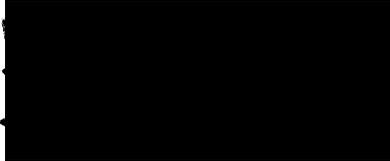


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invasion of personal privacy**



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

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FILE: EAC 02 274 50924 Office: VERMONT SERVICE CENTER Date: **AUG 30 2005**

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

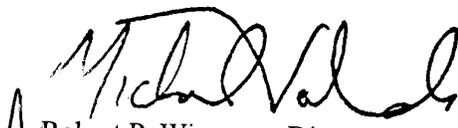
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 construction firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 submits additional evidence and asserts that the petitioner has established its 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) 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$31.62 per hour, which amounts to \$65,769.60 per year. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary claims to have worked for the petitioner since 1998.

At the outset, it is noted that Citizenship and Immigration Services (CIS) electronic records indicate that the petitioner has filed for other beneficiaries. At least two petitions were approved with priority dates in 2001. Although this appeal is being dismissed for the reasons given below, it is noted that where a petitioner files for multiple beneficiaries, it must show that it has had the ability to pay the collective beneficiaries' proposed salaries as of the respective priority dates.

On Part 5 of the petition, filed in August 2002, the petitioner states that it was established in 1998, has a gross annual income of \$1,033,675, a net annual income of \$305,565, and currently employs eight workers.

In support of its ability to pay the proffered wage of \$65,769.60 per year, the petitioner initially submitted a partial copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. It shows that the petitioner files its taxes based upon a standard calendar year. The tax return reflects that the petitioner reported \$19,424 as ordinary income.¹ The petitioner also provided a copy of a Wage and Tax Statement (W-2) showing that it paid \$18,960 in wages to the beneficiary in 2001.

On July 1, 2003, the director requested additional evidence pertinent to the petitioner's financial ability to pay the proposed wage offer beginning on the priority date and continuing until the present. Pursuant to 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence must consist of either copies of annual reports, federal tax returns, or audited financial statements. The director also instructed the petitioner to provide a complete copy of its 2001 federal income tax return, as well as a copy of its Form 941, Employer's Quarterly Federal Tax Return, covering each quarter in 2001.

In response, the petitioner, through counsel, submitted a more complete copy of its 2001 corporate tax return. Schedule L of the tax return reflects that the petitioner had \$26,109 in current assets and \$3,386 in current liabilities, resulting in \$22,723 in net current assets. Besides net income, CIS will consider *net current assets* as an alternative method of examining a petitioner's continuing ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A petitioner's year-end current assets and current liabilities may be found on line(s) 1 through 6 and line(s) 16 through 18, respectively, of Schedule L of a corporate tax return. They represent a measure of a petitioner's liquidity during a given period and an alternate resource out of which to pay a proffered wage. If a petitioner'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 failed to provide copies of its 2001 quarterly tax returns but resubmitted a copy of the beneficiary's 2001 W-2, as well as copies of W-2s issued to ten other employees during 2001. The petitioner further provided a copy of an unaudited financial statement consisting of a balance sheet covering the first three months of 2002.

Examining the corporate tax return and other evidence supplied to the record, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition on December 23, 2003.

On appeal, counsel asserts that the director failed to properly consider the petitioner's "cash-on-hand" of \$50,679.13 as reflected on its balance sheet submitted to the underlying record. Counsel contends that when this sum is combined with the salary of \$18,960 already paid to the beneficiary in 2001, then the petitioner's ability to pay the proffered wage is established. As additional evidence, counsel provides a copy of a second, amended 2001 corporate tax return, which he argues establishes the petitioner's ability to pay the proffered salary. This tax

¹ For purposes of this review, ordinary income (line 21) will be treated as the petitioner's net taxable income.

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

return reflects increased gross receipts, different figures for salaries and wages and ordinary income of \$70,318. The figures reflected on the Schedule L balance sheet have also been amended.

As noted by the director, the record indicates that the unaudited balance sheet represents a compiled financial statement. Such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. 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. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As this document is not audited as required by the 8 C.F.R. § 204.5(g)(2), it is not probative of the petitioner's ability to pay the proffered wage during the period represented.

It is also noted that, other than this unaudited balance sheet, the petitioner failed to present any other financial documentation related to 2002.

The director adequately considered the petitioner's assets given on Schedule L of the petitioner's 2001 tax return. Moreover, the cash balance reflected on line 1 of Schedule L is already factored into the calculation of the petitioner's current assets and current liabilities for 2001 and will not be considered in isolation of those figures.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, the record establishes that the petitioner employed the beneficiary and paid him \$18,960 in wages in 2001, which is \$46,809.60 less than the certified wage offer of \$65,769.60.

CIS will also examine a petitioner's net taxable income as shown on its 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*, 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.

In this case, as noted by the director, the corporate petitioner's 2001 tax return submitted to the underlying record fails to demonstrate that either its reported net income of \$19,424 or its net current assets of \$22,723 was

sufficient to pay the \$46,809.60 shortfall between the \$18,960 in wages paid to the beneficiary and the proffered salary. The tax return submitted on appeal will not be considered as it is provided with no explanation of such changes to the figures already provided and no proof that it was filed with the Internal Revenue Service. Counsel's assertions in this regard do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, as noted above, the record contains no credible financial documentation related to 2002. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. In this matter, the petitioner has failed to demonstrate that it has had the continuing financial ability to pay the certified wage beginning April 26, 2001.

Based upon a review of the evidence contained in the underlying record and on appeal, the AAO concludes that the petitioner has failed to establish that it has had the continuing ability to pay the proffered wage beginning on the priority date.

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.