U.S. Department of Homeland Security
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invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 2 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a clothing manufacturer and wholesaler. It seeks to employ the beneficiary permanently in the United States as a pattern maker. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies 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 counsel submits a statement.

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) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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. Here, the Form ETA 750 was accepted for processing on March 5, 2001. The proffered wage as stated on the Form ETA 750 is $20.45 per hour, which equals $43,536 per year.

With the petition, the petitioner submitted its 2001 Form 1120 U.S. Corporation Income Tax Return, which shows that the petitioner declared a loss of $1,584 as its taxable income before net operating loss deduction and special deductions during that calendar year. The corresponding Schedule L shows that at the end of that year the petitioner had net current assets of $51,361.

On December 18, 2002, the California Service Center requested that the petitioner provide evidence that it employed the beneficiary and was paying her the proffered wage. The Service Center also requested the petitioner's 2000 tax return and California Form DE-6, Employer's Quarterly Wage Reports, for the previous four quarters.

In response, counsel submitted a letter, dated March 6, 2003, stating that the petitioner was not yet employing the beneficiary. Counsel stated that the petitioner's 2001 tax return was the first tax return it had filed as 2001 was the first year during which the petitioner had sales. Counsel also noted that because the priority date was during 2001, tax returns from previous years would not be directly relevant to the petitioner's

ability to pay the proffered wage beginning on the priority date. Counsel provided the petitioner's Form DE-6 wage reports for all four quarters of 2002 as requested. Those reports show that the petitioner did not employ the beneficiary during those quarters.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 11, 2003, denied the petition.

On appeal, counsel cites the petitioner's 2001 Schedule L, Line 1(d) end-of-year cash-on-hand for the proposition that the petitioner had the ability to pay the proffered wage during that year.

Counsel's reliance on the petitioner's cash-on-hand, as such, is misplaced. The petitioner's Line 1(d) cash-on-hand, however, is a part of the petitioner's current assets. The petitioner's current assets reduced by the petitioner's current liabilities equal the petitioner's net current assets. The petitioner's net current assets are a consideration in the determination of the petitioner's ability to pay the proffered wage, as shall appeal below.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed 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 did not establish that it employed the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

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, the AAO will review the petitioner's net current assets[1] as an alternative method of demonstrating the ability to pay the proffered wage.

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[1] End-of-year net current assets are the taxpayer's end-of-year current assets, shown on Schedule L at lines 1(d), 2b(d), and 3(d), less the taxpayer's end-of-year current liabilities, shown on Schedule L at lines 16(d), 17(d), and 18(d). Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. Thus, if the 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The priority date is March 5, 2001. The proffered wage is $43,536 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 63 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 302 days. The proffered wage multiplied by 302/365th equals $36,021.57, which is the amount the petitioner must show the ability to pay during 2001.

The petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return shows that it declared a loss during that year. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage during 2001 out of its income. As was stated above, the petitioner did not establish that it employed the beneficiary during 2001. Wages paid to the petitioner during that year are not, therefore, a consideration during 2001. The petitioner's end-of-year net current assets, however, equaled $51,361. The petitioner was able to pay the salient portion of the proffered wage during 2001 out of its net current assets.

The Request for Evidence was issued on December 18, 2002. The petitioner's tax return for the 2002 calendar year would not have been completed by that date and, in any event, the Service Center did not request it. Counsel's response was prepared on March 6, 2003, at which time the petitioner's 2002 tax return still may not have been available. The salient portion of 2001, therefore, is the only period during which the petitioner was required to present evidence of its ability to pay the proffered wage. Having presented sufficient evidence pertinent to that period, the petitioner has demonstrated 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.