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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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Handwritten signature/initials

FEB 10 2005



FILE: WAC 02 141 50467 OFFICE: CALIFORNIA SERVICE CENTER Date:

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.

Handwritten signature of Robert P. Wiemann

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 petition will be remanded to the director for further review and entry of a new decision.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental lab technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied 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 and denied the petition accordingly.

On appeal, counsel asserts that the director misinterpreted the evidence and maintains that the petitioner established its ability to pay the beneficiary's proposed wage offer.

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 20, 1998. The proffered wage as stated on the Form ETA 750 is \$748.80 per week, which amounts to \$38,937.60 annually.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On Part 5 of the petition, filed March 21, 2002, the petitioner claims to have been established in 1957, to have a gross annual income of approximately \$2,500,000, a net annual income of \$100,000, and to currently employ fifty-five workers. In support of its ability to pay the proffered wage, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998, 1999 and 2000. The petitioner also submitted a partial copy of its 1997 corporate tax return. These returns show that the petitioner files its taxes using a fiscal year running from May 1st until April 30th of the following year. Thus its 1997-2000 tax returns cover the period

¹ The director misstated the proffered wage as \$22,800 per year.

from May 1, 1997 through April 30, 2001. These tax returns reflect the following information for the following years:

	1997	1998	1999	2000
Net income	\$216	\$ 81,455	\$25,668	-\$ 37,985
Current Assets (Schedule L)	(not included)	\$298,329	\$288,837	\$272,898
Current Liabilities (Schedule L)	(not included)	\$200,451	\$140,477	\$169,376
Net current assets	\$	\$ 97,878	\$148,360	\$103,522

Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method of evaluating its financial ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporate petitioner's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on February 3, 2003, the director requested additional evidence pertinent to that ability. Although the director advised the petitioner that it must demonstrate the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence, the director also requested that the petitioner provide this evidence from 1998 to 2002, including providing federal tax returns with appropriate signature.

In response, the petitioner resubmitted copies of the 1998, 1999, and 2000 tax returns, as well as a copy of the its 2001 tax return. The record indicates that the petitioner could not provide a copy of the 2002 tax return because its fiscal year had not yet ended. It did not include another copy of its 1997 tax return. Its 2001 return reflects that it reported net income of \$38,312. Schedule L of the tax return shows that it had \$275,047 in current assets and \$132,920 in current liabilities, yielding \$142,127 in net current assets.

The director denied the petition on May 28, 2003, concluding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage. It is noted that besides misstating the proffered wage, the director miscalculated the amount of the petitioner's net current assets, referring to such as "cash assets," as shown on Schedule L of the tax returns for each of the 1998, 1999, 2000, and 2001 years.

² 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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel submits copies of the petitioner's federal financial quarterly data showing cumulative wages paid for the first quarter of 1998, as well as for 2001 and 2002. Counsel also provides various copies of the petitioner's state quarterly wage reports from 1999 through 2002. Counsel arguments adopt the erroneous figure of \$22,800 per year as the proffered wage and assert that, particularly for the year 2000, the petitioner's tax returns, together with its other evidence, demonstrate the petitioner's ability to meet its payroll burden and ability to pay the proffered salary.

For the reasons discussed below, the AAO concurs that petitioner has demonstrated the ability to pay the proffered wage to the extent shown by the 1998-2001 federal tax returns, covering the period from May 1, 1998 to April 30, 2002, but finds that the information is insufficient to conclude that the ability to pay the proffered wage existed as of the priority date of January 20, 1998.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the given 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. Here, there is no evidence in the record reflecting that the petitioner has employed the alien beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax returns, if the petitioner submits them as proof of its ability to pay the proposed wage offer, 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 this case, as previously noted, it is important to recognize that the petitioner's tax returns each cover a period running from May 1st until April 30th of the following year. As set forth above, the petitioner's 1998 tax return, covering May 1, 1998 until April 30, 1999, shows that its net income of \$81,455 could cover the proffered salary of \$38,937.60 during that fiscal year. The petitioner's net current assets of \$148,360 could pay the proffered wage as shown by the 1999 tax return. The petitioner's net current assets of \$103,522 and \$142,12, respectively, could also cover the proffered wage of \$38,937.60 as reflected by the 2000 and 2001 tax returns. The partial tax return provided for 1997, however, which covers the priority date, showed only a \$216 net income and failed to include Schedule L showing the petitioner's net current assets, which would be relevant to the review.

While it is recognized that the petitioner bears the ultimate burden of proof in these proceedings, the AAO finds that because of the errors presented in the director's denial relevant to the period covered by the 1998-2001 tax returns, the case will be remanded to the director for further review of the petitioner's ability to pay the proffered wage, focusing on the specific period covering the priority date. The director may request additional evidence relevant to the petitioner's continuing ability to pay the proffered wage consistent with the requirements of 8 C.F.R. 203.5(g)(2). Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. The petitioner must provide complete copies in response to any request for

such evidence, whether it is federal tax returns, annual reports, or audited financial statements. Upon receipt of all evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.