

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: [Redacted]
EAC 05 015 50851

Office: VERMONT SERVICE CENTER

Date: JUL 26 2006

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, Chief
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 case will be remanded to the director for further investigation and entry of new decision.

The petitioner is an information systems technology firm. It seeks to employ the beneficiary permanently in the United States as a software quality assurance lead person. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 February 17, 2004. The proffered wage as stated on the Form ETA 750 is \$60,431 per year. On the Form ETA 750B, signed by the beneficiary on January 30, 2004, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on October 18, 2004, the petitioner claims to have been established in 1998, to currently employ fifteen workers and to have a gross annual income of \$1,890,159.

In support of its ability to pay the beneficiary's proposed wage offer of \$60,431 per year, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation. It reflects that the petitioner files its federal tax returns using a standard calendar year. In 2003, the petitioner reported ordinary income of \$13,196.

Schedule L contains the petitioner's current assets and current liabilities. It shows that the petitioner had \$228,088 in current assets and current liabilities of \$240,378, yielding net current assets of -\$12,290. Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible readily available resource out of which a proffered wage may be paid. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 director denied the petition on December 23, 2004. He reviewed the petitioner's financial data contained within its 2003 corporate tax return and concluded that neither the petitioner's net income of \$13,196, nor its net current assets of -\$12,290 could pay the proposed wage offer of \$60,431.

On appeal, counsel provides an incomplete copy (lacking all schedules) of the petitioner's 2004 corporate tax return in support of its ability to pay the certified wage. It reflects that the petitioner's net income was \$203,852. Schedule L shows current assets of \$199,652.50 and current liabilities of \$54,200, resulting in net current assets of \$145,452.50. Counsel emphasizes that the petitioner has a sizeable payroll and reflects a significant level of accounts receivables and has the ability to pay the proposed wage offer. Counsel also mentions that the petitioner had seven employees on its payroll in the 4th quarter of 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. In this case, there is no evidence that the petitioner has employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may

¹ 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.

reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income.

As noted above, the 2004 corporate tax return submitted on appeal indicates either sufficient net taxable income of \$203,852 or net current assets of \$145,452.50 could cover the proposed wage offer. It is noted, however, that CIS electronic records show that the petitioner has filed at least fifteen immigrant visa petitions in the last two years, with at least eight approved with a priority date in 2004, as in this case. It is unclear how many cases utilized the same financial information or the particulars in each case, but it is the petitioner's burden to demonstrate its continuing ability to pay the proffered wage for petitions filed on behalf of multiple beneficiaries. Before determining as a final matter that this petition merits approval, we would remand this case to the director to request any additional evidence necessary to assure that the financial ability of the petitioner to pay the prospective proffered wage of another beneficiary is demonstrated and that this petition represents a bona fide job offer.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.