

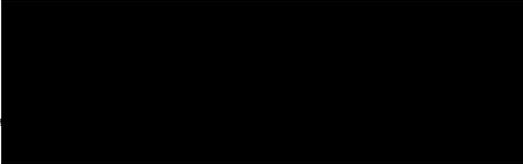


U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

BG



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 10 2005
WAC 03 043 55276

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

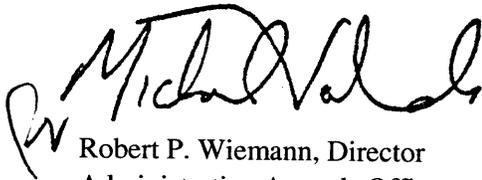
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



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 wholesaler and distributor of hi-tech equipment and testing instruments. It seeks to employ the beneficiary permanently in the United States as a sales engineer. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 October 1, 2001. The proffered salary as stated on the labor certification is \$37.32 per hour or \$77,625.60 per year.

With the petition, counsel failed to submit evidence of the petitioner's ability to pay the proffered wage. On January 24, 2003, the director requested evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested that the evidence be in the form of copies of annual reports, audited financial statements, or signed federal income tax returns with all schedules, attachments, and statements.

In response, counsel provided complete copies of the petitioner's 2001 and 2002 Forms 1120, U.S. Corporation Income Tax Return, and copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$133 and net current assets of -\$87,002. The 2002 tax return reflected a taxable income before net operating loss deduction and special deductions of \$13,528 and net current assets of -\$27,184. The beneficiary's Forms W-2 reflected wages earned of \$45,000 in 2001 and \$49,250 in 2002.

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. On July 10, 2003, the director denied the petition.

On appeal, counsel submits a brief and evidence of an investment in China of \$100,000 in 2001 and 2002. Counsel states:

Based on the Director'[s] finding, petitioner should have at least **\$32,492.60** (Proffered Wage (\$77,625.60) – Wage Paid (\$45,000) – Taxable Income (\$133) for the year 2001 to pay the proffered wage for that year. Similarly, petitioner should have at least **\$14,847.60** (Proffered Wage (\$77,625.60) – Wage Paid (\$49,250) – Taxable Income (\$13,525) to pay the proffered wage for 2002.

As shown in the Forms 1120 for both 2001 and 2002 that were submitted by the petitioner with the petition, petitioner has \$100,000 listed as other investment. See Form 1120 for the year 2001, page 4, Item 9 (Other Investment); and Form 1120 for the year 2002, page 4, Item 9 (Other Investment). To show that petitioner did have such a cash investment, petitioner hereby submits a copy of a Back [sic] of China Los Angeles Branch, showing that petitioner wired \$100,000 to Shanghai Aotai Electronics International Trade Co. Ltd. on June 21, 2001. See **Exhibit A**. Furthermore, petitioner also submits a bank record showing that \$100,000 was debited from petitioner's account on June 21, 2001. See **Exhibit B**. Therefore, in the years 2001 and 2002, petitioner had \$100,000 cash investment that could be used to pay the balance of the proffered wage to the beneficiary.

Furthermore, petitioner's tax returns in the record also shows that in 2001, petitioner had \$1,446,165 cash in its various back [sic] accounts. See Form 1120 for the year 2001, Detail Statements, Page 2, Statement #6 – Cash. For the year 2002, petition had \$354,303 cash in its various back [sic] accounts. See Form 1120 for the year 2002, Detail Statements, Page 2, Statement #6 – Cash. Therefore, petitioner clearly had the ability to pay the beneficiary the balance of the proffered wage in 2001 and 2002.

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 2001 and 2002. The beneficiary was paid \$45,000 in 2001 or \$32,625.60 less than the proffered wage. The beneficiary was paid \$49,250 in 2002 or \$28,375.60 less than the proffered wage.

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 (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.

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.¹ 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 2001 were -\$87,002. The petitioner could not have paid the proffered wage in 2001 from its net current assets. The petitioner's net current assets during 2002 were -\$27,184. The petitioner could not have paid the proffered wage in 2002 from its net current assets.

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.

Counsel points out that the petitioner had \$1,446,165 in cash in various bank accounts in 2001 and \$354,303 in 2002. However, these cash amounts were the amounts of cash available at the beginning of the year, not at the end of the year. As an alternative to net income after a particular tax year, CIS relies on the amount of cash on hand at the end of the year as part of its net current assets analysis.

Counsel also asserts that the petitioner had \$100,000 in investments in 2001 and 2002. However, these investments are considered long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$133 and net current assets of -\$87,002. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2001.

The petitioner's 2002 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$13,528 and net current assets of -\$27,184. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2002.

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.