

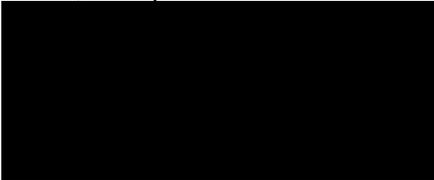
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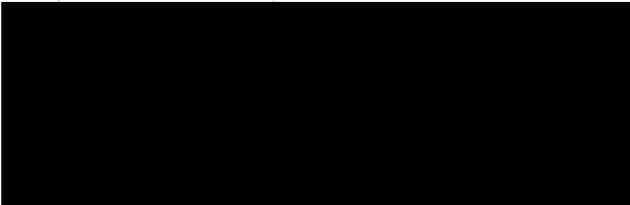
FILE: WAC 02 199 53823 Office: CALIFORNIA SERVICE CENTER Date: MAY 12 2004

IN RE: Petitioner:
Beneficiary:



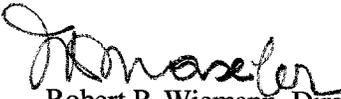
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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 petition will be denied.

The petitioner is a bedding manufacturing company. It seeks to employ the beneficiary permanently in the United States as a sample maker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of 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 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) 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 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. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.49 per hour for a forty-hour workweek, which equates to \$23,899.20 per annum.

With the petition, counsel provided incomplete copies of the petitioner's tax returns for the tax years 1998, 1999, 2000, and 2001. Counsel also provided a copy of the petitioner's quarterly wage statement dated September 28, 2001. In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments, counsel submitted copies of the petitioner's complete tax returns for the tax years 1998 through 2001.¹

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will 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 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

¹ The petitioner's tax year begins on July 1 and ends on June 30.

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).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established. On appeal, counsel submits a brief accompanied by newly submitted bank statements for 1998. In addition, counsel resubmits the tax returns for 1998 through 2001.

A review of the petitioner's tax returns reveals that the petitioner's net income for the relevant years was as follows:

<u>Year</u>	<u>Net Income</u>
1998	-\$36,199.00
1999	\$68,069.00
2000	\$137,274.00
2001	\$219,247.00

On appeal, counsel alleges that the director failed to acknowledge that the petitioner had established its ability to pay for the years 1999, 2000, and 2001. The evidence in the record clearly shows that the petitioner's net income for these years surpassed the amount of the beneficiary's proposed salary. Consequently, the AAO concurs with counsel's assertion that this element of proof has been satisfied for 1999, 2000, and 2001.

The petitioner, however, did not establish that it had the ability to pay the proffered wage in 1998. The regulations require proof of eligibility at the priority date. *See* 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). Since the petitioner's net income for the 1998 tax year was insufficient to meet this requirement of proof, the director examined the petitioner's assets as set forth on Schedule L of the tax return. As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets, which are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In this case, however, the petitioner's current assets of \$128,225.00 are outweighed by its current liabilities, which total \$780,528.00. At the end of the 1998 tax year, the petitioner had net current liabilities of \$652,303.00. Consequently, this figure is not supportive of a finding that the petitioner had the necessary funds to pay the proffered wage.² The AAO concurs with the director's denial of the petition.

² Both the director and counsel discuss "cash assets" and the erroneous figures provided by the director in his decision. The director erroneously referred to the petitioner's net current assets as "cash assets," and subsequently referred to an incorrect number in determining the petitioner's net current liabilities. In addition, although counsel for the petitioner points out the amount of "cash assets" that the petitioner lists on its tax returns for 2000 and 2001, these figures are not relevant for purposes of this decision, since only the financial figures for 1998 warrant consideration.

On appeal, counsel submits copies of the petitioner's business checking account statements for the year 1998. As set forth in its brief, the average ending balances displayed on the statements are significant. However, the AAO finds these documents and counsel's assertions unpersuasive for the following reasons.

First, these statements are not persuasive evidence of the petitioner's ability to pay the wage offered because there is no proof that these statements somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes. Additionally, the petitioner's cash assets as set forth on Schedule L for 1998 are listed as \$0.00. Although the petitioner urges the AAO to presume that the cash amounts displayed on the bank statements were readily available to the petitioner in 1998, the fact that the petitioner claims no cash assets for 1998 casts serious doubt on these claims. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

There is no additional evidence in the record that establishes the petitioner's ability to pay the proffered wage, nor is there any evidence to prove that the funds in the business checking account were readily available to the petitioner in 1998.

Secondly, upon review of the record of proceeding, the AAO notes that the petitioner's tax year is from July 1 to June 30. Therefore, the petitioner's tax return for 1998 covers the period from July 1, 1998 through June 30, 1999. Since the priority date in this case is *January 14, 1998*, the petitioner has failed to provide complete financial evidence that would establish its ability to pay the proffered wage as of the priority date of the visa petition. Other than the bank account statements submitted on appeal, the petitioner has provided no additional evidence showing that it had the ability to pay the proffered wage as of the priority date. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although the director specifically requested that the petitioner provide evidence of its ability to pay the proffered wage *at the time the priority date is established* and continuing thereafter in the request for evidence dated September 18, 2002, the petitioner failed to provide acceptable financial evidence of its ability to pay the proffered wage as of the priority date of the petition. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing thereafter.

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. The petition is denied.