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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 012 55098 Office: CALIFORNIA SERVICE CENTER Date: **MAR 10 2005**

IN RE: Petitioner:
Beneficiary:



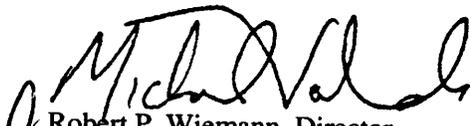
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Chinese language radio broadcasting company. It seeks to employ the beneficiary permanently in the United States as a producer. 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 and resubmits evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 23, 1996. The proffered wage as stated on the Form ETA 750 is \$2,293 per month, which amounts to \$27,516 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 1996 to 2001, as well as copies of three certificates of deposit issued by United National Bank in 2002. The aggregate amount of the certificate of deposits was \$652,223.29.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 24, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal income tax returns, with IRS Form 1120, 2220, 4562, and 5472, if appropriate, from 1996 to the present. The director

stated that the petitioner could also submit annual reports or audited financial statements to establish its ability to pay the proffered wage. The director also requested the state of California Form DE-6 for the last four quarters, with a description of the duties of each employee listed. The director requested the petitioner's business license and further documentation of the beneficiary's foreign work experience prior to the priority date

In response, the petitioner explained that it usually filed its federal income tax return on the Corporate Short-Form (1120A), which only has two pages and no attachments. The petitioner stated that its audience is mostly elderly persons and its operation is also partially based on charity. The petitioner submitted IRS tax computer records from 1996 to 2002. The petitioner stated that it had cash assets and that the company balance sheet showed a cash flow of \$250,000 to \$270,000. The petitioner submitted Form DE-6 for five quarters, and explained that it had six employees on payroll and over 12 volunteers who did not receive pay. The petitioner also submitted its business license.

With regard to the beneficiary's experience, the petitioner submitted letters from two previous employers in Taiwan. One letter from the [REDACTED] Station Headquarters stated that the beneficiary produced and hosted a radio program from July 1, 1993 to the present. The letter is dated April 25, 1996. The second letter is from [REDACTED] Taipei, Taiwan, dated May 5, 2003. The letter stated that the beneficiary worked with the organization from June 1993 to October 1996.

On June 25, 2003, the director requested that the petitioner resubmit its federal income tax returns from 1996 to 2002 and that these documents be dated and signed by the petitioner, as well as certified by the IRS. The director also stated that in lieu of such documents, the petitioner could submit IRS computer tax records, date-stamped by the IRS. In response, on June 25, 2003, the petitioner restated that it used the IRS Form 1120A to report its federal income, which does not have attachments. Counsel submitted the petitioner's 2002 federal income tax returns, and resubmitted the petitioner's federal income tax returns from 1996 to 2001. The petitioner's president signed these returns, although they had originally been signed by the petitioner's secretary/bookkeeper.¹ The petitioner also stated it could not provide certified tax returns as these were only available if the returns were provided in person to the IRS, and an additional copy was brought for the IRS certification. Counsel stated that the petitioner could no longer request certified copies of its previous federal income tax returns.

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 September 22, 2003, denied the petition. The director examined the petitioner's taxable income before net operating loss and special deductions as listed on page one of the petitioner's federal income tax returns from 1996 to 2002. Based on these figures, which ranged from \$907 to \$3,395.65, the director stated that the petitioner did not have the ability to pay the proffered wage of \$27,516, as of the priority date and onward.

On appeal, counsel asserts that the director did not mention or comment on the petitioner's total assets, as outlined in the IRS computer printouts for 1996 to 2002. Counsel states that the petitioner has been in business for twenty

¹ It is not clear why the director requested signed and dated federal income returns in his second request for evidence. The returns originally submitted by the petitioner in its petition are signed and dated by its bookkeeper.

years and has always been in stable financial condition. Counsel states that the petitioner has always had cash assets of over \$250,000. Counsel states that the petitioner submitted two certificates of deposit in the amount of \$150,000 to \$100,000 to the record and that the petitioner's tax returns reflect company cash assets from \$250,000 to \$270,000. Counsel asserts that the director overlooked the petitioner's cash assets when he examined the petitioner's financial resources. Counsel resubmits the petitioner's federal income tax returns and the IRS computer printouts.

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. The petitioner did not claim to have employed the beneficiary as of the priority date and onward. Therefore, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 1996 and onward.

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 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, now CIS, should have considered income before expenses were paid rather than net income. The director is correct in stating that the petitioner's net income figures on its federal tax returns are insufficient to establish that the petitioner is capable of paying the beneficiary's wage. From 1996 to 2002, the petitioner's net or taxable income before operating loss deductions amount are as follows: \$2,200.75, \$2,258.83, \$1,542.03, \$2,083.58, \$3395.65, \$907.90, and \$3,378. These figures are not sufficient to cover the beneficiary's annual salary of \$27,516.

Nevertheless, counsel is correct that 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. In addition, 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 On Form 1120A, a corporation's year-end current assets are shown on Part III, Balance Sheet Per Books, lines 1(b) through

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

6(b). Its year-end current liabilities are shown on lines 13(b) through 14(b). 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 tax returns reflect the following information for the following years:

	1996	1997	1998	1999
Taxable income ³	\$ 2,200.75	\$ 2,258.83	\$ 1,542.03	\$ 2,083.58
Current Assets	\$ 285,000	\$ 285,000	\$ 285,000	\$ 285,000
Current Liabilities	\$ 0	\$ 0	\$ 0	\$ 0
Net current assets	\$ 285,000	\$ 285,000	\$ 285,000	\$ 285,000

	2000	2001	2002
Taxable income	\$ 3,395.65	\$ 907.90 ⁴	\$ 3,378
Current Assets	\$ 285,000	\$ 285,000	\$ 285,000
Current Liabilities	\$ 0	\$ 0	\$ 0
Net current assets	\$ 285,000	\$ 285,000	\$ 285,000

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, or that it has sufficient taxable income to pay the beneficiary's wage as of the priority date and onward. However, as illustrated above, the petitioner has established that it has sufficient net current assets for each of the years in question to pay the beneficiary's wage. With regard to the submission of the petitioner's certificates of deposit as evidence of the petitioner's ability to pay the proffered wage, certificates of deposit, which can be accessed at any time albeit with penalties for early withdrawal, are viewed as liquid assets. However, the certificates of deposit submitted by the petitioner are for the year 2002, and therefore do not establish the petitioner's ability to pay the proffered wage from 1996 to 2001. Nevertheless, based on its net current assets from 1996 to 2002, the petitioner has shown the ability to pay the proffered wage during the salient portion of 1996 and onward.

Therefore, the director's decision will be withdrawn, and the petition will be approved.

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. The petition is approved.

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.

³ Taxable income is the sum shown on line 24, taxable income before NOL deduction and special deductions, IRS Form 1120A, U.S. Corporation Income Tax Return.

⁴ The petitioner left line 24 blank on its 2001 federal income tax return; however, since the petitioner listed no net operating loss deduction, line 26, taxable income, can be used as the petitioner's net or taxable income.

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