

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 27 2005

EAC 00 105 52011

IN RE:

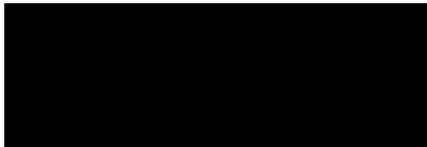
Petitioner:



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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a driving school. It seeks to employ the beneficiary permanently in the United States as a manager. 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 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 June 10, 1996. The proffered salary as stated on the labor certification is \$34,500 per year.

With the petition, counsel submitted a copy of the petitioner's 1996 Form 1120, U.S. Corporation Income Tax Return for the fiscal year May 8, 1996 through April 30, 1997. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$11,896 and net current assets of \$14,608. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on October 26, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to 1999. The director specifically requested a copy of the beneficiary's 1996 through 1999 Forms W-2, Wage and Tax Statements. The director also requested the original Form ETA-750, Parts A & B.

In response, counsel provided a duplicate, dated February 6, 2001, of the original ETA-750.

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. On May 8, 2001, the director denied the petition.

On appeal, counsel submits copies of the beneficiary's 1996 through 1999 Forms 1040, U.S. Individual Income Tax Returns, copies of the beneficiary's 1996 through 1999 Forms W-2, Wage and Tax Statements, and copies of Forms NYWT401, New York Quarterly Combined Withholding and Wage Reporting Return for the fourth quarter of 1996 and for the entire year of 1997. Counsel did not provide copies of the petitioner's 1997 through 1999 corporate tax returns. Even though the director did not specifically request the petitioner's 1997 through 1999 corporate tax returns, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner show the ability to pay the proffered wage with annual reports, federal tax returns, or audited financial statements. In addition, the 1996 tax return demonstrates that the petitioner did not have the ability to pay the proffered wage, and, therefore, the fact that these tax returns are not in the record of proceeding would not change the AAO's decision.

The beneficiary's 1996 through 1999 forms W-2 reflected wages earned of \$4,500, \$23,400, \$23,400, and \$23,400, respectively. The Forms NYWT401 reflected the petitioner paid wages of \$4,500 in the fourth quarter of 1996 and \$23,400 for the year 1997. Counsel did not submit a brief or draw any conclusions with regard to the evidence provided.

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 1996 through 1999.

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.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 1996 were \$14,608. The petitioner could not have paid the proffered wage in 1996 from its net current assets. No evidence of net current assets for 1997 through 1999 was provided.

The petitioner's 1996 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$11,896 and net current assets of \$14,608. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 1996. Even if the wages earned by the beneficiary were added to either the taxable income or the net current assets, those amounts would still be less than the proffered wage of \$34,500. (\$11,896 taxable income + \$4,500 wages earned = \$16,396, \$14,608 net current assets + \$4,500 wages earned = 19,108) The years 1997 through 1999 show wages earned by the beneficiary of \$23,400 or \$11,100 less than the proffered wage.

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 met that burden.

ORDER: The appeal is dismissed.

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.