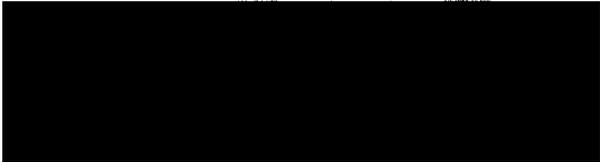




U.S. Citizenship
and Immigration
Services

B6



FILE: EAC 02 036 54542 Office: VERMONT SERVICE CENTER Date: SEP 09 2004

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

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

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Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy.

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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. The AAO concurred with the director's decision on appeal.

On motion, counsel provides previously submitted documentation and a statement.

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.

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 December 16, 1996. The proffered salary as stated on the labor certification is \$18.33 per hour or \$38,126.40 per year.

On motion, counsel reiterates his position that the beneficiary could have been paid the proffered wage out of the cost of labor for the years 1997 through 2000. Counsel states:

... the more accurate reading of the tax return would be based upon the amount actually spent on paying the labor. The "Cost of Labor" is actually the amount of dollars spent in seeking the services of independent contractors. The beneficiary upon being issued an employment authorization or United States lawful permanent residency would be paid on a permanent basis and [the] beneficiary's proffered salary will come out of the amounts reflected under the title, "Cost of Labor." Therefore, the figures for the "Cost of Labor" are

material to the issue of the employer's ability to pay the proffered wage and they were recited in the undersigned attorney's brief, dated April 30, 2002, accompanying the appeal and also in a letter to the I&NS [sic], dated February 5, 2002. Both copies are once again enclosed for your ready review.

The figures are once again recited, as follows:

<u>COST OF LABOR</u>	<u>YEAR</u>
\$ 85,986	1996
\$130,548-	1997
\$381,250-	1998
\$165,221-	1999
\$132,977-	2000

Each year has clearly documented the ability to pay the proffered wage of \$38,126.40.

* * *

In view of the large sums of wages paid every year, it would be arbitrary, capricious and abusive of discretion in maintaining that the net income should be the sole consideration to determine any employer' [sic] ability to pay the proffered wage and that such wage should be paid to a beneficiary who is neither authorized to work nor a lawful permanent resident/immigrant.

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 provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage from 1996 through 2000.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. In this case, as noted by the previous AAO decision, the petitioner's taxable income before the net operating loss deduction and other special deductions as reflected on each of the tax returns contained in the record, was far less than the beneficiary's proffered wage of \$38,126.40.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In the instant case, the petitioner's net current assets were \$58,917, \$8,448.66, \$unknown, -\$9,013.08, and \$20,544.01, respectively for the years 1996 through 2000. The petitioner was able to pay the proffered wage in 1996 only, from its net current assets.

Counsel advises that the beneficiary will replace independent contractors currently used by the petitioner. However, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The visa petition, as well as the petitioner's documents submitted to the record, suggests that the petitioner employed more than one contractor. The record contains no evidence directly relating the tax return figures for contract labor to cabinet making services the beneficiary may have performed.

Moreover, there is no evidence that the position of the other independent contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those contractors performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel contends that the petitioner is not obligated to pay the proffered wage until the beneficiary obtains work authorization or lawful permanent residency. While this may be true, the petitioner is obligated to establish that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residency. *See* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not established that it paid the beneficiary the proffered wage not that it could pay the beneficiary from its taxable income or its net current assets.

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of December 12, 2002 is affirmed. The petition is denied.