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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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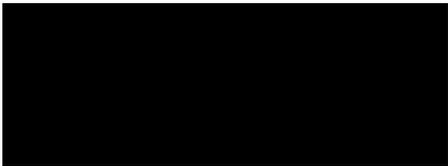
Office: NEBRASKA SERVICE CENTER

Date: JAN 05 2005

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

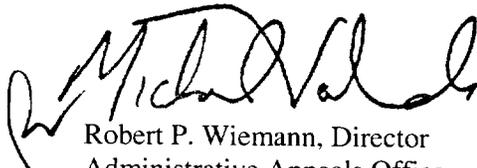
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto repair and rebuilding company. It seeks to employ the beneficiary permanently in the United States as an auto body repairer.

The instant petition is the second I-140 petition filed by the petitioner based on the same Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The previous I-140 petition was denied by the director in a decision dated August 21, 2000, and no appeal was taken from that decision. The original Form ETA 750 Application for Alien Employment Certification is found in the record of proceeding of the previous I-140 petition, in the same A-file as the instant petition, which is the beneficiary's A-file. The petitioner submitted a photocopy of the approved Form ETA 750 when it filed the instant petition.

In adjudicating the instant 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 states that the evidence establishes the petitioner's ability to pay the proffered wage.

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 or seasonal 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 either 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 petition's priority date, which is the date 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). The priority date in the instant petition is July 14, 1997. The proffered wage as stated on the Form ETA 750 is \$13.50 per hour, which amounts to \$36,400.00 annually. On the Form ETA 750B, signed by the beneficiary on July 3, 1997, the beneficiary claimed to have worked for the petitioner from July 1993 to the present.

On the petition, the petitioner claimed to have been established on September 5, 1984, to have been reincorporated on May 22, 1998, to have gross annual income of \$773,799.00, to have net annual income of \$35,233.00, and to currently have 8 employees.

In support of the petition, counsel submitted a letter dated November 6, 2000 explaining that the instant petition is a refiling and submitted the following evidence: a copy of a Form I-797 receipt notice dated November 8, 1999 showing the receipt date of October 12, 1999 of the previous I-140 petition; a copy of a letter dated August 11, 1997 from the County Transportation Co-op, Dabrowa Tarnowska, Poland, stating that the beneficiary had been employed as a car mechanic with that organization from July 6, 1984 until August 31, 1991, with certified English translation; a copy of the beneficiary's [REDACTED] for automobile body work issued by the Chamber of Crafts, Krakow, Poland, and dated October 11, 1979, with certified English translation; a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2000; a copy of the beneficiary's Form 1040A U.S. Individual Income Tax Return for 2000; a copy of the beneficiary's Form IL-1040 Illinois Individual Income Tax Return for 2000; copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 1998, 1999, and 2000; and a copy of the petitioner's Form IL-1120-ST Illinois Small Business Corporation Replacement Tax Return for 1998.

On October 1, 2001 the director issued a request for evidence (RFE), in which the director stated that bank statements and tax returns from a previous petition for the same beneficiary indicated that the name of the petitioner in 1997 was United Auto Rebuilders, Inc. The director asked for an explanation, and requested evidence of a legal change in name of the petitioner, if one took place, and evidence that the petitioner and United Auto Rebuilders are one and the same company. The director also requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the July 14, 1997 priority date and continuing to the present.

In response, counsel submitted a letter dated November 19, 2001 and the following documents: a letter dated October 25, 2001 from the petitioner's president; a copy of the petitioner's articles of incorporation dated May 22, 1998; a copy of an unsigned Illinois Domestic Corporation Annual Report of United Auto Rebuilders, Inc., with due date of September 1, 1999; a copy of an unsigned Illinois Domestic Corporation Annual Report of the petitioner, with due date of May 1, 1999; a letter from a certified public accountant dated November 7, 2001 with attached summary of cash flows of the petitioner's president for the years 1997, 1998, 1999 and 2000; an additional copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1998; copies of the Form 1120S U.S. income tax returns for an S corporation for United Auto Rebuilders, Inc., for 1997 and 1998; copies of each first page of statements for an account of the petitioner at [REDACTED] for the months of January through August 1999; and copies of the Form 1040 U.S. individual income tax returns of the petitioner's president and his wife for 1997, 1998, 1999 and 2000.

In a decision dated January 8, 2002, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence.

Counsel states on appeal that the petitioner's gross income and the personal financial assets of the petitioner's owner are more than sufficient to pay the proffered wage to the beneficiary. Counsel also states that the petitioner has been paying the salary of the beneficiary since 1994.

Since no additional evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

An initial issue raised by the evidence concerns the legal identity of the petitioner.

In response to questions in the RFE seeking clarification of the relationship between the petitioner and United [REDACTED] counsel submitted copies of U.S. income tax returns for an S corporation for United Auto [REDACTED] for 1997 and 1998, and a copy of an unsigned annual report for 1999 by that corporation. Although unsigned on behalf of the corporation, the annual report form contains printed information about the corporation apparently placed on the form by the Illinois Department of Business Services. The above-mentioned documents indicate that United Auto Rebuilders, Inc., was incorporated in 1984 and that it was still in existence as a corporate entity until at least mid-1998.

The copies of the petitioner's U.S. income tax returns for an S corporation for 1998, 1999 and 2000, the copy of the petitioner's articles of incorporation, and the copy of the petitioner's unsigned annual report for 1999 indicate that the petitioner was incorporated on May 22, 1998, and that it elected tax status as an S corporation at that time.

The letter of the petitioner's president dated October 25, 2001 states that [REDACTED] was the predecessor corporation to the petitioner. The president states that the business was reincorporated under its present name because the previous name was causing confusion with automobile insurance companies, since many other auto body shops and repair shops in the Chicago area also had names which began with the word "United." The president's letter does not explain why the business was incorporated under new articles of incorporation, rather than merely changing the name of the existing corporation through an amendment to its articles of incorporation.

The Form ETA 750 supporting the instant petition was filed in the name of the petitioner on July 14, 1997. That date, however, was ten months prior to the May 22, 1998 date of incorporation of the petitioner.

The evidence includes no tax return of the petitioner for 1997. The only tax return for 1997 in the record is that of [REDACTED]. As noted above, the record contains two tax returns for 1998, one for [REDACTED] and one for the petitioner. The income and balance sheet figures on the two 1998 returns suggest that [REDACTED] was active in about the first half of the year, and that the petitioner was active in about the second half of the year. In 1997, the gross receipts or sales figure of [REDACTED] was \$725,678.00. In 1998, the gross receipts or sales figure of United Auto [REDACTED] was \$382,870.00 and the gross receipts or sales figure of the petitioner was \$390,929.00, so that the two corporations' combined gross receipts or sales for 1998 were \$773,799.00, a 6.7% increase over the 1997 figure for [REDACTED]. In 1998, United Auto Rebuilders, Inc., began the year with significant cash and accounts receivables and ended with less than \$1,000.00 in cash, zero accounts receivable, and \$51,020.00 in external liabilities, that is, liabilities other than loans from shareholders, capital stock, additional paid-in capital and retained earnings. In 1998 the petitioner began the year with no assets or liabilities and ended the year with \$26,074.00 in total assets and \$44,952.00 in external liabilities.

The tax returns for 1998 for both corporations are generally consistent with the statements by the petitioner's president that the petitioner took over the business from [REDACTED]. However, the tax returns for [REDACTED] show a different employer identification number than the employer identification number on the petitioner's tax returns. Also, no explanation appears in the tax returns or elsewhere in the record of how the \$51,020.00 in external liabilities of United Auto Rebuilders, Inc., at the end of 1998 were handled. Those liabilities do not appear as liabilities for the beginning of the year on the

petitioner's tax return for 1998, its first year of operation. Moreover, the president's letter of October 25, 2001 does not state that the petitioner assumed all of the rights, duties, and obligations of the predecessor company, nor does it explain why it was necessary to establish a new corporation simply to effect a change of name in the business. For the foregoing reasons, the evidence fails to establish that the petitioner is a successor in interest to United Auto Rebuilders, Inc. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Moreover, even assuming that the evidence were sufficient to establish that the petitioner is a successor in interest to United [REDACTED] the evidence is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the petitioner obtains lawful permanent residence.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA signed by the beneficiary on July 3, 1997, the beneficiary claimed to have worked for the petitioner from July 1993 to the present. In light of the above discussion concerning a successor in interest, the beneficiary's claim of employment prior to May 1998 is understood to refer to employment by United Auto Rebuilders, Inc. Nonetheless, no corroborating documentation of that employment was submitted for the record.

The only copy of a Form W-2 Wage and Tax Statement for the beneficiary in the record is one for the year 2000, which shows compensation from the petitioner in the amount of \$37,960.00. Since that amount is higher than the proffered wage of \$36,400.00, the beneficiary's Form W-2 for 2000 would be sufficient to establish the petitioner's ability to pay the proffered wage in that year. However, the record lacks any evidence on the amount of compensation paid to the beneficiary in other years. Therefore the evidence related to the beneficiary's employment fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses.

The petitioner submitted in evidence copies of the Form 1120S U.S. income tax returns of an S corporation of United Auto Rebuilders, Inc., for 1997 and 1998 and copies of its own Form 1120S returns for 1998, 1999 and 2000. The record before the director closed with the submission of the petitioner's response to the RFE. That response was received by CIS on November 21, 200, at which date the petitioner's return for 2000 was the most current return available.

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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent

that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner and is structured as an S corporation and that United Auto Rebuilders, Inc., was also structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The tax returns of U [REDACTED] show the following amounts for ordinary income: -\$71,486.00 for 1997; and -\$22,725.00 for 1997. The petitioner’s tax returns show the following amounts for ordinary income: -\$12,508.00 for 1998; \$20,113.00 for 1999; and -\$19,003.00 for 2000. The figure for 1999 shows a positive net income, but that amount is less than the proffered wage of \$36,400.00. All of the other net income figures are negative. Therefore, the net income figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner’s ability to pay the proffered wages, CIS may review the petitioner’s net current assets. Net current assets are a corporate taxpayer’s current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation’s 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner’s ability to pay.

Calculations based on the Schedule L’s attached to the tax returns of United Auto Rebuilders, Inc., yield the following amounts for net current assets: \$17,893.00 for the beginning of 1997; -\$37,175.00 for the end of 1997; and -\$50,112.00 for the end of 1998. Calculations based on the Schedule L’s attached to the petitioner’s tax returns yield the following amounts for net current assets: \$0.00 for the beginning of 1998; -\$18,878.00 for the end of 1998; -\$17,475.00 for the end of 1999; and -\$56,790.00 for the end of 2000. Since each of the foregoing figures is either negative or is less than the proffered wage, those figures also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner’s ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner’s bank statements the ending balances are as follows:

1999	January	\$26,684.00
	February	\$21,300.03
	March	\$9,424.92
	April	\$23,742.65
	May	\$17,768.09
	June	\$11,526.81
	July	\$13,666.03
	August	\$10,052.22

The ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The record also contains evidence related to the personal financial resources of the petitioner's president, who, according to the petitioner's tax returns, owns 100% of the petitioner's stock. The record contains copies of the Form 1040 U.S. individual income tax returns of the petitioner's president and his wife for 1997, 1998, 1999 and 2000, and a letter from a certified public accountant dated November 7, 2001 with attached summary of cash flows of the petitioner's president for the years 1997, 1998, 1999 and 2000.

Counsel states in his brief that the personal financial resources of the owner are additional evidence of the petitioner's ability to pay the proffered wage. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In his decision, the director did not address the issue of whether the petitioner is a successor in interest to United Auto Rebuilders, Inc. It was error for the director to fail to do so. Although the ETA 750 and the instant I-140 petition were both filed in the name of the petitioner, the petitioner did not yet have a legal existence in 1997 when the ETA 750 was filed. The legal entity then existing for the petitioner's business was United Auto Rebuilders, Inc., according to the evidence in the record. However, as discussed above, the record fails to establish that the petitioner is a successor in interest to that corporation.

In his analysis of the ability to pay issue, the director analyzed the ordinary income figures on the tax returns in the record and correctly found that those figures failed to establish the petitioner's ability to pay the proffered wage during the relevant time period. The director failed to consider the net current assets of the petitioner and of [REDACTED] as possible evidence of the petitioner's ability to pay the proffered wage. However, that error did not affect the director's conclusion, since, as shown above, the figures for net current assets of the petitioner and of United Auto Rebuilders, Inc., in each of the relevant years are either less than the proffered wage or are negative, and those figures therefore fail to establish the petitioner's ability to pay the proffered wage during the relevant period. The director also correctly declined to consider the personal financial resources of the petitioner's owner as evidence of the petitioner's ability to pay the proffered wage.

Although the director's analysis of the evidence should have been more complete, the decision of the director to deny the petition was correct, based on the evidence in the record. No new evidence has been submitted on appeal. The assertions of counsel in his brief fail to overcome the decision of the director.

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.