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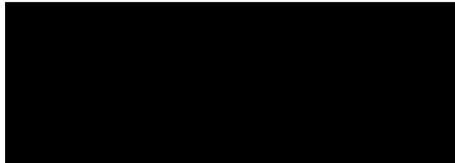
U.S. Department of Homeland Security
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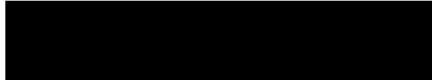
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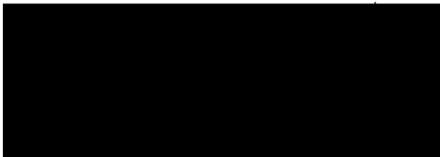
Petitioner:



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, 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 appeal will be sustained. The petition will be approved.

The petitioner is a Japanese language newspaper and magazine. It seeks to employ the beneficiary permanently in the United States as an internet web-site 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.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has the 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$67,597 per year. On the Form ETA 750B, signed by the beneficiary on November 1, 2002, the beneficiary claims to have worked full-time for the petitioner since March 2001.¹

¹ On the biographic questionnaire (G-325A) submitted with the beneficiary's application for permanent resident status and signed by the beneficiary on August 26, 2003, he states that he has worked for the petitioner from June 2001 to the present.

Part 5 of the petition, filed on February 11, 2004, indicates that the petitioner was established in 1991, claims a gross annual income of two million dollars and currently employs twenty workers. In support of its continuing ability to pay the proffered wage, the petitioner initially provided a copy a "federal income tax summary" that summarizes and compares the petitioner's financial information for 2001 and 2002. The petitioner also submitted the front side of a copy of a check, dated April 30, 2003, drawn on the petitioner in favor of the beneficiary for \$2,160.50.

On March 25, 2004, the director requested additional evidence from the petitioner. The request included instructions to provide additional evidence of the petitioner's ability to pay the proffered salary of \$67,597 per year as of the April 25, 2001, priority date and continuing until the present. The director instructed the petitioner to submit a copy of the beneficiary's 2001, 2002, and 2003 Wage and Tax Statement (W-2) since the record indicated that the petitioner had employed the beneficiary. The director advised the petitioner that as an alternative, it could provide copies of its 2001, 2002, and 2003 United States federal corporate income tax return(s), with all schedules and attachments or, it could provide copies of annual reports for 2001, 2002, and 2003, which are accompanied by audited or reviewed financial statements.

In response, the petitioner, through counsel, submitted a copy of Internal Revenue Service (IRS) Form 1099/Miscellaneous Income issued by the petitioner to the beneficiary for 2001, 2002, and 2003. They reflect that the petitioner paid compensation to the beneficiary in the following amounts:

2001	\$10,166.50
2002	\$26,532.50
2003	\$26,093.50

The petitioner also submitted a copy of the first page of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. The figures reflected show that the petitioner reported approximately 5.28 million dollars in gross sales, officer compensation of \$388,500, salaries and wages of \$801,198, and ordinary income² (loss) from trade or business as -\$2,359 in 2001. In 2002, it declared approximately \$4.58 million dollars in gross sales, officer compensation of \$229,000, salaries and wages of \$705,211, and -\$75,069 in ordinary income.³ In 2003, the petitioner reported approximately \$4.23 in gross sales, officer compensation of \$170,500, salaries and wages of \$740,278, and ordinary income of -\$147,114.

² For the purpose of this review, ordinary income will be treated as net income. A subchapter S corporation reports its cumulative net income (including income and expenses from sources in addition to those from a trade or business) on line 23 of Schedule K. Here, the complete copies of the petitioner's 2001 and 2002 tax returns provided on appeal reflect that the net income on line 23 was \$2,555 in 2001 and -\$74,105 in 2002.

³ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay a certified wage, CIS will examine a petitioner's net current assets in determining the ability to pay a proffered wage. 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.³ A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. 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 July 28, 2004, determining that the petitioner had failed to establish its ability to pay the proposed wage offer of \$67,597. The director noted that the amounts reflected on the 1099s provided in response to her request for additional evidence did not reflect that the petitioner had paid salaries to the beneficiary commensurate with the proffered wage. She also concluded that the figures shown on the tax summary submitted with the petition did not reflect that the petitioner had sufficient funds to pay the balance of the offered salary

On appeal, the petitioner, through counsel, submits complete copies of its 1998-2002 income tax returns. Counsel maintains that the year-end bottom line should not be determinative of the petitioner's ability to pay a certified wage. He asserts that such items as depreciation, amortization, capital expenditures and acquisitions can contribute to the end result although they are not operating expenses and that a company's income stream should also be examined. Counsel also cites an example of a company that could have acquired another company and carry forward a loss as a deduction during subsequent years. He further emphasizes that the size of the petitioner's officer compensation and salaries and wages further demonstrate that payment of the balance of the beneficiary's proffered salary would not impose any strain upon the petitioner's resources.

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 matter, as set forth above, in 2001, the petitioner paid the beneficiary \$57,430.50 less than the proffered wage. In 2002, the beneficiary's compensation was \$41,064.50 less than the proffered wage, and in 2003, the petitioner paid the beneficiary \$41,503.50 less than the proffered wage.

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. 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 reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1053 ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 and *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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 that were submitted in support of the ability to pay, 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. 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.

CIS does consider, in certain cases, the extent that losses are carried forward in a given year. This may occur, for example, when deductible expenses for a tax year exceed a business' gross income then certain business' 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 should not be considered as affecting the operations of the current year's tax return. On a corporation return such as Form 1120, taxable income before a net operating loss will be reviewed as the principal source of payment of a proffered wage. In this matter, no specific assertion of a carry forward loss has been made by the petitioner.

As mentioned before, a petitioner's net current assets may also be examined as a possible source out of which a certified wage may be paid. In this case, as revealed on appeal, the petitioner's net current assets shown on Schedule L in 2001 were \$60,032 and in 2002, they were -\$22,058.

In some cases, as is suggested here, it may be appropriate to examine the total circumstances surrounding a petitioner's financial profile based on its reasonable expectations of generating increasing profit despite losses incurred in other years. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In this case, the AAO finds that there is sufficient evidence to apply this principle based on the fact that the petitioner has reported steady gross revenue of four to five million dollars for the past several years, substantial salaries and wages in relation to the amounts needed in 2002 and 2003 to cover the difference between the proffered wage of \$67,597 and the actual compensation paid of \$41,064.50 and \$41,503.50, respectively. These differences represented approximately six percent of the petitioner's payroll in both years and approximately 18% and 24% of the officer compensation in 2002 and 2003, respectively. It is noted that in 2001, the petitioner's net current assets of \$60,032 could cover the \$57,430.50 shortfall between actual compensation paid and the proffered wage. In this case, it may be concluded that the petitioner has sufficiently demonstrated its continuing ability to pay the proffered salary, beginning at the priority date consistent with the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

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.