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

PUBLIC COPY

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[redacted]

FILE: WAC 03 005 54609 Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[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 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 tire sales and service company. It seeks to employ the beneficiary permanently in the United States as a motor vehicle mechanic. 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.

On appeal, the petitioner submits a brief and additional evidence.

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) 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 March 23, 2001. The proffered salary as stated on the labor certification is $19.00 per hour or $39,520 per year.

With the petition, the petitioner, through counsel, submitted a copy its 2001 Form 1120, U.S. Corporation Income Tax Return, for fiscal year April 1, 2001 through March 31, 2002. The tax return reflected a taxable income before NOL deduction and special deductions of $6,494 and net current assets of $58,879.

The director considered this documentation insufficient, and, on January 29, 2003, he requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of original, date stamped, computer printouts from the Internal Revenue Service (IRS), of the tax returns filed with the IRS for the years 2001 to present.

In response, counsel provided copies of the petitioner's 2000 and 2001 computer printouts of its tax records. It is noted that since the petitioner files on a fiscal year, the petitioner's 2001 computer printout

gives the information listed on the petitioner's 2000 tax return, and, therefore, the 2000 computer printout would be for the information listed on the petitioner's 1999 tax return. The computer printout for 2001 reflected a taxable income of $17,332.

On April 29, 2003, the director again requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of annual reports, completed and signed federal tax returns, or audited financial statements for the year 2002. The director specifically requested copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements. It is noted that since the petitioner's fiscal year runs from April 1 through March 31, the petitioner's 2002 tax return may not have been available at the time of the request for evidence.

In response, counsel submitted copies of the beneficiary's 1998 through 2002 Forms W-2, and copies of the petitioner's 2002 Forms DE-6, Quarterly Wage and Withholding Report. The beneficiary's 1998 through 2002 Forms W-2 reflected wages earned of $12,415.50, $14,652.56, $14,652.56, $15,926.56, and $16,142.80, respectively. The 2002 Forms DE-6 confirmed the wages earned by the beneficiary in 2002 of $16,142.80.

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 June 3, 2003, denied the petition.

On appeal, counsel submits copies of previously submitted material, and a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The 2000 federal tax return reflected a taxable income before net operating loss deduction and special deductions of $17,332 and net current assets of $62,055. Counsel states:

> While the employer/petitioner did not pay the wage offered to the alien at the time the job offer was made, he still paid the alien wages which must be taken into consideration. Statutory regulations do not require the petitioner to be paying the wage offer at the time the job offer was made, only that the employer has the funds to pay such a wage.
>
> In addition, your office continues to quote Elates Restaurant Corp. and KEF Food co. over and over again. This boiler plating quoting is not applicable in all cases, since all cases are different.
>
> Your office has already been informed by the petitioner's Certified Public Accountant, a person well qualified in these matters that the petitioner reflects access to more than sufficient funds within the net assets of the corporation.[1]

[1] It is noted that there is no evidence in the record which corroborates counsel's statement that the petitioner's Certified Public Accountant notified CIS in this matter.

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 establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 through 2002. The wages paid to the beneficiary were $24,867.44 less than the proffered wage in 2000, $23,593.44 less than the proffered wage in 2001, and $23,377.20 less than the proffered wage in 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 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." *See also Elatos Restaurant Corp.*, 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.[2] 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

[2] 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.

wage out of those net current assets. The petitioner's net current assets during the fiscal years in question, 2000 and 2001 were $62,055 and $58,879, respectively[3]. The petitioner could have paid the proffered wage in fiscal years 2000 and 2001 from its net current assets.

The fiscal year 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of $17,332 and net current assets of $62,055. The petitioner could pay the proffered wage in fiscal year 2000 from its net current assets.

The fiscal year 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $6,494 and net current assets of $58,879. The petitioner could pay the proffered wage in fiscal year 2001 from its net current assets.

In summary, the petitioner has established that it had the ability to pay the proffered wage at the priority date, March 23, 2001, and continuing.

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.

[3] It is noted that the director, in his denial, reported that the petitioner's tax returns for 2000 and 2001 reflected no net current assets. However, Schedule L of those tax returns does show net current assets as stated.