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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [redacted]
Beneficiary

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:

[redacted]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a supermarket and grocery. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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 submits additional evidence and asserts that the evidence establishes that the petitioner has had the continuing ability to pay the proffered wage.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is $55,000 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On the petition, the petitioner claims to have been established in 1989 and to currently employ twenty-five workers. In support of its ability to pay the proffered salary, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. It indicates that the petitioner uses a standard calendar year to file its tax return.

Because the tax return did not cover the priority date of April 27, 2001, the director requested the petitioner to provide evidence of its ability to pay the beneficiary's wage offer of $55,000 per year, on June 19, 2002, the director requested additional evidence pertinent to that ability. The director advised the petitioner that the evidence must include annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted a copy of its Form 1120S for 2001, copies of its commercial checking account statements for March and April 2001, and an unaudited balance sheet and profit and loss statement covering the period from January through June 2002. These financial statements were accompanied by a letter, dated July 23, 2002, from [redacted] states that the petitioner's business has been growing and can support at least two more employees. The petitioner's 2001 tax return reflects that the petitioner reported $2,232,533 in gross receipts or sales, $96,831 in salaries and wages, and $19,103 in net income. Schedule L of the tax return shows that the petitioner had $116,527 in current assets and $8,978 in current liabilities, resulting in $107,549 in net current assets. Besides net income, CIS also reviews a petitioner's net current assets as a measure of its liquidity and continuing ability to pay a beneficiary's proposed wage offer. 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. Here, the petitioner's net current assets of $104,320 were sufficient to cover the beneficiary's wage offer of $55,000 in 2001.

The director, however, 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 August 14, 2003, denied the petition. The director primarily based his decision on a review of the petitioner's net income as shown on its 2001 federal tax return.

On appeal, along with copies of the petitioner's commercial checking account balances for April through July 2001 and a copy of a letter from a bank, counsel also submitted copies of the petitioner's 2001 and 2002 federal tax return. The 2002 tax return shows that the petitioner reported gross receipts or sales of $1,991,662, salaries and wages of $84,668, and net income of $34,386. Schedule L of the tax return shows that the petitioner had $96,358 in current assets and $5,027 in current liabilities, yielding $91,331 in net current assets. Counsel asserts that the petitioner's documentation demonstrates its ability to pay the proffered wage, and specifically claims that the petitioner's depreciation expenses taken in 2001 and 2002 should be added back to the calculation of the petitioner's ability to pay the proffered wage.

At the outset, it is noted that 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 may have 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

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[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.

prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the record fails to show that the petitioner has employed the beneficiary.

As noted by the director, CIS will also 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.

That said, it is noted that the petitioner's net current assets of $91,331, as shown on its 2002 federal tax return, were sufficient to cover the beneficiary's proffered wage of $55,000. Because the petitioner's net current assets were equal to or exceeded the beneficiary's proffered wage in both 2001 and 2002, the petitioner met its burden of proof in demonstrating its continuing ability to pay the proffered wage. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is sustained. The petition is approved.