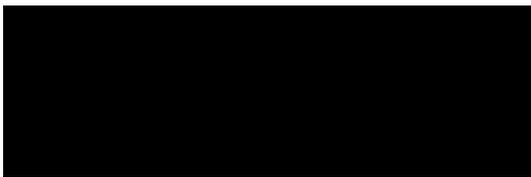




U.S. Citizenship
and Immigration
Services



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FILE: WAC 02 155 53104 Office: CALIFORNIA SERVICE CENTER Date: JUN 9 2003

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

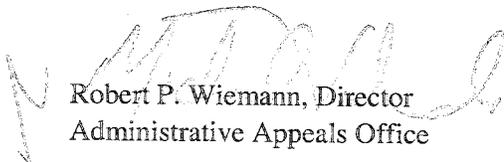
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a data processing services firm. It sought to employ the beneficiary permanently in the United States as an executive assistant to president.¹ As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor (DOL).

On October 10, 2002, the director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition, January 13, 1998.

The AAO dismissed the petitioner's appeal on October 29, 2003. The AAO reviewed the underlying record, as well as the evidence and argument offered on appeal and affirmed the director's decision, finding that although the petitioner had established its ability to pay the certified wage during 2000 and 2001, its financial information failed to demonstrate its continuing financial ability to pay the beneficiary's annual proffered wage of \$31,000 in 1998 and 1999. The AAO further identified an additional issue overlooked by the director in that the evidence failed to substantiate the beneficiary's two years of qualifying past employment experience required by the terms of the labor certification.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. As current counsel offers both new evidence and also contends that the AAO's decision was also based on an erroneous application of law or CIS policy, her motion is properly identified.

In this case, counsel resubmits copies of the petitioner's 1999, 2000, and 2001 tax returns and further provides a partial copy of the petitioner's 2002 return. For ease of reference, the information contained in the 1998, 1999, 2000 and 2001 tax returns previously considered by the AAO is again presented as shown on the petitioner's Form 1065, U. S. Return of Partnership Income for 1998 and 1999, as well as the petitioner's Form 1065 and Form 1120S, U.S. Income Tax Return for an S Corporation, which it also filed for 2000 when it changed its structure to a corporation, and Form 1120S for 2001:

	(Form 1065)	(Form 1065)	(Form 1065)	(Form 1120S)	(Form 1120S)
	1998	1999	2000	2000	2001
Net income ²	-\$ 16,996	-\$ 50,176	\$ 11,795	-\$23,818	\$137,312

¹ The position is classified under the occupation title of "secretary" by the DOL.

² "Net income" is used to identify the petitioner's reported ordinary income on line 22 of Form 1065 and line 21 of Form 1120S.

Current Assets	\$694,695	\$896,513	\$893,710	\$ 959,854	\$850,524
Current Liabilities	\$736,244	\$957,183	\$553,410	\$1,032,587	\$799,810
Net current assets	-\$ 41,549	-\$ 60,670	\$340,300	-\$ 72,733	\$ 50,714

Although the figure is not complete, the petitioner's 2002 tax return, submitted on motion, shows that it reported approximately \$40,500 in net income. Schedule L of the tax return reflects that it had \$757,499 in current assets and \$351,521 in current liabilities, resulting in \$405,978. As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.³ Besides net income, CIS will review a petitioner's net current assets as an alternative method of determining its financial ability to pay a proposed wage offer during a given period. A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. On Form 1120S, current assets are shown on lines 1(d) through 6(d) and current liabilities are listed at lines 16(d) through 18(d). Form 1065 is the same except current liabilities are shown on lines 15(d) through 17(d). If a corporation's 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 noted in the AAO's previous decision, while the petitioner's net current assets or net income was sufficient in 2000 and 2001 to pay the proffered wage, neither its net income of -\$16,996, nor its net current assets of -\$41,549 was sufficient to meet the proposed wage offer of \$31,000 in 1998. Similarly, in 1999, neither its net income of -\$50,176, nor its net current assets of -\$60,670 was sufficient to cover the proffered wage.

Counsel submits copies of the beneficiary's Wage and Tax Statements (W-2s) for 1998 through 2002 and contends that they should be factored in the review of the petitioner's ability to pay the proffered salary. 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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary for that period. In this case, as stated above, the relevant period is 1998 and 1999. The beneficiary's 1998 W-2 shows that she received \$28,620.83 in wages from the petitioner, or \$2,379.17 less than the proffered wage. In 1999, she was paid \$30,354.63 or \$645.37 less than the proffered wage. As noted above, the losses reported as both net income and net current assets for 1998 and 1999 could not cover any shortfall between actual wages received and the proffered salary in either year. Although the wages paid are slightly less than the proffered wage in 1998 and 1999, the record of proceeding contains no evidence that other readily available sources of funds, not already reflected on the petitioner's tax returns, was available to pay the difference between the proffered wage and the actual wages paid.

³ 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.

Citing large companies such as Cisco and Xerox, counsel contends that a minimal net income of a company as reflected on its tax return is a simply a result of proper tax planning and should not be considered indicative of a petitioner's ability to pay a given wage. This concept is already embodied in the regulation at 8 C.F.R. § 204.5(g)(2) permitting organizations that employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). It recognizes that large employers may have large net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the director retains the discretion to reject an employer's assurances and seek corroborative evidence. 8 C.F.R. § 103.2(b)(8). In this case, however, the petitioner is a business, which was established on January 1, 1998 and had 36 employees as of the filing of the preference petition.

On motion, counsel cites a Department of Labor regulation suggesting that the collective financial evidence of a petitioner's ability to pay the proffered wage should be considered equally. The DOL regulation may offer guidance in some circumstances but does not govern a CIS examination of the petitioner's financial ability to pay the certified salary. Rather, the current regulation at 8 C.F.R. § 204.5(g)(2) states that the evidence required to demonstrate a petitioner's financial ability to pay the proffered wage, in order to support its eligibility for the visa classification sought, must consist of either federal tax returns, audited financial statements or annual reports. Moreover, CIS jurisdiction to consider the petitioner's ability to pay the proffered wage was considered in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984), where the court determined that the financial viability of the employer to pay the wage stated in the labor certification is within the province of [CIS]. The court stated:

In *Ubeda v. Palmer*, 539 F. Supp. 647, 649-50 (N.D. Ill. 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983), the court concluded that the determination of a petitioning employer's financial viability is one to be made solely by [CIS] and not the Secretary of Labor. In view of the agencies' current practice, which is given weight in determining the proper division of functions between [CIS] and DOL, *see Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983), we conclude likewise. . . .

Counsel also submits copies of the petitioner's bank statements covering 1998 and 1999 as well as subsequent periods and refers to a past appeal sustained by the AAO asserting that its reference to checking accounts as part of the petitioner's ability to pay a proffered wage should mandate a similar decision in the instant case. The facts of that case are not before us and do not represent a binding precedent as described in 8 C.F.R. § 103.3(c).

In this case, although it is noted that the petitioner's monthly balances show substantial cash balances during 1998, 1999 and subsequent periods, as noted in the previous AAO decision, these balances are consistent with the large figures reported as cash on hand on Schedule L of the petitioner's federal tax returns for 1998 and 1999. No proof has been offered to show that they are additional monies available beyond that already reflected in the petitioner's tax returns. As current assets, they must also be balanced against obligations represented as current liabilities. Thus bank statements illustrate only a portion of a petitioner's financial status but do not establish the full extent of a petitioner's assets and liabilities.

Counsel further provides copies of the petitioner's payroll register for 1998 and 1999 and subsequent periods as well as copies of the petitioner's various quarterly federal tax returns (Form 941) from 2000 to the third quarter of 2003 showing that collective payroll that the petitioner maintained during those periods. Along with the petitioner's gross income and total assets counsel asserts that salaries paid should be determinative of a petitioner's ability to pay the proffered wage, rather than focusing on net income.

Counsel's contention is not persuasive. As stated in the previous AAO decision, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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, supra*); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision. The petitioner has not demonstrated its ability to pay the proffered wage in 1998 or 1999 as set forth above, and therefore has not persuasively shown that it has had a continuing ability to pay the certified wage as of the 1998 priority date of the petition.

It is finally noted that the regulation at 8 C.F.R. § 204.5(g)(1) provides that "evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. The Department of Labor decides the test of the job market and CIS may make a *de novo* determination to see if the alien's credentials sufficiently fulfill the certification's requirements. See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg. Comm.); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra* at 1309.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides in relevant part:

(ii) Other documentation—

- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Item 14 of the approved labor certification in this case requires that, in addition to two years of college culminating in an associate degree, the alien beneficiary must have two years of experience in the job offered as an executive assistant to the president or two years in an related occupation, defined as an "executive secretary." These qualifications must be demonstrated to have accrued as of the visa priority date. Copies of the educational

credentials of the beneficiary were submitted to the underlying record and on motion. Evidence of the beneficiary's qualifying past experience in the job offered or as an executive secretary has also been offered to the underlying record and on motion. It consists of a photocopy of the alien with an employee number referencing the Philippine National Bank, a copy of an envelope addressed to the alien from Trans Union Corporation, a copy of a medical insurance form signed by the alien and referring to Trans Union Corporation as her employer, a copy of a 1994 W-2 issued by Trans Union Corporation to the alien, and a copy of a some kind of identification document from the Asian Development Bank issued to the beneficiary in 1992 and identifying her as a staff member. As suggested in the previous AAO decision, this kind of evidence does not sufficiently support her qualifying past experience as an executive assistant to a president or executive secretary and does not indicate that letters from previous employers verifying her relevant experience were otherwise unavailable pursuant to 8 C.F.R. § 204.5(g)(1). For this additional reason, the petition remains denied.

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 motion to reopen/reconsider is granted and the previous decisions of the director and the AAO are affirmed. The petition remains denied.