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**U.S. Citizenship
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FILE: [REDACTED]
WAC 03 025 53690

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 30 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

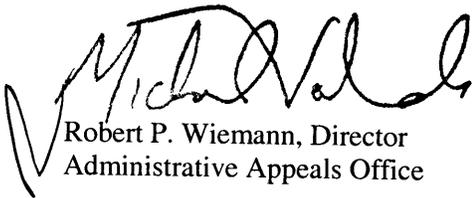
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 7, 1997. The proffered wage as stated on the Form ETA 750 is \$10.95 per hour (\$22,776.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, petitioner submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications as well as other documents.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence on May 13, 2003, of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

* * *

Submit copies of the tax documents that reflect the earnings (profits and losses). If they are a Corporation, you must submit Forms 1120. If an "S" Corporation, you must submit Forms 1120S ... Regardless of the type of entity, all Schedules and attachments must be included

* * *

Copies of the petitioner's Forms DE-6 (quarterly wage statement) for the four most recent quarters, along with a statement indicating each employee's name, position title, duties, wage, and the amount of hours per month each is employed.

* * *

The Petitioner has also filed other Forms I-140 at the present. The petitioner must establish that they can pay all beneficiaries' wages. Please provide a list of all the Forms I-140 you have filed along with each petition's receipt number, the proffered wages (hourly wage and annual salary) and position titles.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for years 2001 and 2002 as well as a list of petitioner's employees and wage amounts. Two I-797C receipt notices for two pending I-140 petitions (i.e. for the "second" and "third" beneficiary) were also submitted.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$22,776.00 per year from the priority date.¹

- In 2002, the Form 1120S stated taxable income² of \$32,623.00.
- In 2001, the Form 1120S stated taxable income of \$15,812.00.

The director of California Service Center issued a Notice of Intent to Deny the petition on October 14, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date due to the multiple pending petitions outstanding. The director stated that the three outstanding petitions required petitioner to have the ability to pay all the beneficiaries' wages totaling \$66,497.60 per year.

Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage in 2002, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries.

¹ The petitioner has admitted to the receipt of a total of \$12,600.00 derived from the labor of aliens who are presently the beneficiaries of her sponsored petitions who are working without employment authorization.

² IRS Form 1120S, Line 21.

In response to the Notice of Intent to Deny, the petitioner submitted information concerning the two other pending I-140 petitions. Petitioner indicated that the second beneficiary was paid \$10.95 per hour and her salary was reported on the petitioner's as an expense on the tax return for 2002 under the line item "salaries and wages". The third beneficiary, as she was without work authorization, is not an employee of the petitioner. The petitioner indicated that the third beneficiary rents business space from petitioner in her salon. Through this arrangement, according to the petitioner, this beneficiary generated revenues of \$26,000.00, \$7,800.00 of which was received by petitioner as gross income on its tax return.

The director denied the petition on December 5, 2003, finding that the evidence submitted in rebuttal to the Service Center's Notice of Intent to Deny did not establish that the petitioner had the continuing ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. No evidence was submitted to show that the petitioner employed the subject beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, 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 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 that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wages of two beneficiaries not in the employ of petitioner at any time between the years 2001 through 2002 for which petitioner's tax returns are offered for evidence.

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.³ A

³ 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 accounts

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

The record in the instant case contains information about wages paid to one of the other potential beneficiaries of I-140 petitions filed by the petitioner, and, about the present employment status of those two other potential beneficiaries. The record contains evidence of the beneficiaries' contribution to petitioner's taxable income for the tax year 2002. However, even with this contribution as reflected in the petitioner's tax returns, there are insufficient funds to pay the wages of the present and another beneficiary.

Examining the two Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following.

- In 2002, petitioner's Form 1120S return stated current assets of \$46,300.00 and \$17,904.00 in current liabilities. Therefore, the petitioner had \$28,396.00 in net current assets for 2002. Since the proffered wage was \$22,776.00 per year, and the second and third beneficiaries whose petitions are pending⁴ proffered wages are \$20,945.60 and \$22,776.00 respectively, the sum of all three proffered wages is less than net current asset.
- In 2001, petitioner's Form 1120S return stated current assets of \$56,080.00 and \$23,465.00 in current liabilities. Therefore, the petitioner had \$32,615.00 in net current assets for 2001. Since the proffered wage was \$22,776.00 per year, and the second and third beneficiaries whose petitions are pending⁵ proffered wages are \$20,945.60 and \$22,776.00 respectively, the sum of all three proffered wages is less than net current asset.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Petitioner's asserts that the beneficiary will in the future generate sufficient revenues to pay her wage. The petitioner's taxable income is examined from the priority date to determine if it has the ability to pay the proffered wage. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns that state insufficient taxable income to pay the wages of two beneficiaries. Proof of ability to pay begins on the priority date, that is July 7, 1997, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor.

Petitioner argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. No detail or documentation has been provided to explain how the beneficiary's employment as a cosmetologist will significantly increase petitioner's profits. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ Identification number WAC 02 224 53110.

⁵ Identification number WAC 02 224 53110.

the number of customers.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Petitioner's statements cannot be concluded to outweigh the evidence presented in the two corporate tax returns as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.