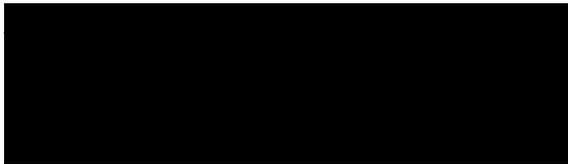




U.S. Citizenship
and Immigration
Services

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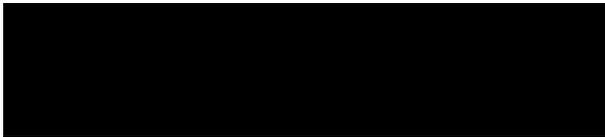
FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC 03 III 54943

Date: AUG 19 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

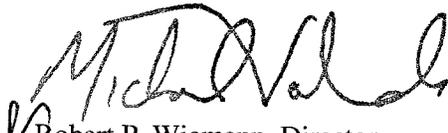
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

The petitioner is a food products manufacturer. It seeks to employ the beneficiary permanently in the United States as an industrial maintenance mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 19, 2001. The proffered wage as stated on the Form ETA 750 is \$18.54 per hour \$38,563.20 per year The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined that there was no evidence submitted to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on April 14, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested.

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 either in the form of copies of annual reports, federal tax returns ... audited financial statements ... The petitioner is requested to provide this evidence from 2001 to the present

Form DE-6, Quarterly Wage Report: Submit copies of the U. S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four (4) quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees

Employment with the Petitioner : The labor certificate claims that the beneficiary has been working for the petitioner since 1997 to the present. Submit evidence of this employment. The Evidence must be in the form of copies of official documents such as pay stubs or the beneficiary's W-2 (official IRS printout only) or California Employment Development Department (EDD) Form DE-6 Quarterly Wage Reports for the beneficiary or other IRS generated tax documents.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for years 2001, and 2002 and the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all petitioner's employees for the 4th quarter of 1997 and from 1998 through 2002. Petitioner also submitted a State of California Form DE-678 for the 1st quarter of 2003.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$18.54 per hour (\$38,563.20 per year) from the priority date.

- In 2002, the Form 1120S stated taxable income¹ of \$301,522.00.
- In 2001, the Form 1120S stated taxable income of <\$107,842.00>².

The director denied the petition on March 27, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

"The US employer makes a valid offer of employment to the applicant and can show the ability to pay the proffered wage...."

¹ IRS Form 1120S, Line 21.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

With the appeal counsel submits a brief and the following copies of documents: Form 941 for years 2000 and 2001; letters from an accountant and a compiled financial statement; a letter from the company's president; federal tax returns Form 1120 for the years 1997 through 2002; beneficiary's pay check stubs for the period 1998 through 2004; the beneficiary's U.S. Internal Revenue Service (IRS) print outs of Form W-2 Wage and Tax Statements for 1997, 1998 and 2000 as well as other documentation including a sales history, Form 941 tax returns (last quarter of 2000, and for 2001), and an internally generated historical and projected financial statement.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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.

Evidence was submitted to show that the petitioner employed the beneficiary as follows: copies of IRS W-2 transcripts for years 1997, 1998 and 2000 stating wages paid to the beneficiary by the petitioner of \$2,101.00 in 1997, \$39,869 in 1998, \$47,528.00 in 2000, and copies of the beneficiary's W-2 statement shows wages paid for 2001 in the amount of \$17,826.57, for 2002 in the amount of \$47,527.00, and, for 2003, wages were reported in the amount of \$50,997.50. Since the priority date is March 19, 2001, evidence was submitted through W-2 statements that the proffered wage of \$38,563.20 per year was paid the beneficiary in 2002 and 2003.³ Counsel points out that the petitioner has and continues to pay the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$18.54 per hour (\$38,563.20 per year) from the priority date.

- In 2002, the Form 1120S stated taxable income of \$301,522.00.

³ Additional evidence was submitted to show that the petitioner employed the beneficiary. Petitioner has submitted payroll statements evidencing wages paid to the beneficiary at the rate of \$19.00 per hour that substantiate the W-2 reports also submitted. This indicates an annual wage of \$39,520.00 that is above the amount of the proffered wage. Also, petitioner submitted the beneficiary's Social Security Administration's report of earnings for 2002 stating wages of \$47,527.80 received from petitioner for that year.

- In 2001, the Form 1120S stated taxable income loss of <\$107,842.00>.⁴

Therefore, in tax year 2002 the petitioner had sufficient taxable income to pay the 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. Since wages paid to the beneficiary by the petitioner exceeded the proffered wage in 2002 and 2003, we will examine 2001.

- In 2001, the Form 1120S stated taxable income loss of <\$107,842.00>. A copy of the beneficiary's W-2 statement for 2001 states wages paid in the amount of \$17,826.57. The sum of these two figures is less than the proffered wage amount of \$38,563.20 per year.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income sufficient to pay the proffered wage in year the year 2001 for which petitioner's tax returns are offered for evidence.

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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120S U.S. Income Tax Return submitted by petitioner for 2001, Schedule L found in that return indicates the following.

- In 2001, petitioner's Form 1120S return stated current assets of \$427,609.00 and \$1,035,625.00 in current liabilities. Therefore, the petitioner had a <\$608,016.00> in net current assets for 2001. Since the proffered wage was, this sum is \$38,563.20 per year less than the proffered wage.

Therefore, for the year in which the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel asserts that the petitioner's financial status should be examined in totality considering all factors submitted into evidence. Further, counsels states that the

⁴ Since the priority date from which the ability to pay the proffered wage is March 19, 2001, the prior federal tax returns submitted into evidence dated prior to this date do not enter into this particular examination of the ability to pay but do have relevance elsewhere.

⁵ 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.

beneficiary has replaced less productive workers, and by implication, his loss to the petitioner will be a hardship and his continued employment a business necessity. Counsel has also brought to CIS attention that it has received prior employment based immigrant petitions approvals, again by implication upon the same evidence presented in the subject case. Lastly, counsel asserts that the petitioner has a "trust income" and liquid assets beyond that shown on the tax returns available to pay the proffered wage.

By way of preface, according to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Proof of ability to pay begins on the priority date March 19, 2001, that is, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor.

Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Petitioner's profit projections have little probative value for this reason. The response to the director's request for evidence included unaudited financial statements⁷ as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

There is an assertion that the loss of the beneficiary's service resulted in the hiring of two new employees and the loss of production. The record does not contain any objective evidence showing the money paid to these employees. The record does contain evidence in the form of a statement from the petitioner's owner, of the beneficiary's contribution to petitioner's taxable income. The petitioner has explained how the beneficiary's employment as an industrial maintenance mechanic will significantly increase petitioner's profits

During the week of April 2001 during an INS investigation, it was found that 19 of our employees did not possess valid documentation and had to be terminated [one of which was the beneficiary]. The new employees required great amounts of training that resulted in over-time during the last three quarters of 2001 at a cost of \$180,872. While all this training was going on we also produced large amounts of product not to our specifications that resulted in over \$125,000 of waste.

However, the costs that have resulted from the petitioner's choice to hire persons not authorized to work in the United States cannot be shown to be funds available to pay the proffered wage. Moreover, it is against public policy for anyone to benefit from an illegality evident here, or complain that the imposition of sanctions resulted in a compensable loss. The loss of the beneficiary's labor and/or the cost of its replacement cannot be a factor under these circumstances.

Counsel has also brought to CIS attention that it has received prior employment based immigrant petitions approvals, again by implication upon the same evidence presented in the subject case. The petitioner noted that CIS approved other petitions that had been previously filed. The director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current

⁶ 8 C.F.R. § 204.5(g)(2), *Supra*.

⁷ The statements were qualified as compiled. A compilation is the management's representation of its financial position. It is the lowest level of financial statements.

record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel asserts that the petitioner has a "trust income" and liquid assets beyond that shown on the tax returns available to pay the proffered wage. There is no evidence in the record of proceedings to substantiate this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The CIS will examine the financial viability of a business in the totality of the circumstances presented. Counsel has provided information concerning the petitioner and its business plans to reach a determination according to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). No unusual circumstances have been shown to exist in this present case to parallel those in *Sonogawa*, to explain why 2001 was an uncharacteristically unprofitable year for the petitioner. Again, petitioner cannot use illegality and the imposition of CIS authority upon its undocumented workforce as an excuse for business reversals.

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.