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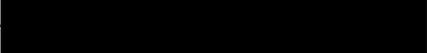


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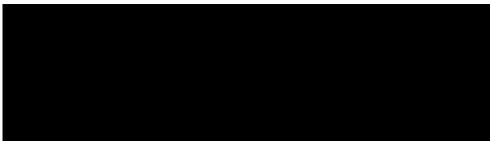
Office: CALIFORNIA SERVICE CENTER

Date: OCT 07 2005

IN RE: Petitioner:   
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:



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 petition will be approved.

The petitioner is a real estate development firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 29, 1999. The proffered wage as stated on the Form ETA 750 is \$28.10 per hour, which amounts to \$58,448 per annum. On the Form ETA 750B, signed by the beneficiary on October 4, 1999, the beneficiary claims to have worked for the petitioner since April 1999.

On Part 5 of the visa petition, filed on March 17, 2003, the petitioner claims to have been established in 1985, to currently employ six workers, and to have a gross annual income of 1.2 million dollars. In support of its

ability to pay the beneficiary's proposed wage offer of \$58,448 per year, the petitioner initially submitted copies of its Form 1065, U.S. Partnership Return of Income for 1999, 2000, and 2001. They indicate that the petitioner, a general partnership, files its returns using a standard calendar year. The returns contain the following information:

	1999	2000	2001
Gross receipts or sales	-0-	-0-	-0-
Total Income	\$ 203,645	\$194,823	\$123,464
Ordinary Income	-\$ 181,700	-\$123,988	-\$235,107
Current Assets (Sched. L)	\$ 51,300	\$155,612	\$315,632
Current Liabilities (Sched. L)	\$1,464,261	\$ 31,390	\$ 37,649
Net current assets	-\$1,412,961	\$124,222	\$277,983

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>1</sup> Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A petitioner's year-end current assets and current liabilities are generally shown on Schedule L of a partnership return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 15 through 17. If a petitioner's year-end 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.

On April 28, 2003, the director issued a notice of intent to deny to the petitioner. The director noted that the petitioner had two pending petitions<sup>2</sup> and summarized the losses that the petitioner had declared as ordinary income in 1999-2001. He advised the petitioner that they did not support its ability to pay the proffered wage. The petitioner was afforded an additional 30 days from the date to submit additional information, evidence or argument in support of the petition.

In response, the petitioner, through former counsel, explained that the petitioner is a general partnership engaged in real estate development and management and reports its earnings differently from corporations. As such, counsel states that its total earnings are summarized on Schedule K, Partners' Shares of Income, Credits, Deductions, etc. Counsel summarizes the figures presented on Schedule K for 1999-2001 as yielding the earnings of \$599,343, \$780,791, and \$622,586, respectively.

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>2</sup> [REDACTED] was denied in September 2003.

The director denied the petition on June 23, 2003, determining that the petitioner's reported ordinary income in each of the relevant years did not demonstrate that the necessary funds were available to pay the proffered wage.

It is noted that the petitioner, as the prospective U.S. employer, must establish its own ability to pay the proffered wage to the beneficiary. As a general partnership, the petitioner is structured as an entity in which the general partners participate fully in the profits, losses and management of the partnership and who are personally liable for its debts. See *Black's Law Dictionary* 582 (5th Ed., West 1983).

On appeal, current counsel asserts that the director failed to consider both the petitioner's ordinary and passive income, which are presented in different locations on the partnership return. Counsel submits a letter from [REDACTED] C.P.A. [REDACTED] maintains that when reviewing partnership returns, as *pass-through entities* to the individual general partners, CIS should focus on a partnership's compiled income, not just the income generated through the ordinary course of business. In this petitioner's case, considerable income was generated as passive income from real estate rentals and other sources.

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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, although the record suggests that the petitioner employed the beneficiary during a period in 1999, no additional evidence has been submitted to the record to quantify the level of wage that the beneficiary may have been paid.

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 generally examines the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. The director failed to completely consider this petitioner's net current assets. As shown above, in 2000 and 2001, the petitioner's respective net current assets of \$124,222 and \$277,983 was sufficient to cover the beneficiary's proposed wage offer of \$58,448.

Even without considering the petitioner's net current assets, counsel's point is well taken in emphasizing that this petitioner, as a general partnership, requires an examination of all sources of income, both active and passive. The petitioner derives substantial income from sources other than those characterized as ordinary income from trade or business activities. In such a case, it is instructive to examine the petitioner's total income reported on Schedule K, Analysis of Net Income, (page 4) of Form 1065. As noted above, this partnership generated substantial total income reporting \$599,343 in 1999; \$780,791 in 2000, and \$622,586 in 2001. Such an income stream can support the beneficiary's proposed wage offer of \$58,448.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has demonstrated that it has maintained a continuing financial ability to pay the proffered wage as of the priority date of the petition pursuant to the requirements of 8 C.F.R. § 204.5(g)(2).

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.