

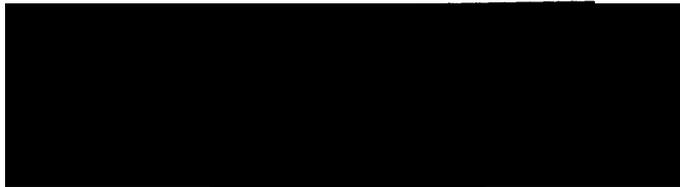
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 26 2005

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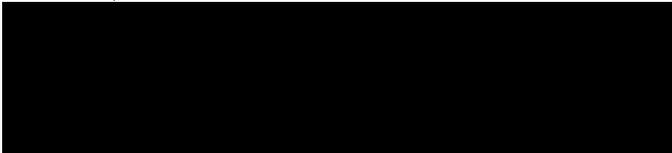
Petitioner:

Beneficiary:



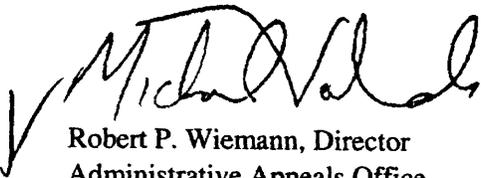
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 service center director denied the employment-based immigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a company that constructs, repairs, and sells high-grade cabinets and furniture. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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, or that the beneficiary had the requisite two years of relevant work experience. Accordingly, the director denied the petition.

On appeal, counsel states that the director erred in relying solely on the net income of the petitioner when determining whether the petitioner had the ability to pay the proffered wage, and that the beneficiary had obtained the required experience as outlined on the ETA-750. Counsel provides no further 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.

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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$17.16 per hour, which amounts to \$35,692.80 annually.

On the I-140 petition, the petitioner did not indicate when it was established or its number of employees. The petitioner did indicate a gross annual income of \$39,302, and a net annual income of \$79,870. With the petition, the petitioner submitted IRS Form 1120 for the year 2002.

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 17, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide IRS computer printouts for tax years 2001 and 2002, as well as the beneficiary's W-2 Forms for 1997 to 2000.

With regard to the petitioner's business operations, the director requested copies of business permit, articles of incorporation, master payroll list showing the names of all employees with their proper titles, duties/salaries, and whether they were full time or part time. The director also requested a minimum of three photos of the business infrastructure and copies of at least three business transactions, such as business flyers, or accounts receivable documentation.

In response, the petitioner submitted a one-page form that listed its business address, type of establishment, number of employees, gross annual income for 2002, and its net annual income for 2002. The petitioner also submitted federal corporate tax returns for 2001 and 2002. The petitioner also stated that the petitioner had employed the beneficiary since June 2000, and that W-2 forms prior to 2000 were unavailable from the petitioner. The petitioner submitted the beneficiary's W-2 forms for 2000, 2001, 2002, and 2003. These documents indicate that the petitioner paid the beneficiary \$8,000 in 2000, \$29,120 in 2001, \$35,360 in 2002, and \$35,360 in 2003. The petitioner also submitted business licenses issued in 2004. In counsel's cover letter that accompanied the evidence submitted in response to the director's request for further evidence, counsel noted that the petitioner was new in 2001, and that the petitioner had a deficit in 2002.¹ Counsel also stated that in 2001, the petitioner paid the beneficiary \$29,120 in 2001, and that this salary combined with the cash available at year's end, namely, \$5,608, and the petitioner's total assets of \$69,150 were sufficient to show that the petitioner had the ability to pay the proffered wage in 2001.

With regard to the petitioner's business operations, the petitioner submitted its articles of incorporation for the state of Nevada, dated June 15, 2000, and a current payroll list that indicated three persons worked for the petitioner: [REDACTED], cabinetmaker, the beneficiary, cabinetmaker, and [REDACTED], supervisor, shop manager/quality control. The petitioner also submitted pictures of its business premises, a job purchase order dated February 2004, and its business licenses dated 2004.

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 2, 2004, denied the petition. The director stated that the \$69,150, identified by counsel as the petitioner's total assets available to pay the difference between the beneficiary's actual wages and the proffered wage, was actually a depreciation figure on Schedule L of the petitioner's 2001 tax return. The director stated that depreciation deductions were not available to pay wages. The director also stated that the petitioner had three pending I-140 petitions, on which the instant petition was one. The director stated that the other two positions were for a cabinetmaker supervisor with a proffered wage of \$41,600 and another cabinetmaker, with a proffered wage of \$35,692.80. The director stated that the petitioner had to establish the ability to pay the wages for all three petitions as of the priority date, which is April 19, 2001. The director then determined that the petitioner had not established the ability to pay these wages for tax year 2001.

On appeal, counsel states that the director erred in relying only on the petitioner's net income to determine the petitioner's ability to pay the proffered wage, and that the petitioner demonstrated the ability to pay for 2001, 2002, and 2003. Although counsel stated on appeal that he would submit a brief and/or evidence to the Administrative Appeals Office (AAO) within 30 days, as of this date, more than 15 months later, the AAO has received nothing further. Therefore the AAO in these proceedings will utilize the record as presently constituted.

¹ The petitioner's 2001 federal income tax return indicates taxable income of -\$35,880.

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 indicated on ETA Form 750 that he had worked fulltime for the petitioner from September 1999 to the present, and the petitioner submitted W-2 forms for 2000, 2001, 2002, and 2003 to establish its employment of the beneficiary. Since the priority date is April 2001, the beneficiary's wages in 1999 or 2000 are not dispositive as to whether the petitioner has the ability to pay the proffered wage. Therefore only the wages paid to the beneficiary in 2001 to 2003 are considered in these proceedings. As previously stated, the petitioner paid the beneficiary \$29,120 in 2001, \$35,360 in 2002, and \$35,360 in 2003. Since the proffered wage is \$35,692.80, the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage in either 2001, 2002, or 2003. 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, and, contrary to counsel's reference to the petitioner's depreciation deduction in 2001, 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. Based on the federal income tax forms submitted to the record, the petitioner's net income in 2001 is -\$35,880, and in 2002, \$70,120. While the petitioner's net income is insufficient to pay the difference between the beneficiary's actual wages and the proffered wage in 2001, namely, \$6,240, the petitioner's net income in 2002 is more than sufficient to pay the difference between the beneficiary's actual wages of \$35,360 and the proffered wage, namely, \$332.80. However, as stated in the director's decision, the petitioner has to establish that it can pay the wages of all three pending I-140 petitions. The total wages for all three positions is \$112,985.60. The petitioner's net income for 2002 is not sufficient to pay all three wages. Therefore the petitioner has not established that it can pay the proffered wage based on its 2001 or 2002 net income.

Nevertheless, 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. 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 Schedule L, lines 1 through 6. Its 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 out of those net current assets. The tax returns reflect the following information for the following years:

	2001	2002
Taxable income ³	\$ 35,880	\$ 70,120
Current Assets	\$ 5,608	\$ 8,131
Current Liabilities	\$ 0	\$ 0
Net current assets	\$ 5,608	\$ 8,131

The petitioner has demonstrated that it paid the beneficiary \$29,120 in 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$35,880, and net current assets of \$5,608. The petitioner's net current assets in 2001 are not sufficient to pay the difference between the beneficiary's actual wage and the proffered wage, namely, \$6,240. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage through its net income or net current assets in 2001. In addition, as previously noted by the director, the petitioner has in total three pending I-140 petitions, and the petitioner must establish the ability to pay all three proffered wages.

With regard to tax year 2002, while the petitioner established the ability to pay the beneficiary's salary out of its net income, the petitioner did not establish that could pay all three proffered wages for the other I-140 beneficiaries out of its net income or net current assets. Furthermore, neither counsel nor the petitioner provide any further information on any additional sources of funding with which the pay the proffered wages. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 and onward.

In his decision, the director also determined that the petitioner had not established that the beneficiary was qualified to perform the position outlined in the ETA 750. With regard to the beneficiary's qualifications as of the 2001 priority date, 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(1)(3)(ii)(C) states the following:

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.

³ 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.

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 19, 2001. On the Form ETA 750, Part A, the petitioner specified that any applicants have a minimum of a sixth grade education and four years of work experience in the job offered. On the ETA 750, Part B, Work Experience, section 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated the following in reverse chronology:

1. Cabinets, Closets, and Good Things, Las Vegas, Nevada. 40 hours a week, September 1999 to the date of filing the ETA application, April 9, 2001. Cabinetmaker.
2. Showcase Cabinets, Las Vegas Nevada. 40 hours a week, June 1997 to June 1998, Cabinetmaker.

Because the evidence was insufficient, on December 17, 2003, the director requested that the petitioner submit evidence to establish that the beneficiary possessed the work experience listed on the Form ETA 750. The director stated that such evidence should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information, and that the verification letter should state the beneficiary's title, duties, dates of employment/experience, and number of hours worked per week.

In response to the director's request for evidence, the petitioner submitted two employment verification letters. [REDACTED] position unidentified, signed one letter on letterhead that stated the beneficiary worked full time as a cabinetmaker at Showcase Commercial and Gaming Cabinets, Las Vegas, Nevada, from June 1997 to June 1998. [REDACTED], identified as former owner, Closets and Good Things, stated in the second letter that the beneficiary had worked for him from June 1998 to June 2000, when his company closed. Mr. [REDACTED] stated that due to the closure of the company, he could not locate the accounting documents and described previously issued W-2s as included in these accounting documents.

In his denial of the petition, with regard to the beneficiary's qualifications, the director noted that Form ETA 750 required four years of work experience. The director noted that the letter from [REDACTED] established one year of experience. The director also noted that the beneficiary had claimed he worked for the petitioner since September 1999 and that Form ETA 750 did not mention employment with [REDACTED] from June 1998 to June 2000. The director stated that the record was not clear whether the businesses Cabinets, Closets and Good Things, and Closets and Good Things were one in the same business, and that counsel's statements with regard to the beneficiary's work experience had not explained or clarified the beneficiary's previous work experience. Based on the inconsistencies in the record, the director determined that the petitioner had not established that the beneficiary had four years of previous work experience, prior to the priority date of April 2001.

On appeal, counsel states that a brief is forthcoming that will provide conclusive explanatory evidence that the beneficiary possesses the requisite four years of work experience, and will clarify the difference between the petitioner and Closets and Good Things, the business previously owned by Mr. [REDACTED]. As previously stated, as of this date, more than 15 months later, the AAO has received nothing further from the petitioner or counsel. Therefore the AAO will examine whether the beneficiary possesses the requisite four years of work experience, utilizing the record as presently constituted.

Upon review of the record, the petitioner has not established that the beneficiary possessed the requisite four years of work experience prior to the April 2001 priority date. The letter from [REDACTED] of Showcase Cabinets only establishes one year of relevant work experience. With regard to any work done by the beneficiary for Cabinets and Good Things, an employer not identified on the ETA 750, the petitioner has not established that the beneficiary was employed by this entity, nor has it explained whether this company and the petitioner are one and the same business. It is noted that although the former owner of Cabinets and Good Things stated that he could not find the appropriate accounting documents, the beneficiary, if employed by Cabinets and Good Things in the stated time period, would have had copies of any W-2 Forms. More importantly, as stated by the director, the ETA 750 contains no mention of any work with Cabinets and Good Things, and the petitioner's documentation submitted to the record in response to the director's request for further evidence is inconsistent with the ETA 750. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Furthermore, if the petitioner is attempting to establish the four years of requisite work experience beginning with the beneficiary's employment with Showcase Cabinets in June 1997, the four years of work experience immediately prior to the priority date would have spanned a period of time from April 1997 to April 2001. However, the beneficiary only claimed employment with Showcase Cabinets as of June 1997. Even if the claimed employment with Cabinets and Good Things were more substantially documented, the two jobs described by the petitioner would not establish the four years of requisite work experience. Thus, without more persuasive evidence, the petitioner has not established that the beneficiary has the four years of work experience required by the ETA 750.

As previously stated, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward, or that the beneficiary is qualified to perform the duties of the position. Therefore, 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.