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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 197 51543 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

MAR 31 2004

PETITION: Immigrant Petition for a 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, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a metal furniture custom finishing company. It seeks to employ the beneficiary permanently in the United States as a metal furniture finishing supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and contends that the director failed to adequately review the information furnished on the federal tax returns.

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) also provides in pertinent part:

(2) *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 [CIS].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the Department of Labor's employment service system. Here, the petition's priority date is June 7, 1999. The beneficiary's salary, as stated on the labor certification, is \$21.40 per hour or \$44,512 per year based on a 40-hour week. The record indicates that the petitioner was established in 1988 and is organized as a corporation. It employs eleven people. Part B of the ETA-750 reflects that the petitioner has employed the beneficiary since 1995.

In support of the petitioner's ability to pay the proffered wage, counsel initially submitted partial copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1998, 1999 and 2000. These returns indicate that the petitioner files its taxes based on a fiscal year running from September 1st to August 31st of the following year. They reveal the following:

Year	Taxable Income before Net Operating Loss Deduction
1998	\$22,154
1999	11,308
2000	15,150

On August 30, 2002, the director requested additional evidence from the petitioner in order to establish its continuing ability to pay the beneficiary's wage offer of \$44,512 per year. The director advised the petitioner to submit copies of signed federal tax returns with all attachments and schedules, audited financial statements, or annual reports from 1999 through 2001.

The petitioner responded by submitting complete copies of its Form 1120, U.S. Corporation Income Tax Return for 1998, 1999 and 2000. Based on its fiscal year, these returns present its financial data from September 1, 1998 through August 31, 2001. Schedule L represents a balance sheet showing, among other things, a petitioner's net current assets. Net current assets represent the difference between current assets and current liabilities. It reflects the level of liquidity that a petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the balance sheet. Schedule L of this petitioner's relevant corporate tax returns contained the following:

Year	Current Assets	Current Liabilities	Net Current Assets
1998	\$ 17,204	\$ 8,455	\$ 8,749
1999	20,606	10,748	9,858
2000	77,490	69,291	8,199

The director issued a notice of intent to deny on December 4, 2002. He determined that neither the petitioner's net income, nor its net current assets for each of the relevant years revealed sufficient levels to pay the beneficiary's proposed salary.

In her response to the director's notice of intent to deny the petition, counsel asserted that the petitioner's ability to pay should be evaluated in light of the petitioner's reported gross income in excess of 1.5 million dollars for each of the pertinent years. Counsel also pointed out that the petitioner has annually paid over \$500,000 as "costs of labor" in the three years under discussion. It has also paid its officers compensation averaging \$455,840. Most significantly, counsel advised that the beneficiary has been on the petitioner's payroll since 1995.

The director denied the petition, citing the same reasons as set forth in his notice of intent to deny.

On appeal, counsel submits a copy of one of the petitioner's corporate resolutions, dated August 25, 1998. The resolution establishes a defined contribution plan, which provides for retirement, disability, and death benefits for the petitioner's employees. Counsel also submits copies of the investment account supporting the plan. These account balances cover a period from November 1, 2002 through January 31, 2003.

Although counsel presents this evidence in support of the petitioner's ability to pay the beneficiary's proffered wage, it is not clear from the documents that the investment account, set up pursuant to a trust agreement referenced by the August 1998 corporate resolution establishing the plan, is available to be used to meet payroll costs, rather than restricted for the uses described in the resolution. The trust agreement has not been offered to

the record.

Counsel submits copies of the petitioner's total wage summary for 2000, 2001 and 2002 in support of the petitioner's viability. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the visa petition and continuing to the present. While the overall magnitude of a petitioner's business activities should be considered when the petitioner's ability to pay is marginal, it is not reasonable to consider gross income or other revenue without considering the expenses that were incurred to generate that income. See *K.C.P. Food Co. Inc., v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. at 1084, the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Similarly, counsel's assertion that the level of officer compensation shows its ability to pay the proffered wage to the beneficiary is not persuasive in light of the discussion above and the requirement that the continuing ability to pay must be established as of the priority date of the visa petition. Similar to other expenses already incurred, the distribution of officer compensation represents monies that are not available to pay the proffered wage.

That said, it is also noted that the director failed to request copies of the beneficiary's Wage and Tax Statements (W-2s) or evidence of proof of wages paid, despite the information revealed by Part B of the ETA-750 and by counsel's advisement. Such credible evidence could help establish the petitioner's ability to pay the proffered salary if the documentation shows that either the petitioner's net income or net current assets could cover the difference between the wages paid to the beneficiary and the proffered salary.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional evidence from the petitioner related to its past employment of the beneficiary as well as any further updated financial information. 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.