



U.S. Citizenship
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Services

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FILE: WAC 03 068 50493 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a bakery. It seeks to employ the beneficiary as an auditor. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a statement and indicates that a brief.

In pertinent part, 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 September 10, 1999. The proffered salary as stated on the labor certification is \$4,612.40 per month or \$55,348.80 per year.

With the petition, counsel submitted copies of the petitioner's 1999 through 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation, a copy of the petitioner's 1999 through 2001 income statement and balance sheet, and copies of the petitioner's bank statements for the period June 28, 2002 through September 30, 2002. The petitioner's 1999 tax return reflected an ordinary income of \$18,233 and net current assets of -\$603. The 2000 tax return reflected an ordinary income of \$48,122 and net current assets of -\$11,402. The 2001 tax return reflected an ordinary income of \$20,581 and net current assets of \$9,042. The bank statements reflected balances from a low of \$25,910.26 to a high of \$34,558.55. The director considered this documentation insufficient and on May 5, 2003, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of September 10, 1999 and continuing to the present. The director specifically requested that the financial documentation be in the form of copies of annual reports, copies of federal tax returns including all schedules and tables (with appropriate signature(s)), or audited

financial statements. The director informed the petitioner that the tax returns did not support its ability to pay the proffered wage from 1999 through 2001 and that proof of wages paid (Forms W-2) could support that ability.

In response, counsel submitted copies of the petitioner's 1999 through 2002 Forms W-3, Transmittal of Wage and Tax Statements, copies of Forms W-2, Wage and Tax Statements, for all the petitioner's employees for the years 1999 through 2002, a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return For an S Corporation, and a copy of the petitioner's 2002 income statement and balance sheet. The 2002 tax return reflected an ordinary income of \$2,822 and net current assets of -\$29,647. The beneficiary did not work for the petitioner from 1999 through 2002.

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 22, 2003, denied the petition.

On appeal, counsel, states:

Please note that the Gross Annual Income and the total deductions of the Petitioner's Corporation Tax Return are as follows:

	<u>Gross Annual Income</u>	<u>Total deductions</u>
1999	\$635,259	\$401,654
2000	\$684,779	\$415,842
2001	\$674,261	\$446,014
2002	\$778,356	\$508,135

The Petitioner is in need of a qualified Auditor to review data, inspect accounting systems, verify journals and ledger, examine and analyze accounting records and to prepare reports. This will enable the Petitioner to continue to have success as shown on chart above of Gross Annual Income in the year 1999, 2000, 2001 and 2002.

* * *

Since the priority date the company has shown a Gross Annual Income of \$600,000 and has continued to grow well over \$700,000 in the year 2002. From this income the company is paying all overhead expenses and employees wages and will continue to use all available fund[s] to expand and market their products.

It is concluded that the company has shown the ability to pay the employees wages and by hiring a qualified Auditor, this will further the marketability of the company.

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 in 1999 through 2002 at a salary equal to or greater than the proffered wage.

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 from 1999 through 2002 were -\$603, -\$11,402, \$9,042, and -\$29,647, respectively. The petitioner could not have paid the proffered wage in 1999 through 2002 from its net current assets.

It is noted that the record of proceeding contains bank statements for the petitioner. However, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the

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

petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an auditor will significantly increase profits for a bakery. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The 1999 tax return reflects an ordinary income of \$18,233 and net current assets of -\$603. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 1999.

The 2000 tax return reflects an ordinary income of \$48,122 and net current assets of -\$11,402. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of \$20,581 and net current assets of \$9,042. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

The 2002 tax return reflects an ordinary income of \$2,822 and net current assets of -\$29,647. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2002.

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.