U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

File: WAC 02 090 50417 Office: CALIFORNIA SERVICE CENTER Date: JUN 15 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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner designs and installs custom draperies. It seeks to employ the beneficiary permanently in the United States as a designer and installer of custom draperies. 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.

On appeal, counsel submits a brief and additional evidence.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted on November 12, 1997. The proffered salary as stated on the labor certification is $9 per hour, which equals $18,720 per year.

With the petition counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $22,601 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 21, 2002, requested additional evidence pertinent to that ability. The Service Center requested evidence of that ability beginning on the priority date of the petition and continuing to the date of that request for evidence. The Service Center also specifically requested that the petitioner submit certified copies of its 1997 through 2001 income tax returns or IRS generated printouts of the information from those returns.

In response, counsel submitted IRS computer generated printouts of its 1997 though 2001 Form 1120 U.S. Corporation Tax Returns. Those printouts were incomplete.

Therefore, the California Service Center, on July 17, 2002, requested additional evidence again. The

Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that the petitioner submit signed copies of its 1997 through 2001 income tax returns.

In response, counsel provided the requested copies of the petitioner's income tax returns.

The 1997 tax return shows that the petitioner declared a loss of $52,107 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $27,411 and current liabilities of $4,190, which yields net current assets of $23,221.

The 1998 tax return shows that the petitioner declared a loss of $1,860 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $11,742 and current liabilities of $2,676, which yields net current assets of $9,066.

The 1999 tax return shows that the petitioner declared a loss of $14,419 as its taxable income before net operating loss deduction and special deductions of during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $1,266 and current liabilities of $1,115, which yields net current assets of $151.

The information on the 2000 return was described above.

The 2001 tax return shows that the petitioner declared a loss of $1,571 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $8,499 and current liabilities of $3,465, which yields net current assets of $5,034.

The Director, California Service Center, determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on March 4, 2003, denied the petition.

On appeal, counsel argues that the emphasis on taxable income is inappropriate, as that figure is reached after subtracting all expenses, including salaries and owner's bonuses, from gross receipts.

In support of that position, counsel submitted a letter from a certified public accountant. The accountant observed that the petitioner's gross receipts exceed the proffered wage and implied that this demonstrates the ability to pay the proffered wage. The accountant stated that the Line 28 taxable income before net operating loss deduction and special deductions is not the appropriate figure to consider in determining the petitioner's ability to pay the proffered wage. Finally, the petitioner observed that profit in small business is usually paid out as a bonus to the owner, leaving a very small amount as retained earnings.

Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1], the petitioner

[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

In essence, counsel and the accountant argue that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to demonstrate its ability to pay the proffered wage with annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage. Since filing the petition, the Service Center has twice requested that the petitioner submit evidence of its continuing ability to pay the proffered wage beginning on the priority date.[2] The petitioner was not obliged to rely solely on tax returns to demonstrate its ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, salary or wage expense, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In 1997 the petitioner declared a loss, but had net current assets of $23,221 at the end of that year. The petitioner has shown the ability to pay the proffered wage with its net current assets during that year.[3]

In 1998 the petitioner declared a loss. At the end of that year, the petitioner had net current assets of $9,066. The petitioner has not demonstrated the ability to pay the proffered wage during 1998 out of either its net taxable income or its net current assets.

In 1999 the petitioner declared a loss of $1,860. At the end of that year, the petitioner had net current assets of $151. The petitioner had not demonstrated the ability to pay the proffered wage during that year out of either its net taxable income or its net current assets.

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[2] In the requests for evidence issued March 21, 2002 and July 17, 2002.

[3] 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.

In 2000 the petitioner declared a taxable income before net operating loss deduction and special deductions of $22,601. The petitioner has demonstrated that it was able to pay the proffered wage out of its net taxable income during 2000.

In 2001 the petitioner declared a loss of $1,571. At the end of the year, the petitioner had net current assets of $5,034. The petitioner has not demonstrated the ability to pay the proffered wage during that year out of either its net taxable income or its net current assets.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998, 1999, and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.