

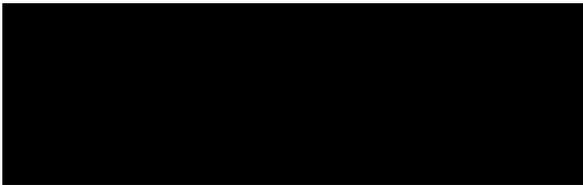
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: WAC-02-175-53150 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2006

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 engaged in the business of vegetable farming. It seeks to employ the beneficiary permanently in the United States as crew leader. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 submits a brief statement.

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 14, 1998. The proffered wage as stated on the Form ETA 750 is \$12.10 per hour, which amounts to \$25,168 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 15, 1988.

On the petition, the petitioner claimed to have been established on April 19, 1982, to have a gross annual income of \$1,848,073, and to currently employ “20+” workers. In support of the petition, the petitioner submitted the first page of its Form 1120, U.S. Corporation Income Tax Return for 1998 through 2000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on September 16, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically asked for complete, signed, and certified tax returns from 1998 to the present.

In response, the petitioner submitted its complete Form 1120 Corporate tax return for the year 2001 and the first page of its Form 1120 Corporate tax return for 1998 through 2000 as previously submitted. The copied tax

returns were accompanied by a brief letter signed by the petitioner's treasurer and president verifying that the copies were true replicas of those filed by the petitioner with "the appropriate entity in a timely manner."

The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	-\$20,867	-\$3,755	-\$12,049	\$6,774
Current Assets	\$n/a	\$n/a	\$n/a	\$106,233
Current Liabilities	\$n/a	\$n/a	\$n/a	\$0
Net current assets	\$n/a	\$n/a	\$n/a	\$106,233

In addition, counsel submitted copies Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 1998, 1999, 2000, and 2001. The Forms W-2 Wage and Tax Statements reflect wages of only \$16,360, \$8,808 less than the proffered wage in 1998; \$19,763, \$5,405 less than the proffered wage in 1999; \$21,114, \$4,054 less than the proffered wage in 2000; and \$20,575, \$4,593 less than the proffered wage in 2001. Additional Forms W-2 were submitted that were issued to Rosa I. Ortega by various unrelated businesses.

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 May 6, 2003, denied the petition. The director noted that the beneficiary was not paid the whole proffered wage by the petitioner in each year of employment and the petitioner's net income failed to make up the difference between the proffered wage and wages actually paid to the beneficiary.

On appeal, counsel asserts that the petitioner's gross wages, wages actually paid to the beneficiary and depreciation and total assets evidence the petitioner's ability to pay the proffered wage.

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 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. In the instant case, the petitioner established that it employed and paid the beneficiary \$16,360, \$8,808 less than the proffered wage in 1998; \$19,763, \$5,405 less than the proffered wage in 1999; \$21,114, \$4,054 less than the proffered wage in 2000; and \$20,575, \$4,593 less than the proffered wage in 2001. Thus, the petitioner must demonstrate that it can pay remaining wages of \$8,808 in 1998; \$5,405 in 1999; \$4,054 in 2000; and \$4,593 in 2001.

If the petitioner does not establish that it 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). Showing that the petitioner's

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income of -\$20,867, -\$3,755, and -\$12,049, for 1998, 1999, and 2000, respectively, fail to cover the remaining wages for each year. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income for 1998, 1999, or 2000. The petitioner's net income of \$6,774 in 2001, however, covers the remaining wage of \$4,593 in 2001. Thus, the petitioner has demonstrated its ability to pay the proffered wage out of its net income in 2001.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The petitioner's net current assets during the years in question, 1998 through 2000, however, were not provided by the petitioner even though the director specifically requested complete tax returns for those years. The petitioner's failure to provide its Schedules L to each year's tax return, which would have provided information concerning its net current assets results in an inability to assess the petitioner's continuing ability to pay the proffered wage out of its net current assets.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide complete copies of its tax returns for 1998, 1999, and 2000. Schedule L to those tax returns would have demonstrated the amount of net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested

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.