wage. Counsel submits quarterly tax summaries for the three quarters ending December 31, 2001, March 31, 2002, and June 30, 2002, respectively.

In determining the petitioner's ability to pay the proffered wage, 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 established that it had previously employed the beneficiary, but not that it had paid the beneficiary a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO 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 (9th 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 (7th 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.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may 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 the 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 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 priority date in this matter is March 5, 2001 and the proffered wage is \$54,000. The evidence of record indicates that the petitioner paid the beneficiary \$26,914.56 during 2001. The petitioner is therefore obligated to pay the beneficiary the remaining \$27,085.44 of the proffered wage. Schedule L of the petitioner's 2001 Form 1120S tax return reflected current assets of \$73,059, current liabilities of \$27,971 and net current assets of \$45,088. Thus, it is concluded that the petitioner has sufficient net current assets to pay the remainder of the proffered wage.

After a review of the evidence it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

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ORDER: The appeal is sustained. The petition is approved.