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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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APR 24 2008

FILE: WAC 02 027 58525 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



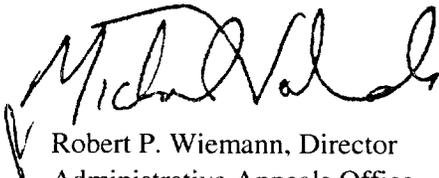
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a movie production company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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. The AAO concurred with the director's decision on appeal.

On motion, counsel submits a brief.

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 request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on January 13, 1998. The proffered salary as stated on the labor certification is \$14.46 per hour or \$30,076.80 per year.

On motion, counsel reiterates his position that the petitioner has established its ability to pay the proffered wage. Counsel points to two letters previously submitted by two accountants asserting that the petitioner has the ability to pay the proffered wage when depreciation and amortization is added back to the taxable income. Counsel further claims that the AAO indicates that the petitioner has met its burden of proof regarding its ability to pay the proffered wage. Counsel states:

The AAO's letter indicates that ". . . after a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present." (EXHIBIT E, page four, paragraphs one and two). The AAO further states on the same page that "[t]he burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. Section, 1361. The Petitioner has met that burden. (*emphasis added*).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 1998 through 2000.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses such as amortization. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

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.¹ 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, 1998 through 2000, were -\$299,370, -\$341,595, and -\$427,716, respectively. The petitioner could not have paid the proffered wage in 1998 through 2000 from its net current assets.

Counsel points to the last page of the prior AAO decision that admittedly omits the word "not" in two places. However, even counsel cannot conclude that the AAO agrees that the petitioner has established its ability to pay the proffered wage when every other part of the decision clearly states that the petitioner has **not** established its ability to pay the proffered wage. The very first paragraph of the decision states: "The appeal will be dismissed.", as does the order on the very last page of the decision. Every other paragraph of the decision explains why the petitioner has not established its ability to pay the proffered wage. In addition, if the AAO agreed that the petitioner had established its ability to pay the proffered wage, there would be no reason for counsel to file a motion.

The tax return for 1998 reflects a taxable income before net operating loss deduction and special deductions of -\$3,958 and net current assets of -\$299,370. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 1998.

The tax return for 1999 reflects a taxable income before net operating loss deduction and special deductions of \$16,158 and net current assets of -\$341,595. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 1999.

The tax return for 2000 reflects a taxable income before net operating loss deduction and special deductions of \$42,951 and net current assets of -\$427,716. The petitioner could have paid the proffered wage from its taxable income in 2000.

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of November 25, 2003 is affirmed. The petition is denied.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.