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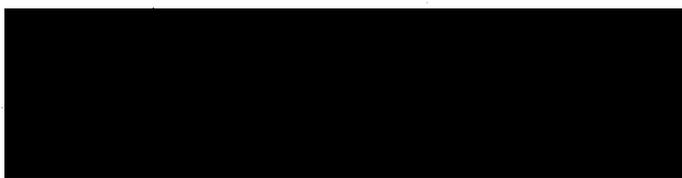
U.S. Department of Homeland Security
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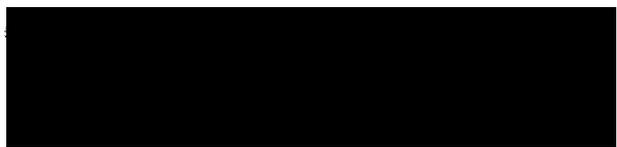


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 10 2005
WAC 03 094 52892

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

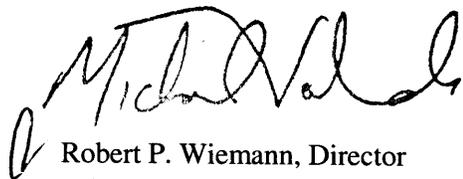
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an international ocean and air freight company. It seeks to employ the beneficiary permanently in the United States as freight forwarder. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 states the federal income tax information already submitted by the petitioner, which establishes the petitioner's gross receipts and accounts for certain deductions and appreciations, is sufficient to establish the petitioner's ability to pay the proffered wage. Counsel resubmits documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 nature, for which qualified workers are not available in the United States.

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) 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 11, 2000. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$30.35, or an annual salary of \$63,128.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ The director used a monthly salary of \$4,856 to arrive at an annual wage of \$58,272. The AAO salary figure is based on the hourly rate of \$30.35, identified in the Form ETA 750, multiplied by 2080 hours.

On the petition, the petitioner claimed to have been established in 1986 and to have a net annual income of \$250,000. The petitioner indicated it had three to four employees. In support of the petition, the petitioner submitted its federal income tax return for 1999, 2000, and 2001, and monthly bank statements from two California banks from February 2002 to December 2002. The petitioner submitted a copy of the petitioner's business license, articles of incorporation, as well as letters verifying the beneficiary's employment from two companies in Korea.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 19, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal tax returns from 2001 and 2002, with all accompanying attachments and schedules. The director stated that audited financial statements and annual reports could also demonstrate the petitioner's continuing ability to pay the proffered wage as of the priority date.

In response, on June 4, 2003, counsel stated that the petitioner's income tax return for the year 2002 was not available yet, because the petitioner's fiscal year ended on August 31, 2003. Counsel resubmitted the petitioner's 1999, 2000, and 2001 federal income tax returns.

On July 3, 2003, the director denied the petition. The director stated that the petitioner's net income during 2000 was \$-3,242 and for 2001, \$2,460. The director determined that these net income figures were insufficient to establish that the petitioner had the ability to pay the proffered wage. The director also examined the petitioner's current assets and liabilities. The director identified the petitioner's current assets and current liabilities in 2000 as \$46,605, and its current assets and liabilities as \$46,164 for the year 2001.² Based on these figures, the director determined that the petitioner had not established its ability to pay the proffered wage on the basis of its current assets and liabilities.

On appeal, counsel states that the petitioner is a multi-million dollar corporation doing business between the United States and Korea, and that the petitioner's 2001 tax return established gross receipts of \$827,814, and that its 2000 federal tax return established gross receipts of \$1,029,337. Counsel notes that certain deductions and appreciations affect the taxable income and, as a consequence, the reported income for the petitioner. Counsel states that the petitioner is allowed these depreciation deductions. Counsel resubmitted the petitioner's tax returns for 2000 and 2001.

Although counsel does not refer to the petitioner's monthly bank statements on appeal, counsel's reliance on the balances in the petitioner's bank account in submitting the initial petition is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third,

² The director actually was stating the petitioner's net current assets. A discussion of how these figures were established follows.

no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 claim that it employed and paid the beneficiary the full proffered wage in 2000 and onward.

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). Contrary to counsel's assertions with regard to the petitioner's gross receipts, 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. Since the priority date for the instant petition is September 11, 2000, the tax documentation submitted by the petitioner for the year 1999 is not relevant to these proceedings. Therefore, only the petitioner's 2000 and 2001 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2000 and 2001 show the following amounts of ordinary income: \$ -3,242, and \$2,460. These figures fail to establish the ability of the petitioner to pay the proffered wage on the basis of its net income in 2000 and 2001.

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.³ 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 provided the following figures for tax years 2000 and 2001:

	2000	2001
Ordinary Income	\$ -3,242	\$ 2,460
Current Assets	\$ 198,896	\$ 195,015
Current Liabilities	\$ 152,291	\$ 148,851
Net current assets	\$ 46,605	\$ 46,164

Thus, while the petitioner had positive net current assets for 2000 and 2001, the petitioner's net current assets figures fail to establish the ability of the petitioner to pay the proffered wage of \$63,128. Although the petitioner submitted its monthly banking statement balances, as previously stated, banking statements are not viewed as sufficient evidence that the petitioner can pay the proffered salary. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000 and continuing to the present date. Therefore, the petitioner has not established that it had 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 not met that burden.

ORDER: The appeal is dismissed.

³ 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.