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U.S. Citizenship  
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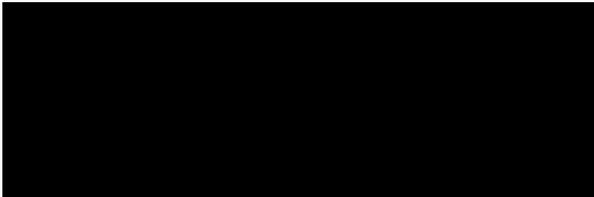
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FILE: WAC-02-165-50260 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2005

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 engaged in the business of industrial enameling and metal refinishing. It seeks to employ the beneficiary permanently in the United States as a furniture finisher. 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 a brief statement and submits previously submitted 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 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 February 26, 1999. The proffered wage as stated on the Form ETA 750 is \$10.07 per hour, which amounts to \$20,945.60 annually<sup>1</sup>. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in January 1985, to have a gross annual income of \$237,031, and to currently employ ten workers. In support of the petition, the petitioner submitted its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2000; its Form 1120, U.S. Corporation Income Tax Return for 1999; and its state quarterly wage reports for all quarters in 2001, none of which contained the beneficiary's name.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 25, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested

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<sup>1</sup> The director's decision calculated the annual proffered wage as \$19,200; however, \$10.07 per hour multiplied by 40 hours per week and multiplied again by 52 weeks in a year equals \$20,945.60, which is the annual proffered wage.

that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2000 for the year 2001 and resubmitted the tax returns previously submitted.

The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income <sup>2</sup>	-\$30,908	-\$31,005	\$0
Current Assets	\$41,303	\$15,436	\$41,692
Current Liabilities	\$33,856	\$15,935	\$52,810
Net current assets	\$7,447	-\$499	-\$11,118

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 13, 2002, the director again requested additional evidence pertinent to that ability. The director requested documents relating to the petitioner's payroll summary.

In response, the petitioner submitted copies of the petitioner's Forms W-2, Wage and Tax Statements for 1999, 2000, and 2001. The Forms W-2 do not show that the petitioner paid any wages to the beneficiary. On the first page of the evidence, a handwritten note states that "[t]he alien is not employed by the petitioning employer."

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 May 29, 2003, denied the petition.

On appeal, counsel asserts the following:

The decision to deny was an error as the adjudicating officer did not take into account the methodology of accounting of the petitioner employer. The corporation's tax returns are filed on a "cash basis" of accounting, not the "accrual basis" of accounting. What this means, is that the corporation does not recognize income until the physical cash is received, rather than the more common way of reporting income a [sic] the date the customer is billed. The results of this method, is that the company had significant profit using the accrual basis of accounting, however, the tax purposes using the approved cash method, the company was able to show a lost depreciation of assets is not actual cash being paid out [sic]. The corporation was extremely solvent for the qualifying years and was and still is able to pay the proffered wage.

The petitioner resubmits previously submitted evidence.

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

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 on the petitioner's regular tax return; and Line 24 on the petitioner's short-form tax return.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1999, 2000, or 2001.

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, without consideration of depreciation or other expenses contrary to counsel's appellate assertion. 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 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 petitioner's net income was -\$30,908, -\$31,005, and \$0 for 1999, 2000, and 2001, all amounts which are less than the proffered wage of \$20,945.60, and thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in any relevant year.

Nevertheless, 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.<sup>3</sup> 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.<sup>4</sup> 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 petitioner's net current assets during 2000 and 2001, however, were negative and only \$7,447 in 1999. As

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>4</sup> For this petitioner's short-form taxes, the net current assets were found on Part III, Lines 1-6 and 13-14.

such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets in any relevant year.<sup>5</sup>

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a loss and net current assets of only \$7,447 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a loss and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows no net income and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

Counsel's assertion on appeal concerning the impact of a cash versus an accrual basis of accounting is without merit. Counsel does not present any legal authority for the premise that the petitioner's chosen method of accounting overcomes the poor financial picture portrayed by the regulatory-prescribed evidence of its tax returns. Regardless, counsel's explanation that receivables owed to the petitioner have not yet been collected cannot show additional funds to pay the proffered wage during the past or present time as it requires speculation that the funds will actually be collected in full in the future. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1999 or subsequently during 2000 and 2001. Therefore, the petitioner has not established that it 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.

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<sup>5</sup> The director's decision referenced "cash assets" in his analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. However, CIS does not use "cash assets" in its analysis. Presumably the director was using the petitioner's current assets in its discussion of the petitioner's cash assets. However, CIS analyzes net current assets, and reduces a petitioning entity's current assets by its liabilities accordingly.