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**U.S. Citizenship
and Immigration
Services**

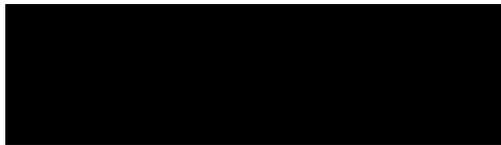
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FILE: SRC 02 179 53256 Office: TEXAS SERVICE CENTER Date: **APR 07 2005**

IN RE: Petitioner:
Beneficiary:



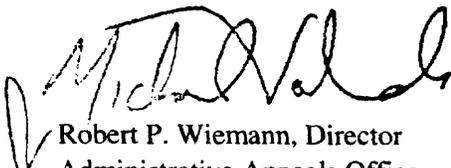
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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. 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 The motion will be granted, the previous decision of the AAO will be withdrawn and the petition will be approved.

The petitioner is a upholstery repair company. It seeks to employ the beneficiary permanently in the United States as an upholstery repairer. 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. The AAO sustained the director's decision, and also determined that the petitioner's net income and assets in 2001 were not sufficient to establish that the petitioner was capable of paying the proffered wage.

On motion, counsel states that Citizenship and Immigration Services (CIS) fails to take into account other factors that complement a company's business operation. Counsel resubmits evidence previously submitted to the record and submits new 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 January 29, 2001. The proffered wage as stated on the Form ETA 750 is \$16.65 per hour, which amounts to \$34,632 annually. On the ETA 750B, the beneficiary claimed that he had worked for the petitioner since May 1993.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 1999, 2000, and 2001, as well as a letter to document the beneficiary's previous employment in Mexico. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 12, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of the beneficiary's W-2 or Form 1099 for the tax years 2000 and 2001; a copy of each employee's W-2 or Form 1099 for 200 and 2001; copies of Form 941, Quarterly Tax Report, for all four quarters of 2002, in addition to any other documents that could establish the petitioner's ability to pay the proffered wage. The petitioner submitted copies of twelve of its cancelled checks in the name of the beneficiary for July to December 2002. The checks are marked subcontractor and they total \$11,580 in wages. The petitioner also submitted copies of its employees' Form 1099-MISC's for 2000 and 2001. These documents indicated that the beneficiary earned \$12,100 in 2000 and \$14,840 in 2001. The petitioner also submitted twelve monthly worksheets used to prepare its 2002 Texas Sales and Use Tax Returns reports.

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 April 29, 2003, denied the petition. The director stated that the petitioner's 2001 federal income tax return did not establish that the petitioner had sufficient funds to pay the beneficiary the difference between his actual wage in 2001 and the proffered wage, based on its net income for 2001. The director indicated that after combining the beneficiary's actual 2001 wage of \$14,840 and the petitioner's net income of \$15,797, the petitioner still lacked an additional \$4,000 to cover the proffered wage in 2001.¹ The director stated that the petitioner had not established that they had an additional \$4,000 in 2001 that could have been paid to the beneficiary.

In addition, the director determined that there was no evidence that the petitioner paid the beneficiary the proffered wage in 2002. The director stated that the state sales tax reports submitted by the petitioner did not show wages paid to the petitioner's employees, although they did show that the petitioner had more sales in 2002 than in 2001. The director also stated that the beneficiary's cancelled checks for 2002 did not establish that the petitioner had paid the proffered wage because they did not cover the entire year.

On appeal, counsel asserted that CIS overlooked the guidance of federal regulations and case law when it used documents such as the beneficiary's 1099-MISC forms to conclude that the petitioner did not have the ability to pay the proffered wage. Counsel states that the petition should be adjudicated on the basis of the employer's financial documents. In addition, counsel states that the CIS cannot base its conclusion on the ordinary income alone, but that other items, such as gross receipts, assets, cash on hand, deposits, along with ordinary income can be used to determine the ability of a petitioner to pay the proffered wage. Counsel submitted the petitioner's Form 1120, federal income tax return for 2002; and five of the petitioner's unaudited quarterly financial reports prepared by ██████████ Houston, Texas, from January 2002 to March 2003.

The AAO, in its decision on the petitioner's appeal, examined the petitioner's tax return for 2001 and 2002. The AAO stated that petitioner had taxable income of \$15,797 and that the petitioner could not have paid the proffered

¹ The precise sum of wages lacking after the petitioner's actual wage and the petitioner's net income are subtracted from the proffered wage of \$34,632 is \$3,995.

wage solely from the taxable income. The AAO also noted the petitioner's current assets of \$30,820 and current liability of \$2,665 from the 2001 tax records. Nevertheless the AAO determined that the petitioner did not have sufficient resources to pay the proffered wage in 2001. With regard to the petitioner's 2002 tax records, the AAO determined that based on the petitioner's current assets and liabilities, the petitioner could have paid the proffered wage from its net current assets in 2002. Although the AAO determined that the petitioner had the ability to pay the proffered wage in 2002, it did not find that the petitioner had the ability to pay the proffered wage as of the January 29, 2001 priority date, and dismissed the appeal.

On November 11, 2003, counsel submitted a Motion to Reconsider the denial of the instant petition and subsequent appeal. Counsel states that the AAO failed to take into account factors such as the past economic growth and reasonable expectation for future business. Counsel cites to *In re Sonogawa*, 12 I & N Dec. 612(1967). Counsel submits the petitioner's monthly checking account balances for 2001 to establish that the banking balances exceeded the proffered wage in 2001. Counsel also asserts that petitioner's business is constantly growing, and submits a chart that shows the increasing total income from 1999 to 2002. Counsel also submits a notice of intent to revoke written by the Texas Service Center with regard to a I-140 petition involving a beneficiary who subsequently worked for a petitioner part-time as a mechanic. Counsel also submits the Service Center's subsequent decision to not revoke the same I-140 petition.² Finally, counsel submits a letter from the petitioner's president.

Counsel on motion submits the petitioner's monthly bank statements for January 31, 2001 to November 30, 2002. Counsel's reliance on the balance in the petitioner's bank account 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, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for two years somehow reflect additional available funds that were not reflected on its 2001 or 2002 tax returns.

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 petitioner submitted two IRS Form 1099-MISC for the beneficiary that indicated he was paid \$12,100 in 2000 and \$14,840 in 2001. Since the priority date for the petition is January 2001, the Form 1099-MISC non-employee compensation reported in 2000, as well as the petitioner's income tax forms for 1999, and 2000, are not dispositive in these proceedings. Although the petitioner established that it compensated the beneficiary in 2001, and paid him \$14,840, it did not establish that it paid the beneficiary the full proffered wage of \$34,632. With regard to the beneficiary's non-employee compensation in 2002, on the basis of cancelled checks, the petitioner established that it paid the beneficiary \$7,690, a sum considerably less than the

² Since neither the petitioner nor the director has raised any questions with regard to any part-time employment of the beneficiary that could be in violation of the work status outlined in the beneficiary's ETA 750, this documentation is irrelevant to the proceedings.

proffered wage. Thus, although the petitioner established that it employed the beneficiary during 2001 and 2002, it did not establish that it paid the beneficiary an amount at least equal to the proffered wage as of the priority date 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. In the instant petition, the petitioner's tax return for 2001 establishes a net income of \$15,797.³ This net income, in addition to the beneficiary's non-employee compensation for 2001, namely, \$14,840, as documented on the beneficiary's Form 1099-MISC, is not sufficient to cover the proffered wage of \$34,632. The petitioner lacks \$3,995 in wages to match the proffered wage in 2001. With regard to the petitioner's ability to pay the proffered wage in 2002, however, based on the petitioner's 2002 net income of \$33,090, and the beneficiary's 2002 non-employee compensation of \$11,580, the petitioner has established that it has the capability to pay the proffered wage of \$34,632 in 2002.

In addition, counsel is correct that 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, although the AAO does not agree with other factors listed by counsel in his brief as items to be reviewed, such as gross profits, and deposits. 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.⁴ 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

³ Although the petitioner's president in his letter submitted on motion identifies this figure as a loss, this is not identified as a loss in the petitioner's 2001 federal income tax return.

⁴ 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.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the following years:

	2001	2002
Taxable income ⁵	\$ 15,797	\$ 33,090
Current Assets	\$ 30,820	\$ 60,472
Current Liabilities	\$ 2,665	\$ 1,875
Net current assets	\$ 28,155	\$ 58,597

The petitioner has demonstrated that it paid non-employee compensation to the beneficiary during 2001 and 2002. With regard to 2001, based on the petitioner's Form 1099-MISC, the beneficiary was paid \$14,840. In 2001, as previously illustrated, the petitioner shows a taxable income of \$15,797 and positive net current assets of \$28,155. Based on the petitioner's 2001 net current assets in combination with the beneficiary's actual non-employee compensation of \$14,840, the petitioner has established that it had the capability to pay the proffered wage of \$34,632 as of the 2001 priority date. With regard to the petitioner's ability to pay the proffered wage in 2002, as correctly noted by the AAO in its prior dismissal, the petitioner had sufficient net current assets to pay the proffered wage of \$34,632. Therefore the petitioner has established its ability to pay the proffered salary as of the priority date in 2001 and onward.

The decision of the AAO will be withdrawn, and the petition will be approved. 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 met that burden.

ORDER: The decision of the AAO is withdrawn, and the petition is approved.

⁵ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.