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

BK

[Redacted]

FILE: [Redacted]
EAC 03 091 52755

Office: VERMONT SERVICE CENTER

Date: JUN 28 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:

[Redacted]

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is physician practicing in a physician office who operates a medical laboratory adjunct to the office practice. He seeks to employ the beneficiary permanently in the United States as a medical technologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly. The petitioner has appealed.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$22.31 per hour (\$46,404.80 per year). The Form ETA 750 states that the position requires one year of experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 1998, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date the Vermont Service Center on April 1, 2003, requested evidence pertinent to that issue.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for years

1997, 1999, 2000, and 2001. The tax returns, including the 1998 return already submitted, demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$46,404.80 per year from the priority date.

- In 2001, the Form 1120¹ stated taxable income loss ² of <\$104.00>³.
- In 2000, the Form 1120 stated taxable income loss of <\$40.00>.
- In 1999, the Form 1120 stated taxable income loss of <\$183.00>.
- In 1998, the Form 1120 stated taxable income loss of <\$932.00>.
- In 1997, the Form 1120 stated taxable income loss of <\$194.00>.

The director denied the petition on August 13, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

"Contrary to the findings in the decision on appeal, the petitioner has the ability to pay the proffered salary. The income tax return is not a reliable basis to determine the ability to pay the offered salary to a prospective employee for the simple reason that employers tend to find ways to get deductions without underreporting their incomes.

As noted in the attached letter from the petitioner, he has the capacity to pay the offered salary. The deductions claimed in the tax returns will be replaced by the expenses for the salary. In addition, the expected increase in income as a result of the hiring and new business should be considered. The rule that only the income during the year of filing the application should be considered prevents business growth."

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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 this case, the petitioner did not employ the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on

¹ The petitioner has elected to be treated as a personal service corporation on each year of the tax returns examined.

² IRS Form 1120, Line 28.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

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. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the years 1997 through 2001 for which petitioner's tax returns are offered for evidence.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by petitioner for 1997, 1998, and 2000,⁵ Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2000, petitioner's Form 1120 return stated current assets of \$2,729.00 and \$00.00 in current liabilities. Therefore, the petitioner had a \$2,729.00 in current net assets for 2000. Since the proffered wage was \$46,404.80 per year, this sum is less than the proffered wage.
- In 1998, petitioner's Form 1120 return stated current assets of a \$2000.00 and \$2,644.00 in current liabilities. Therefore, the petitioner had a <\$644.00> in current net assets for 1997. Since the proffered wage was \$46,404.80 per year, this sum is less than the proffered wage.
- In 1997, petitioner's Form 1120 return stated current assets of a <\$00.00> and \$2,627.00 in current liabilities. Therefore, the petitioner had a <\$2,627.00> in current net assets for 1997. Since the proffered wage was \$46,404.80 per year, this sum is less than the proffered wage.

Therefore, for the periods 1997, 1998 and 2001 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his appeal that "... the expected increase in income as a result of the hiring and new business should be considered." Counsel cites no legal precedent, and, according to regulation,⁶ copies of

⁴ 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.

⁵ The three tax years for which Schedules "L" were submitted.

⁶ 8 C.F.R. § 204.5(g)(2), *Supra*.

annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined

Petitioner provides a letter upon appeal that some of the expenses incurred by the practice were incurred to legally reduce the amount of taxes due. The petitioner contends that "... As noted in the attached letter from the petitioner, he [the petitioner] has the capacity to pay the offered salary. The deductions claimed in the tax returns will be replaced by the expenses for the salary." Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The beneficiary's occupation is medical technologist, and, there is an offer of employment by petitioner for the beneficiary to work in the petitioner's medical laboratory that is an existing adjunct to his office practice. The petitioner has provided tax returns that state substantial total expenses incurred each year, more than the proffered wage by a factor of three.⁷ A breakdown of the total expenses in the 1998 tax return shows supplies, lab, and miscellaneous expenses to be \$50,463.00. Similarly, in tax year 2000 (there was no expense schedule submitted for tax year 1999.), the expenses were \$49,536.00. Therefore, the petitioner has demonstrated a business necessity for employing the beneficiary in the occupation, and, he has expended funds that he could have used to pay the beneficiary "in-house" to operate his medical laboratory.

The petitioner has elected to be treated as a personal service corporation. The petitioner has demonstrated its ability to pay the proffered wage from the priority date forward because the various amounts it paid its sole shareholder in officer compensation during the pertinent years (1998 to 2001) were slightly more than the proffered wage. From 1997 to 2001, the amount of officer's compensation paid to the sole shareholder and owner of the petitioner was, respectively, \$505, \$4,500, \$1,100, and \$3,100 more than the proffered wage. It is a reasonable contention, in the context of this case, that the petitioner's physician owner and sole shareholder, who has indicated that he spends 100% of his time devoted to the business, would have redirected compensation in order to pay the wages of medical technologist, since the wages would be off-set by elimination of expenses incurred by the practice for the same services conducted by non-employees. Since the petitioner has shown that there are two sources of revenue to pay the proffered wage, any one of which would be adequate, petitioner has sustained his burden of proof in this matter.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained.

⁷ 1997, \$160,646.00; 1998, \$145,369.00; 1999, \$155,187.00; 2000, \$153,579.00; 2001, \$178,738.00.