

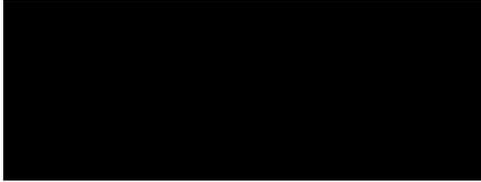
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
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FILE:



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Office: TEXAS SERVICE CENTER

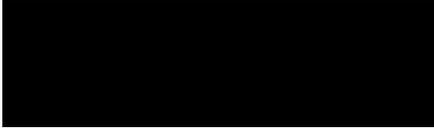
Date:

NOV 07 2005

IN RE:

Petitioner:

Beneficiary:



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

The petitioner is a diesel injection service business. It seeks to employ the beneficiary permanently in the United States as a fuel injection servicer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief.

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 January 14, 1998. The proffered salary as stated on the labor certification is \$8.00 per hour or \$16,640 per year.

With the petition, the petitioner, through counsel, failed to submit sufficient evidence of its continuing ability to pay the proffered wage from the priority date. On January 25, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from May 3, 2001¹ and continuing to the present. The director specifically requested a copy of the petitioner's 2000 federal income tax return.

In response, counsel provided a copy of the petitioner's Articles of Incorporation, a copy of a personal shareholder form, copies of the petitioner's 1998 through 2000 Forms 1040, U.S. Individual Income Tax Returns, copies of the petitioner's 1997, 1998, and 1999 Forms 1120, U.S. Corporation Income Tax Returns, and a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹ It is noted that the priority date of the petition is January 14, 1998, not May 3, 2001.

The tax returns represented the fiscal years between July 1 through June 30 of the following year. The 1997 tax return reflected a taxable income before net operating loss deduction and special deductions of \$1,534 and net current assets of \$87,015. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$2,559 and net current assets of \$81,557. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$9,479 and net current assets of \$168,435. The 2000 tax return reflected an ordinary income of -\$1,511 and net current assets of \$162,145. The 1998 through 2000 Forms 1040 reflected adjusted gross incomes of \$59,285, \$61,322, and \$51,602, respectively.

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. On May 3, 2004, the director denied the petition.

On appeal, counsel provides previously submitted evidence and states that the petitioner has shown its ability to pay the proffered wage through the major shareholder's pledge to guarantee the salary offered. Counsel cites a Board of Labor Certification Appeals (BALCA) case in support of his statement.

In determining the petitioner's ability to pay the proffered wage, 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 at a salary equal to or greater than the proffered wage from 1998 through 2000.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 in fiscal years 1997 through 2000 were \$87,015, \$81,557, \$168,435 and \$162,145, respectively. The petitioner could have paid the proffered wage in the fiscal years 1997 through 2000 from its net current assets.

In support of his contention that CIS should accept the major shareholder's pledge to guarantee the proffered wage, counsel states that, "True enough, the Service is not hierarchically in line with the Board of Labor Certification Appeals (BALCA), but the fundamental approach to the process of petitioning an alien for a job in the United States must be uniform, and cannot be contradictory, within the Federal government." Contrary to counsel's assertion, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In addition, CIS is not bound by BALCA decisions and will only consider them as supplemental evidence.

The petitioner's 1997 fiscal tax return reflects a taxable income before net operating loss deduction and special deductions of \$1,534 and net current assets of \$87,015. The petitioner could have paid the proffered wage from its net current assets in fiscal year 1997.

The petitioner's 1998 fiscal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$2,559 and net current assets of \$81,557. The petitioner could have paid the proffered wage from its net current assets in fiscal year 1998.

The petitioner's 1999 fiscal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$9,479 and net current assets of \$168,435. The petitioner could have paid the proffered wage from its net current assets in fiscal year 1999.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's 2000 fiscal tax return reflects an ordinary income of -\$1,511 and net current assets of \$162,145. The petitioner could have paid the proffered wage from its net current assets in fiscal year 2000.

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.