

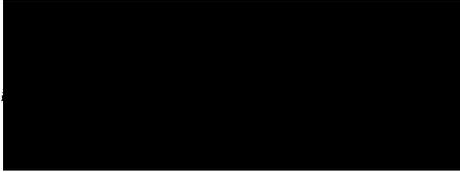
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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FILE: WAC 02 176 50664 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005

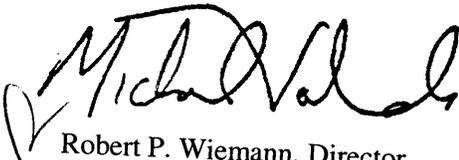
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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: SELF-REPRESENTED

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 sustained.

The petitioner is a furniture refinishing business. It seeks to employ the beneficiary permanently in the United States as a furniture finisher. 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, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 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 May 19, 1998. The proffered salary as stated on the labor certification is \$10 per hour or \$20,800 per year.

With the petition, the petitioner failed to submit any evidence of its ability to pay the proffered wage. On July 31, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage from the priority date to the present. The director specifically requested complete, signed, and certified copies of the petitioner's 1998 through 2002 federal income tax returns.

In response, the petitioner provided copies of its 1997 through 2000 Forms 1120, U.S. Corporation Income Tax Returns for the fiscal years November 1 through October 31 of each year. It is noted that the petitioner filed the I-140, Immigrant Petition for Alien Worker, on May 3, 2002; and, therefore, the 2001 and 2002 federal tax returns would have been unavailable at that time. The 1997 tax return reflected a taxable income before net operating loss deduction and special deductions of \$38,683 and net current assets of \$431,449. The 1998 tax return reflected a taxable income before net operating loss deduction

and special deductions of -\$79,383 and net current assets of \$409,609. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$21,900 and net current assets of \$340,117. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$84,748 and net current assets of \$712,059.

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 June 10, 2003, denied the petition.

On appeal, the petitioner submits a letter from the president of the company and a letter from the petitioner's certified public accountant. The president's letter states:

I was shocked and disappointed to receive your letter denying our request to sponsor [REDACTED] based on a faulty reading of our income tax returns. Over the period requested the gross income of St. Denis Corp. has been around or above \$1,000,000 a year. We have been in business for over 35 years. Like every other business we take advantage of legal tax deductions, including the salaries of about 10 people. We also have tax carry forward deductions that apply, making the amount we pay taxes on much smaller than the gross income.

The petitioner's certified public accountant states:

Please note that St. Denis Corp.'s tax return for the fiscal year ended 10/31/02 is on extension until 7/15/03. Due to the fiscal year, it does appear that we are behind on the returns, but you'll notice on the second line of the returns, the period always ends in October of the year ahead of the one printed on the return. Thus the return that is printed 2000 related to the fiscal year ended 10/31/01.

Finally, it is common for closely held corporations to show a loss for taxes. In this case, the sole shareholder has been loaning the corporation money to operate. The bulk of the skilled labor is in cost of goods sold, which is why the salary line is low. That is just the office help.

The bright side of the corporation accumulating losses in its start up period is that the losses can be used [sic] to offset taxable income when things turn around, thus reducing the federal tax expense to zero until the losses are used up.

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 establish

that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1998 through 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the 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, the 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.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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. The petitioner's net current assets during the fiscal years in question, 1997 through 2000, were \$431,449, \$409,609, \$340,117 and \$712,059, respectively. The petitioner could have paid the proffered wage in fiscal years 1997 through 2000 from its net current assets.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The fiscal year 1997 tax return reflects a taxable income before net operating loss deduction and special deductions of \$38,683 and net current assets of \$431,449. The petitioner could have paid the proffered wage in fiscal year 1997 from either its taxable income or its net current assets.

The fiscal year 1998 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$79,383 and net current assets of \$409,609. The petitioner could have paid the proffered wage in fiscal year 1998 from its net current assets.

The fiscal year 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$21,900 and net current assets of \$340,117. The petitioner could have paid the proffered wage in fiscal year 1999 from its net current assets.

The fiscal year 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$84,748 and net current assets of \$712,059. The petitioner could have paid the proffered wage in fiscal year 2000 from its net current assets.

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.

**ORDER:** The appeal is sustained.