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DEC 17 2004

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:  
WAC 00 032 52599

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

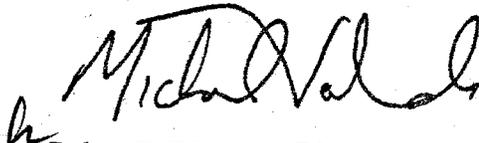
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to  
section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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, California Service Center, initially approved the employment-based preference visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a professional dog handlers/kennel. It seeks to employ the beneficiary permanently in the United States as animal caretaker. 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 revoked the approval of the petition accordingly.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on November 12, 1999. It was initially approved on September 1, 2000. The alien beneficiary filed an application to adjust her status to that of lawful permanent resident. Following the receipt of information from both the petitioner and beneficiary relevant to the beneficiary's application to adjust to permanent resident status, the director concluded that the I-140 was approved in error and issued an intent to revoke the petition on December 5, 2002. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on February 24, 2003, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, asserts that the director's analysis did not accurately reflect the petitioner's ability to pay the proffered wage.

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) provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial

statements. . . . 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 the Service.

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is May 17, 1995. The beneficiary's salary as stated on the labor certification is \$8.75 per hour based on a 40-hour week, or \$18,200 annually.

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$18,200, copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for the years 1995 through 2001 are provided in the record. The director concluded that out of the seven years represented on the tax returns, the petitioner failed to show its ability to pay the proffered wage in every year with the exception of 1998. Those tax returns contained the following information:

	1995	1996	1997
Net income	\$ 4,664	\$ 9,044	\$16,821
Current Assets	\$ 6,137	\$ 7,818	\$15,405
Current Liabilities	\$ 0	\$ 0	\$ 0
Net current assets	\$ 6,137	\$ 7,818	\$15,405
	1998	1999	2000
Net income	\$35,595	\$ 8,882	-\$16,490
Current Assets	\$14,545	\$11,056	\$ 8,002
Current Liabilities	\$ 0	\$ 0	\$ 3,745
Net current assets	\$14,545	\$11,056	\$ 4,257
	2001		
Net income	-\$3,158		
Current Assets	\$8,092		
Current Liabilities	\$ 0		
Net current assets	\$8,092		

On appeal, counsel states:

In this case, the petitioner filed a labor certification in 1995. Therefore, the petitioner has provided its tax returns from 1995 to the present. The provided tax returns establish the petitioner's ability to pay the offered wage. Specifically:

- \$339,918 in total income for 2001 (Form 1120 (2001), line 11).

- \$454,841 in total income for 2000 (Form 1120 (2000), line 11).
- \$288,585 in total income for 1999 (Form 1120 (1999), line 11).
- \$294,128 in total income for 1998 (Form 1120 (1998), line 11).
- \$256,635 in total income for 1997 (Form 1120 (1997), line 11).
- \$263,484 in total income for 1996 (Form 1120 (1996), line 11).
- \$244,371 in total income for 1995 (Form 1120 (1995), line 11).

However, despite clear evidence to the contrary, the Service concludes that the petitioner does not have the ability to pay the offered wage. The Service is making this erroneous conclusion by focusing solely on the taxable income from the petitioner's tax return (Form 1120, line 30). While the regulations do not specify how the Service should analyze a tax return to determine an employer's ability to pay, it is reasonable to assume that the Service should not violate basic accounting principles when doing so.

The net or taxable income on a tax return is merely indicative of a company's tax liability, not its financial health (*see* Andersen letter, previously submitted). When the Service determines an employer's ability to pay by looking solely at its tax return, the Service should look at the information conveyed by the entire document rather than looking at only the taxable income amount. In this case, in each of the tax returns submitted, the petitioner has well over \$200,000 in deductions, which includes a variety of discretionary and nondiscretionary items (lines 12 through 29). Many of these deductions are taken at the discretion of the employer with the intention of lowering the taxable income on the tax return, . . .

\* \* \*

The Service further states that petitioner has no record of paying the beneficiary the offered wage. However, the Service knows quite well that the beneficiary did not receive work authorization until it approved her I-765, Application for Employment Authorization, on July 15, 2002 (WAC-02-114-52554). Prior to that date, the beneficiary was unable to be on the petitioner's payroll. The Petitioner submitted a statement attesting that the Beneficiary received cash payment for services prior to July 15, 2002. The Service indicates that it cannot verify the cash payments, but does not explain why the attestation from the Petitioner is insufficient.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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. In the instant case, the petitioner provided no evidence of the wages it paid to the beneficiary during the requisite years with the exception of 2001.

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. 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. 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*, 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.

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.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(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 years in question, 1995, 1996, 1997, 1999, 2000 and 2001, however, were \$6,137, \$7,818, \$15,405, \$14,545, \$11,056, \$4,257 and \$8,092. In each year, the amount is less than the proffered wage.

Counsel's claim that the petitioner has shown a steady growth and that its net income has exceeded the proffered wage is obvious. However, the petitioner must show its ability to pay the wage from the priority date, May 17, 1995, until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner has not provided sufficient evidence, notably Forms W-2, Wage and Tax Statements, for the beneficiary for the years 1995 through 2000. In addition, while counsel's statement that the beneficiary was paid in cash prior to her obtaining work authorization and, therefore, the petitioner did not provide the beneficiary with a Form W-2 for the years 1995 to 2000 may be true. However, it is not unreasonable to assume that some type of record (personnel records, cancel checks, time sheets, bank statements, ledgers, etc.) would be available to establish the beneficiary's employment for the years 1995 through 2000. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The tax return for 1995 reflects a taxable income before net operating loss deduction and special deductions of \$4,664 and net current assets of \$6,137. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The tax return for 1996 reflects a taxable income before net operating loss deduction and special deductions of \$9,044 and net current assets of \$7,818. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The tax return for 1997 reflects a taxable income before net operating loss deduction and special deductions of \$16,821 and net current assets of \$15,405. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The tax return for 1999 reflects a taxable income before net operating loss deduction and special deductions of \$8,882 and net current assets of \$11,056. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The tax return for 2000 reflects a taxable income before net operating loss deduction and special deductions of -\$16,490 and net current assets of \$4,257. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The tax return for 2001 reflects a taxable income before net operating loss deduction and special deductions of -\$3,158 and net current assets of \$8,092. The petitioner could not pay the proffered wage from its taxable income. However, the petitioner could pay the proffered wage by adding the wages actually paid to the beneficiary to its net current assets ( $\$14,000 + \$8,092 = \$22,092$ , more than the proffered wage).

Based on the financial data contained in the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition. However, it is noted that if the petitioner could show it paid sufficient wages for the years 1995, 1996, 1997, 1999, and 2000 that when added to either the petitioner's taxable income or its net current assets equals to or is more than the proffered wage, then the petitioner would establish its ability to pay the proffered wage.

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.