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U.S. Citizenship
and Immigration
Services

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APR 21 2005

[Redacted]

FILE: [Redacted]
EAC 04 063 50721

Office: VERMONT SERVICE CENTER

Date:

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

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a stucco construction firm. It seeks to employ the beneficiary permanently in the United States as a stucco mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$29.22 per hour, which amounts to \$60,777.60 per annum. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary does claims to have worked for the petitioner since August 1998.

On Part 5 of the visa petition, filed on December 24, 2003, the petitioner indicates that it currently employs five workers, has a gross annual income of \$665,909 and reports a net annual income of over \$67,000. In support of its ability to pay the beneficiary's proposed wage offer of \$60,777.60 per year, the petitioner initially submitted

incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner files its federal tax returns using a standard calendar year. It shows that the petitioner declared net taxable income of \$21,990 before the net operating loss (NOL) deduction. Schedule L of the tax return indicates that the petitioner had -\$504 in current assets and \$24,861 in current liabilities, resulting in -\$25,365 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 also provided copies of the beneficiary's Wage and Tax Statements for 2001 and 2002. They reveal that the petitioner paid the beneficiary wages of \$24,090.75 in 2001 and \$11,178 in 2002. This represents \$36,686.85 less than the proposed wage offer in 2001 and \$49,599.60 less in 2002. Copies of the beneficiary's pay stubs for September and October 2003 indicate that as of October 17, 2003, the petitioner had paid the beneficiary \$8,672 in wages.

The director reviewed the petitioner's financial data contained within its corporate tax returns of 2001 and 2002, as well as the beneficiary's compensation paid by the petitioner and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 23, 2001.

On appeal, counsel submits a letter, dated September 10, 2004, from the petitioner's certified public accountant, Mr. [REDACTED]. Mr. [REDACTED] states that the depreciation of \$46,726 claimed on the petitioner's 2001 corporate tax return should be added back to net income as a non-cash deduction.

Counsel also submits a copy of the petitioner's 2002 and 2003 corporate federal tax returns. They contain the following information:

	2002	2003
Taxable income before NOL deduction	\$ 392	\$ 1
Current Assets (Sched. L.)	\$ 1,140	\$ 182
Current Liabilities (Sched. L.)	\$23,481	\$7,505
Net Current Assets (Sched. L.)	-\$22,341	-\$7,323

Counsel contends that the petitioner's depreciation expense claimed in 2001 should be added back to its net income, citing Mr. [REDACTED] letter submitted on appeal. Counsel asserts that the petitioner has demonstrated its

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

continuing ability to pay the proffered wage through its federal tax returns submitted for consideration. Counsel's assertions are no persuasive.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as mentioned above, the record shows that the petitioner paid the beneficiary \$24,090.75 in 2001, \$11,178 in 2002, and that as of October 17, 2003, the petitioner had paid the beneficiary \$8,672 in wages.

CIS will also next examine the net taxable 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. As discussed above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, as the financial data on the petitioner's 2001 corporate tax return shows that neither the petitioner's net taxable income of \$21,990, nor its net current assets of -\$25,635 was sufficient to pay the difference of \$36,686.85 between the actual wages paid to the beneficiary and the proffered wage of \$60,777.60.

In 2002, neither the net taxable income of \$392, nor the petitioner's net current assets of -\$22,341 was enough to cover the \$49,599.60 difference between the \$11,178 in actual wages paid to the beneficiary and the certified wage of \$60,777.60.

To the extent that the \$8,672 in compensation paid to the beneficiary as of October 2003, reflects his yearly remuneration that year, it continues to demonstrate that the petitioner's evidence is not sufficiently convincing to establish its ability to pay the proposed wage offer. As shown on the 2003 tax return, neither the petitioner's net taxable income of \$1, nor its net current assets of -\$7,323 was sufficient to cover the shortfall of \$51,905.60 needed to pay the difference between the beneficiary's actual wages and the proffered salary.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.