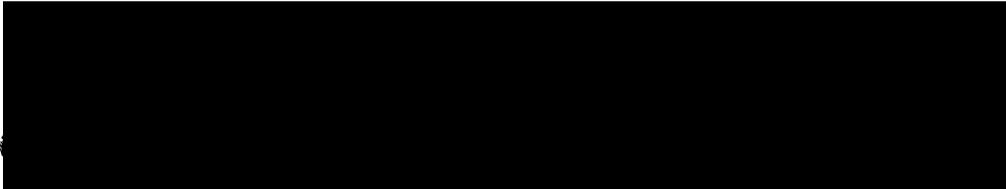


**prevent clearly unwarranted
invasion of personal privacy**



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

PUBLIC COPY



B6

FILE: WAC 02 113 51270 Office: CALIFORNIA SERVICE CENTER

Date: APR 01 2005

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a martial arts studio. The petitioner sought to employ the beneficiary permanently in the United States as a martial arts instructor. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

On July 16, 2002, the director denied the petition, determining that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage of \$45,364.80 per year beginning on the priority date of the visa petition, April 25, 2001.

The AAO dismissed the petitioner's appeal on July 21, 2003. The AAO reviewed the financial information contained in the petitioner's 1999 and 2000 tax returns, as well as unaudited financial statements submitted for the years 2001 and 2002. The AAO noted that either the evidence only related to the period prior to the priority date of April 25, 2001 or it was not consistent with the requirements of 8 C.F.R. 204.5(g)(2) in that it did not include either federal tax returns, annual reports, or audited financial statements.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence. In this case, the petitioner, through counsel, asserts that its federal tax returns for 2001 and 2002 were submitted to the AAO in April 2003, several months subsequent to its original appeal. Counsel resubmits these tax returns with his motion and contends that the petitioner's total income and total assets as set forth on these returns demonstrates the petitioner's ability to pay the proffered wage of \$45,364.80. As these tax returns were not discussed in the AAO's prior decision, counsel's motion will be treated as a motion to reopen.

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner's 2001 corporate tax return shows that it reported \$34,583 in net taxable income in 2001. Schedule L shows that its current assets were \$6,538 and its current liabilities were \$42,241, resulting in -\$35,603 net current assets.

The petitioner's 2002 corporate tax return reflects that it declared \$60,141 in net taxable income. Schedule L shows that it had \$4,546 in current assets and \$43,041 in current liabilities, yielding -\$38,495 in net current assets.

Counsel's assertion on motion that the petitioner's gross income should be determinative is not persuasive. It is noted that in reviewing a petitioner's ability to pay the proffered wage, CIS will examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, as asserted by the petitioner, a combination of other figures extrapolated from bank statements and the petitioner's tax return. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

A petitioner's total assets are also not determinative of its ability to pay a certified wage offer. A petitioner's total assets include depreciable assets that a petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, a petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of a petitioner's liquidity and a possible resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a petitioner's year-end 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, although the petitioner's net taxable income of \$60,141 in 2002 was sufficient to cover the proffered salary, it must demonstrate its continuing ability to pay the full proffered wage beginning as of the visa priority date of April 25, 2001. As mentioned above, its 2001 tax return shows that neither its net taxable income of \$34,583, nor its net current assets of -\$35,603 was sufficient to cover the proffered salary in 2001.

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decisions. The petitioner has not demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.