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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 03 088 50986

Office: VERMONT SERVICE CENTER

Date:

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a floral design and supplier company. It seeks to employ the beneficiary permanently in the United States as a floral designer. 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.

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 granting 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 April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$36,000 per year.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 1994.

On the petition, the petitioner stated that it was established in 1972 and that it employs six workers.

In support of the petition, counsel submitted a G-28; an approved ETA-750, application for Alien Labor certification; the petitioner's letter of support of the petitioner; letters in general support of the beneficiary's qualifications; and a CPA-certified first page of the 2001 Form 1120S tax return.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested on April 7, 2003, additional evidence pertinent to that ability. The director also specifically requested copies of annual reports, federal tax returns or audited financial statements; the petitioner's 2001 federal tax return; Form W-2s for the beneficiary showing evidence of his employment by the petitioner in 2000, 2001 and 2002; and letters of qualification with dates of employment and details about the letter writer showing that the beneficiary had the required two years of experience.

In response, counsel submitted a 2001 Form 1120S tax return; W-2 Forms for 2000 – 2002; and a more detailed letter about the dates of the beneficiary's qualifications.

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 August 18, 2003, denied the petition.

On appeal, counsel submits a brief and the following evidence:

- The petitioner's CPA-audited financial statements for 2000 – 2002, including a balance sheet and a profit and loss statement;
- The petitioner's complete 2000 and 2001 Form 1120S tax returns; and,
- The petitioner's statement that the beneficiary's rate of pay is more than \$36,000 a year.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will examine whether the petitioner employed 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. Accordingly, in the instant case, the petitioner did establish that it employed and paid the beneficiary. According to the submitted W-2 statements, the petitioner paid the beneficiary \$12,750 in 2000, \$13,000 in 2001, and \$13,000 for 2002.¹

If the petitioner does not establish its ability to pay the proffered wage through an analysis of the petitioner's income, that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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*, the court held that CIS, then the Immigration and Naturalization Service, 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

Even so, by adding the amount paid to the beneficiary to the net income, the petitioner still shows a \$4,471 income deficit available for the proffered wage in 2000, and likewise a \$29,277 income deficit for the proffered wage in 2001.

¹ The director's decision overlooked \$11,000 of the beneficiary's earnings for 2002, reported by the petitioner using two employer tax ID numbers.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those it expects to convert into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, that is, those the petitioner plans to pay within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.²

Accordingly, an analysis of the petitioner's tax 1120 returns for 2000 and 2001, at Schedule L, shows in net current assets for 2000 of \$8,212, and for the following year net current liabilities of \$4,843. Accordingly, the AAO's analysis of the petitioner's current assets fails to establish the petitioner's ability to pay the proffered wage.

The audited financial statements counsel submitted on appeal fails to present facts that significantly differ from those found in the petitioner's submitted 1120S tax returns. The sums stated therein do not alter the conclusion that the petitioner possessed, as of the priority date, the continuing ability to pay the proffered wage with either its income or current assets.

Accordingly, counsel has failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2000 or 2001. Therefore, the petitioner has not established that it 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 not met that burden.

ORDER: The appeal is dismissed.

² Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(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 during the year in question, 2001, however, were negative. As such, the director's failure to consider the petitioner's net current assets or liabilities did not prejudice the petitioner's cause.