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

PUBLIC COPY



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FILE: WAC 02 174 51641 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 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:



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
for 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 property sales firm. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. 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 statement.

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 March 10, 1998. The proffered salary as stated on the labor certification is \$17.18 per hour or \$35,734.40 per year.

With the petition, counsel submitted copies of the petitioner's 1998 through 2000 Forms 1120, U.S. Corporation Income Tax Returns, and copies of Forms DE-6, Quarterly Wage and Withholding Report, for 2001. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of \$3,405 and net current assets of \$33,337. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$11,233 and net current assets of -\$3,470. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$3,885 and net current assets of \$45,662. The Forms DE-6 showed that the beneficiary did not work for the petitioner during 2001. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on September 16, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present to be in the form of copies of annual reports, signed and certified federal tax

returns with appropriate signature(s), or audited financial statements. The director specifically requested that the tax returns include all schedules and tables that accompany the submitted tax return.

In response, counsel provided copies of the petitioner's 1998 through 2001 Forms 1120, U.S. Corporation Income Tax Returns, and copies of Forms DE-6, Quarterly Wage and Withholding Reports, for 2001 and for the quarters ended June 30, 2002 and September 30, 2002. The Forms DE-6 show that the beneficiary did not work for the beneficiary in 2001 or in the quarters ended June 30, 2002 and September 30, 2002. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$3,187 and net current assets of \$51,338.

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 June 10, 2003, the director denied the petition.

On appeal, counsel submits previously submitted documentation and states:

The decision to deny based on employer's income was made in error. The employer's gross receipts for 1998 were \$2,081,447.00, wages paid: \$135,292.00, compensation of officers: \$180,000.00. Gross receipts for 1999: \$2,309,620.00, wages paid: \$137,929.00, compensation of officers: \$140,000. Gross income for 2000: \$2,523,593.00, wages paid: \$82,124.00, compensation of officers: \$168,000.00. Gross income for 2001: \$3,842,328.00, wages paid: \$84,372.00, compensation of officers: \$174,000.00. Taxes for the year 2002 are not yet due. Income for 2002 is estimated to be over \$2,000,000.00 again. The employer has demonstrated the ability to pay the proffered wage for the qualified period, therefore, the decision to deny should be reversed and the I-140 approved.

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 (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 1998 were \$33,337, or \$2,397.40 less than the proffered wage. The petitioner could not have paid the proffered wage in 1998 from its net current assets. The petitioner's net current assets during 1999 were -\$3,470, or \$39,204.40 less than the proffered wage. The petitioner could not have paid the proffered wage in 1999 from its net current assets. The petitioner's net current assets during 2000 were \$45,662. The petitioner could have paid the proffered wage in 2000 from its net current assets. The petitioner's net current assets during 2001 were \$51,338. The petitioner could have paid the proffered wage in 2001 from its net current assets.

Counsel points out the amounts of gross receipts, wages paid, and compensation of officers for the years 1998 through 2001 and gives an estimate for income in 2002. However, counsel does not state how these amounts establish the petitioner's ability to pay the proffered wage.

The petitioner's 1998 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$3,405 and net current assets of \$33,337. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 1998.

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.

The petitioner's 1999 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$11,233 and net current assets of -\$3,470. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 1999.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$3,885 and net current assets of \$45,662. The petitioner could pay the proffered wage from its net current assets in 2000.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$3,187 and net current assets of \$51,338. The petitioner could pay the proffered wage from its net current assets in 2001.

The petitioner has established its ability to pay the proffered wage in 2000 and 2001, but not in 1998 and 1999. The petitioner must show its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not done so.

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.