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U.S. Citizenship
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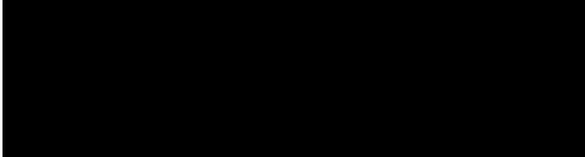
FILE: WAC 01 276 54896 OFFICE: CALIFORNIA SERVICE CENTER Date: JAN 04 2005

IN RE: Petitioner: 

Beneficiary: PARVIN ABDIPOUR

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 remanded to the director to request additional evidence and entry of a new decision.

The petitioner is a fine art gallery. It seeks to employ the beneficiary permanently in the United States as an antique paintings restorer. 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 based his denial on evidence that was never requested and maintains that the petition should be approved.

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 October 24, 1996. The proffered wage as stated on the Form ETA 750 is 17.44 per hour, which amounts to \$36,275.20 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 July 27, 2001, the petitioner claims to have been established in 1988, to have a gross annual income of approximately \$99,000, and to currently employ two workers. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1999 and a copy of an Internal Revenue Service (IRS) application for extension of time to file its 2000 tax return. The 1999 corporate tax return reflects that the petitioner reported net income of \$68,166.

¹ Although the record contains correspondence to the DOL indicating that the petitioner desired to amend the application for labor certification to offer a higher wage, the salary of \$17.44 per hour, as approved on the labor certification, will be used.

Schedule L shows that the petitioner had \$1,348,060 in current assets and \$310,339 in current liabilities, resulting in \$1,037,721 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation'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 December 31, 2001, 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 of October 24, 1996 and noted that the petitioner had submitted information for 1999 only, the director also specifically requested the petitioner's latest IRS certified corporate tax return, the latest audited financial statements, copies of the petitioner's state wage reports filed for the last eight quarters.

In response, the petitioner submitted a copy of its corporate tax return for 2000, as well as the IRS printout of the same year. The tax return reflects that the petitioner reported net income of \$75,403. Schedule L of the tax return shows that the petitioner had \$1,455,199 in current assets and \$256,078 in current liabilities, resulting in \$1,199,121 in net current assets.

In addition, counsel submitted copies of the petitioner's last eight quarterly wage reports beginning with the quarter ending March 31, 2000. They show that the petitioner carried three persons on its payroll including the sole shareholder. Counsel also submitted copies of unaudited financial statements covering the twelve-month periods ending December 31, 1999 and December 31, 2000, respectively.³

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 11, 2002, denied the petition, citing the petitioner's failure to submit any documentation for the years 1996 through 1998.

On appeal, counsel submits a partial copy of the petitioner's 1996 corporate tax return and copies of the petitioner's bank statement from Sumitomo Bank covering the period from May 31, 2002 through June 24, 2002.⁴

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.

³ According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

⁴ Counsel also provides copies of financial documentation related to an individual named "Pnina Cohen." It is unclear how this information relates to this case.

Counsel argues that the petitioner was responsive to the documentation requested by the director and that it was unfair for the director to base his denial on documentation that was never requested. The AAO concurs that the director's request for additional evidence was misleading in simultaneously advising that the petitioner could satisfy its ability to pay the proffered wage by submitting the itemized information while also advising that it must provide evidence from the priority date to the present. The AAO, however, rejects counsel's claim that the director's error mandates that the petition should be approved. For that reason, the AAO will remand the case to the director to clearly articulate his request for information consistent with the provisions of 8 C.F.R. § 204.5(g)(2). This provision requires that the evidence demonstrating the petitioner's continuing ability to pay the proffered wage consist of either federal tax returns, audited financial statements, or annual reports. While this regulation allows additional material, such as bank statements, "in appropriate cases," the petitioner should clearly demonstrate why the basic documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

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 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 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).

As mentioned above, CIS will also consider a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage. In this case, the petitioner's 1999 and 2000 tax returns show that either the petitioner's net income or its net current assets could have paid the certified wage of \$36,275.20 in each of these years. With regard to the petitioner's 1996 tax return offered on appeal, a determination cannot be completed because the petitioner's copy of Schedule L submitted to the record has been "cut off" at line 3, although it appears, by a process of elimination, that the petitioner's net current assets may have been sufficient to cover the certified wage.

While it is recognized that the petitioner bears the ultimate burden of proof in these proceedings, the AAO finds that the record of proceeding produced thus far suggests that the petitioner's evidence may support its ability to pay the certified wage for the years specifically discussed. Because of the confusion engendered by the director's request for evidence, the case will be remanded to the director for further investigation. The director may request additional evidence relevant to the petitioner's continuing ability to pay the proffered wage for any period covering the priority date of October 24, 1996 and continuing until the present. 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 legible copies of such evidence. 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.