

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**



AG

FILE: WAC 02 194 50914 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

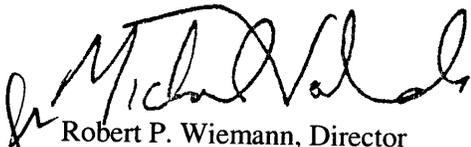
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 a travel service advertising and export firm. It seeks to employ the beneficiary permanently in the United States as a computer systems analyst. 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 asserts that the petitioner has the ability to pay the proffered wage and has paid the beneficiary the proffered wage. On the notice of appeal, counsel indicates that he is submitting a brief and/or evidence to the AAO within thirty days. As of this date, more than a year later, the record has received no further documentation. Therefore, this review will be based on the record as it currently stands.

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 May 27, 1998. The proffered wage as stated on the Form ETA 750 is \$42,640 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since May 1997.

On Part 5 of the petition, the petitioner claims to have been established in 1996, to have a gross annual income of approximately \$772,000, and to currently employ three workers. In support of the petition, the petitioner failed to provide any evidence relating to its ability to pay the proffered salary of \$42,640.

On August 23, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the certified wage. 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. The director advised the petitioner that this evidence must cover the period from 1998 to 2001.

The director also informed the petitioner that if it had one hundred or more workers, it could provide a statement from its financial officer attesting to the company's ability to pay the proffered salary.

In response, the petitioner submitted a letter from its president, [REDACTED] who attested to the petitioner's ability to pay the beneficiary's proffered salary.

On March 5, 2003, the director again requested the petitioner to submit evidence supporting its ability to pay the proposed wage offer. The director specifically instructed the petitioner to provide copies of its federal tax returns from 1998 to 2001.

In response, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998 through 2001. They indicate that the petitioner files its tax returns using a fiscal year running from February 1st to January 31st of the following year. Thus its tax returns cover a period from February 1, 1998 through January 31, 2002. They contain the following information:

	1998	1999	2000	2001
Net income	\$11,380	-\$ 6,208	\$ 18,932	-\$84,648
Current Assets	\$72,972	\$55,404	\$109,867	\$18,611
Current Liabilities	\$ 4,602	\$ 8,508	\$ 26,041	\$ 7,177
Net current assets	\$68,370	\$46,896	\$ 83,826	\$11,434

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on June 10, 2003, denied the petition.

As previously stated, on appeal, counsel merely asserts that the petitioner has the ability to pay the proffered wage, that it has, in fact paid the proffered wage of \$42,640 to the beneficiary, and that additional evidence and/or a brief will be provided in thirty days.

At the outset, it is noted that the letter from Ms. [REDACTED] offered in support of the petitioner's ability to pay the proffered wage couldn't be considered probative. Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), only an employer of one hundred or more workers can offer a letter from its financial officer. Smaller employers must demonstrate their ability to pay a proposed wage offer through annual reports, federal tax returns, or audited financial statements.

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 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. To the extent that a petitioner may have paid a beneficiary less than the proffered wage, consideration will be given to those amounts. In the instant case, although the record suggests that the petitioner has employed the beneficiary since May 1997 and counsel asserts on appeal that the petitioner has paid the proffered wage to the beneficiary, no evidence demonstrating such payment has been submitted.

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 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.

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. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. As shown above, net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets and liabilities are shown on 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.

In this case, as set forth above, although the petitioner's net current assets were sufficient to pay the proffered wage of \$42,640 in three of the four relevant years, in 2001, neither its net income of -\$84,648, nor its net current assets of \$11,434 could pay the proffered wage. As the regulation at § C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay a certified wage beginning on the priority date, in this case, the evidence has failed to demonstrate that ongoing ability.

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.

---

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.