

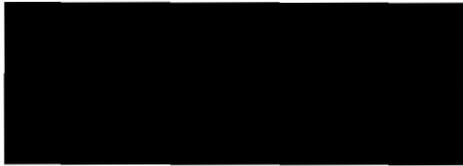
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U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 21 2006
WAC 05 178 53005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a manufacturer of rack mount computer chassis and systems. It seeks to employ the beneficiary permanently in the United States as a manufacturing engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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 a brief and additional evidence. For the reasons discussed below, the petitioner has overcome the director's bases for denial.

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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 8, 2001. The proffered wage as stated on the Form ETA 750 is \$87,942 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of December 2000.

On the petition, the petitioner claimed to have an establishment date in 1991, a gross annual income of \$31,641,381 and 40 employees. Instead of listing its net annual income where requested, the petitioner indicated it had total assets of \$11,000,000. In support of the petition, the petitioner submitted complete income tax returns for 2001 through 2004 and the first page of its tax returns for 1991 through 2000.

The complete tax returns reflect the following information for the following years:

	2001	2002	2003	2004
Gross income	\$22,938,660	\$17,759,521	\$19,324,747	\$31,641,381
Total assets	\$10,277,390	\$6,894,253	\$9,824,669	\$11,672,405
Investment in Subsidiary	\$545,936	\$565,298	\$845,863	\$917,510
Rent Payable	\$753,488	\$2,091,676	\$261,300	\$240,112
Net income (loss)	(\$3,699,279)	(\$2,622,847)	(\$753,875)	\$62,523
Current Assets	\$7,594,428	\$4,999,795	\$6,895,637	\$9,003,377
Current Liabilities	\$6,389,941	\$7,724,144	\$8,551,025	\$10,523,972
Net current assets	\$1,204,487	(\$2,724,349)	(\$1,655,388)	(\$1,520,595)

The petitioner's gross and net income for 1991 through 2000 were as follows: \$260,360 and (\$2,508) in 1991, \$2,000,649 and \$3,172 in 1992, \$3,202,872 and \$29,029 in 1993, \$4,170,951 and \$16,853 in 1994, \$5,585,012 and \$110,826 in 1995, \$9,716,149 and \$218,971 in 1996, \$20,538,3219 and \$678,137 in 1997, \$35,337,448 and \$738,662 in 1998, \$47,899,132 and \$1,912,328 in 1999 and \$64,641,949 and \$1,940,713 in 2000.

In addition, counsel submitted copies of the petitioner's bank statements and Forms W-2, Wage and Tax Statements, the petitioner issued to the beneficiary in 2002, 2003 and 2004. The Forms W-2 reflect wages of \$32,933.01, \$34,513.36 and \$31,991 respectively, more than \$50,000 short of the proffered wage in each year.

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 denied the petition.

On appeal, counsel asserts that the petition was filed during an uncharacteristically unprofitable year and that the petitioner has now become profitable again. Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner resubmits the first page of its tax returns from 1992 through 2004 and unaudited financial statements for 2005.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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, 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 any year.

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 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.

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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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 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 had sufficient net current assets in 2001 and sufficient net income in 2004 to cover the difference between wages paid and the proffered wage. As such, at issue is the petitioner's ability to pay the proffered wage in 2002 and 2003.

As noted by counsel, the petitioner enjoyed a net gain from 1992 through 2000 and is once again profitable. From 2002 to 2004, the petitioner's total assets increased every year. In 2003, the petitioner invested a substantial sum in its subsidiary, consistent with counsel's assertions on appeal. The tax returns also support counsel's assertion that the petitioner restructured a lease during this period; the petitioner's rent payable, a current liability, increased from \$753,488 to \$2,091,676 in 2002 and then decreased from \$2,091,676 to \$261,300 in 2003.

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.

Based on the evidence submitted on appeal, it can be found that the petitioner has sufficient funds available to pay the beneficiary the proffered wage as required by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may be approved.

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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.