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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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Date: APR 04 2005

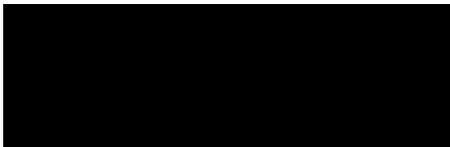
IN RE:

Petitioner:
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:



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

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 that the petitioner is capable of paying the proffered wage and submits additional 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$24.31 per hour, which amounts to \$50,564 annually.

In the petition, the petitioner stated that it was established in 1988, and did not indicate the number of employees, or its gross or net annual income. With the petition, the petitioner submitted documentation on the beneficiary's previous employment and training. Because the evidence submitted was 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 any of the following evidence: a copy of the petitioner's 2001 federal corporate income tax return, with all schedules and attachments; a copy of the beneficiary's 2001 Form W-2 Wage and Tax Statement; or annual reports for 2001, accompanied by audited or reviewed financial statements.

In response, the petitioner submitted corporate, state and city tax returns for the petitioner for the years 2000 and 2001.¹ Counsel also submitted a letter from the petitioner's accountant, Mr. J. Andrew Nam, dated April 22, 2003. In this letter, Mr. Nam stated that he was the independent accountant for the petitioner since it began operations in 1988, and stated that the petitioner had the ability and sufficient financial resources to meet its daily operating expenditures and to pay the beneficiary an annual salary of \$50,565 as of the 2001 filing date. Counsel also submitted a letter from the petitioner in which he stated that he was able to pay the beneficiary a weekly wage of \$972 as of April 6, 2001, the priority date. The petitioner also stated that while the beneficiary did not have employment authorization or a valid social security number, he did have a T.I.N. that the beneficiary would use to pay taxes on his earnings. The petitioner also stated that it paid the beneficiary \$1,000 a week in cash, and that the beneficiary would declare these wages when he filed his taxes for 2003.

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 August 18, 2003, denied the petition. The director stated that the petitioner's 2000 and 2001 federal income tax returns did not indicate sufficient ordinary income or net current assets to pay the proffered wage of \$50,565.

On appeal, counsel resubmits the statement by Mr. Nam, the petitioner's accountant, along with a copy of the petitioner's incorporation paperwork dated June 2, 1988. Counsel also submits the beneficiary's federal, state and local tax returns for the years 1994 to 2002.

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. The beneficiary did not indicate on ETA Form 750 that he had worked for the petitioner at any time. In response to the director's request for further evidence, the petitioner stated that it had employed the beneficiary, and that the beneficiary would be reporting his weekly wages on his 2003 income tax return. However, the petitioner's letter did not specify any employment dates, and provided no further documentation to further substantiate the assertion that it had or did employ the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, the petitioner submits the beneficiary's Forms 1040 federal income tax returns for the years 1994 to 2002. Since the priority date is April 6, 2001, the beneficiary's tax returns from 1994 to 1999 are not relevant to these proceedings. The beneficiary's tax forms from 2001 and 2002 indicate that he worked as an auto mechanic and that, as a sole proprietor, he had business income of \$23,968 in 2001 and \$26,600 in 2002. However, this documentation is not persuasive that the beneficiary worked for the petitioner as of the priority date and onward. As previously stated, in his letter, the petitioner appeared to imply that the beneficiary had not been reporting his wages paid by the petitioner, so it is not clear that the petitioner was the employer who paid the beneficiary in

¹ The petitioner's tax years run from June 1, 2000 to May 31, 2001, and from June 1, 2001 to May 31, 2002. Since the priority date is April 6, 2001, both the petitioner's 2000 and 2001 tax returns are dispositive in these proceedings.

2001 or 2002. In addition, as stated previously, the beneficiary did not establish any such employment by the petitioner on Form ETA 750. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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). 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 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, now CIS, should have considered income before expenses were paid rather than net income. The petitioner had net incomes of -\$6,315 in 2000 and \$3,588 in 2001. These figures are not sufficient to pay the proffered wage of \$50,564.

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. In addition, 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.² A corporation's year-end current assets are shown on Part III, Balance lines 1(b) through 6(b). On Form 1120A, its year-end current liabilities are shown on lines 13(b) through 14(b). 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 tax returns for 2000 and 2001 reflects the following information with regard to the petitioner's net current assets:

² 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.

	2000	2001
Taxable income ³	\$ -6,315	\$ 3,588
Current Assets	\$ 21,756	\$ 20,717
Current Liabilities	\$ 7,827	\$ 8,736
Net current assets	\$ 13,929	\$ 11,981

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a taxable income of -\$6,315 and net current assets of \$13,929, and has not demonstrated the ability to pay the proffered wage of \$50,564 in 2000.

In 2001, the petitioner shows a taxable income of \$3,588 and net current assets of \$11,981, and has not demonstrated the ability to pay the proffered wage in 2001. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. It is noted that even if the petitioner had established that it employed the beneficiary in 2000 and 2001 and paid him the wages reflected in the beneficiary's 2000, 2001, and 2002 tax returns, the beneficiary's wages for each year combined with the petitioner's income or net current assets for the respective year would not have been sufficient to establish that the petitioner had the capability of paying the proffered wage. Accordingly, the director's decision shall stand, and the petition shall be denied.

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 Taxable income is the sum shown on line 24, taxable income before NOL deduction and special deductions, IRS Form 1120A, U.S. Corporation Income Tax Return.