

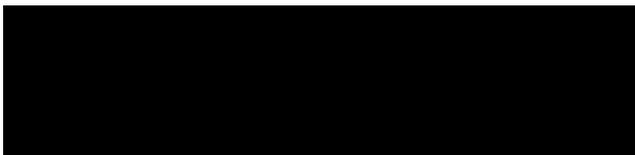
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
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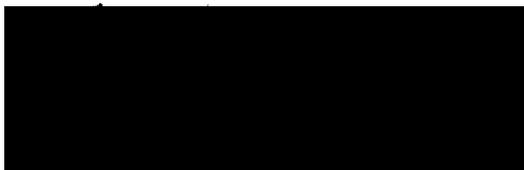
FILE: WAC 99 147 52726 Office: CALIFORNIA SERVICE CENTER Date: NOV 07 2005

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a business service, consulting, and market research business. It seeks to employ the beneficiary permanently in the United States as a market research analyst I. 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 a brief and 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.

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.

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 October 22, 1998. The proffered salary as stated on the labor certification is \$37,000 per year.

With the petition, the petitioner, through counsel, submitted a copy of the petitioner's compiled financial statements for the period ended December 31, 1998 and a copy of the petitioner's 1998 Form 1120, U.S. Corporation Income Tax Return. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of \$16,571 and net current assets of \$2,683. The director determined the evidence to be insufficient to establish the ability to pay the wage and on July 28, 1999, she requested

additional evidence of the petitioner's ability to pay the proffered wage. The director specifically requested the petitioner's Forms 1120 for the years 1995 through 1997.

In response, counsel provided copies of the petitioner's 1995 through 1997 Forms 1120, U.S. Corporation Income Tax Returns. The 1995 tax return reflected a taxable income before net operating loss deduction and special deductions of \$1,634 and net current assets of \$1,251. The 1996 tax return reflected a taxable income before net operating loss deduction and special deductions of \$1,267 and net current assets of \$821. The 1997 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$4,837 and net current assets of -\$11,358.

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 September 27, 1999, denied the petition.

On appeal, counsel submits a brief, a letter from the president of the petitioner, copies of the beneficiary's 1997 and 1998 Forms W-2, Wage and Tax Statements, another copy of the petitioner's 1997 Form 1120, U.S. Corporation Income Tax Return, and copies of the petitioner's Forms DE-6, Quarterly Wage and Withholding Reports, for 1997, 1998, and the first two quarters of 1999. The Forms W-2 reflected wages earned by the beneficiary of \$37,949.34 and \$31,754.09, respectively, in 1997 and 1998. The Forms DE-6 show that the petitioner employed the beneficiary in 1997, 1998, and the first two quarters of 1999. The president's letter states:

We respectfully submit that your office did not read the Corporate Tax Returns fully and made the decision based on taxable income, without taking into account the amount the company paid as salaries.

First, your denial is based on the company's ability to pay the wage as of 1998, and yet you cite tax returns for 1995 to 1997; and clearly the returns for 1995 and 1996 are not relevant.

Counsel reiterates the president's contention and states that the company's quarterly tax reports and the beneficiary's W-2 forms show that the beneficiary is being paid the salary offered and that the company has the financial means to pay that wage.

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.¹ 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 1998².

¹ The petitioner is not required to employ the beneficiary prior to adjustment of status to lawful permanent resident, and therefore, the beneficiary's employment history, aside from wages actually paid does not

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.³ 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

affect the ability to pay determination or the prospect of a petitioner's intent to employ the beneficiary on a fulltime basis.

² Although counsel states that part of the beneficiary's wages for 1998 were actually paid in 1999, there is no evidence that substantiates this contention. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

those net current assets. The petitioner's net current assets during 1995⁴ through 1998 were \$1,251, \$821, -\$11,358 and \$2,683, respectively.

The 1998 tax return reflects a taxable income before net operating loss deduction and special deductions of \$16,571 and net current assets of \$2,683. The beneficiary earned \$31,754.09 in 1998. Therefore, the petitioner could have paid the remaining \$5,245.91 of the proffered wage from its taxable income in 1998 ($\$37,000 \text{ proffered wage} - \$31,754.09 \text{ wages earned} = \$5,245.91$).

The first quarter of 1999 looks consistent with proof of the ability to pay the wage, but since the record of proceeding closed prior to the end of 1999, there is no tax return to document 1999.

In summary, the petitioner has established that it had the ability to pay the proffered wage at the priority date, October 22, 1998. However, an inquiry to the California Business Portal shows that the petitioner has been dissolved subsequent to the filing of the petition.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioner's status and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 27, 1999 decision is withdrawn. The petition is remanded to the director for entry of a new decision.

⁴ Please note that since the years 1995 through 1997 occurred before the priority date, they are not necessarily relevant to the petitioner's ability to pay the proffered wage, and the tax returns for those years will not be given any consideration when determining the ability to pay the proffered wage. *See* at 8 C.F.R. § 204.5(g)(2)