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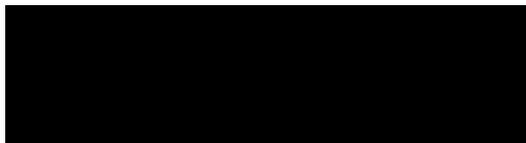
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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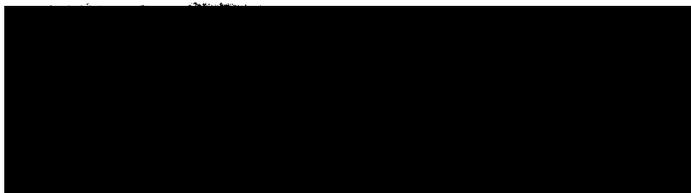
FILE: [Redacted]
SRC-02-119-51735

Office: TEXAS SERVICE CENTER Date: JAN 07 2005

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

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:



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

demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a complete copy of the petitioner's 2001 corporate tax return.

In response, the petitioner submitted its complete Form 1120S corporate tax return for the year 2001. The tax return reflects the following information:

| | <u>2001</u> |
|-------------------------|-------------|
| Net income ² | \$580,427 |
| Current Assets | \$3,634,593 |
| Current Liabilities | \$2,600,762 |
| Net current assets | \$1,033,831 |

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 March 17, 2003, denied the petition. The director stated that the petitioner was operating at a loss of "close to two million dollars two years in a row" and thus has not shown "to have the resources necessary to pay the beneficiary's salary."

On appeal, counsel asserts that the director misinterpreted the tax returns and the petitioner is actually reporting a substantial profit, not a loss. The petitioner submits a letter from its certified public accountant, [REDACTED] Oppenheimer [REDACTED], dated April 3, 2003, that also states that the petitioner is reporting a profit for tax purposes, but suggested that perhaps the director reviewed ending accumulated adjustments accounts (AAA), that for S corporations, is part of retained earnings or deficits "accumulated from the time that the corporation first elected to be an S corp, minus distributions to shareholder." [REDACTED] also states that the petitioner experienced losses in 1998 that is reflected by a loss in its AAA, but since 1998, the petitioner has been profitable.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure 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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income

² Ordinary income (loss) from trade or business activities as reported on Line 21.

figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income in 2001 was \$580,427, which is greater than the proffered wage of \$35,100. Thus, the petitioner has demonstrated its continuing ability to pay the proffered wage out its net income. Even if the petitioner's net income reflected a loss, however, the petitioner could demonstrate its ability to pay the proffered wage out of its net current assets, which were \$1,033,831 in 2001, which is also greater than the proffered wage of \$35,100.³

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, however, the petitioner shows a net income of \$580,427 and net current assets of \$1,033,831 and has, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during the salient portion of 2001. Therefore, the petitioner has established that it has 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 met that burden.

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

³ 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. 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. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.