

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

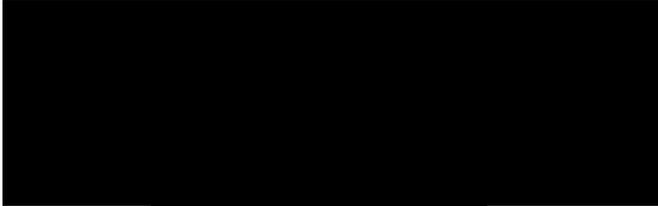
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: [REDACTED]
EAC 03 199 50624

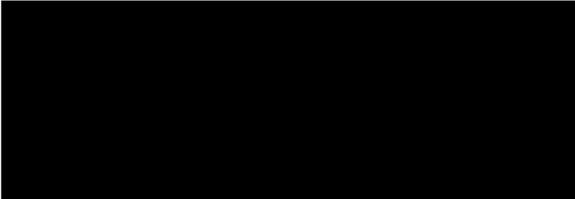
Office: VERMONT SERVICE CENTER

Date: OCT 24 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 Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a textile-manufacturing firm. It seeks to employ the beneficiary permanently in the United States as a cloth designer. 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)(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 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 May 1, 1998. The proffered wage as stated on the Form ETA 750 is \$35.59 per hour, which amounts to \$74,027.20 per annum. On the Form ETA 750B, signed by the beneficiary on April 27, 1998, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on June 23, 2003, the petitioner claims to have been established in 1993 and to currently employ eight workers. In support of its ability to pay the proposed wage offer of \$74,027.20, the petitioner initially provided a copy of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2001. It reflects that the petitioner files its federal tax returns using a standard calendar year. In 2001,

it reported taxable income of \$24,015 before the net operating loss (NOL) deduction. Part III shows that the petitioner had \$563 in current assets and \$19,558 in current liabilities, yielding -\$18,995 in net current assets. 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 Besides net 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 readily available resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Part III or Schedule L of a corporate tax return. Here, current assets are found on line(s) 1(b) through 6(b) and current liabilities are specified on line(s) 13(b) through 14(b). 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 issued a request for additional evidence on August 25, 2004. He advised the petitioner that it must demonstrate its ability to pay the proffered wage from the priority date of May 1, 1998 and continuing to the present. He additionally requested the petitioner to provide a copy of its 1998 federal tax return, or alternatively, its 1998 annual report accompanied by audited or reviewed financial statements.

In response, the petitioner supplied a copy of its 1998 Form 1120, U.S. Corporation Income Tax Return. It shows that the petitioner declared \$49,785 in taxable income before the net operating loss. Current assets of \$2,306 are shown on Schedule L. Combined with current liabilities of \$30,2144, the petitioner had -\$27,938 in net current assets.

The director denied the petition on March 10, 2005. Noting that the petitioner's financial data shown on its 1998 and 2001 federal tax return(s) failed to demonstrate sufficient funds to cover the proffered wage, the director concluded that the petitioner had not established its ability to pay the proffered salary of \$74,027.20 per year.

On appeal, counsel resubmits a copy of the petitioner's 1998 corporate tax return, as well as providing a copy of a letter from the petitioner's accountant. [REDACTED] asserts that as a non-cash item, the petitioner's depreciation expense should be considered as available to pay the proffered wage. He also states that the net operating loss should also be considered as available funds to pay the certified wage. Counsel adopts these arguments in her brief and additionally emphasizes the petitioner's 1998 gross sales of \$862,248.

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 may have 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

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.

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, the record contains no evidence that the petitioner has employed the alien.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If the net taxable income 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. Gross sales are not probative of a petitioner's ability to pay a given wage because the expenses incurred to generate such revenues must also be considered. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is also well established by judicial precedent. "The [CIS] may 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). 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.

The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Further, as stated above, the AAO recognizes the amount taken as a net operating loss shown on a tax return. If deductible expenses for a tax year exceed a business' gross income, certain businesses may deduct the loss from their income in another year or years. The loss claimed in a year other than the year in which it was incurred is

called a net operating loss, and as suggested by [REDACTED] should not be considered as affecting the operations of the current year's tax return. As hereinabove stated, taxable income before a net operating loss will be considered in order to determine whether a petitioner had sufficient income in the year of filing to pay the proffered wage.

In this matter, the neither the 1998 nor the 2001 federal tax return shows that it could have paid the proffered wage of \$74,027.20 out of either taxable income before the net operating loss or its net current assets. In 1998, neither its \$49,785 in taxable income before the net operating loss deduction, nor its net current assets of -\$27,938, was sufficient to cover the certified wage during that year. Similarly, the 2001 tax return reflects that neither the petitioner's \$24,015 in net income before the NOL deduction, nor its net current assets of -\$18,995 could cover the proffered wage during this year. Finally, it is noted that no financial documentation covering 1999, 2000, 2002, or 2003 is contained in the record. As the priority date is May 1, 1998, the lack of such evidence also indicates that the petitioner has failed to demonstrate its ability to pay the certified salary during this period.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing ability to pay the proffered wage beginning at the priority date. Based on the evidence contained in the underlying record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.