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**U.S. Citizenship  
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Services**

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**BL**

FILE: LIN 03 128 50471 Office: NEBRASKA SERVICE CENTER Date: **JUL 13 2005**

IN RE: 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 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 a custom carpentry construction firm. It seeks to employ the beneficiary permanently in the United States as a custom woodworker. 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 additional evidence and contends that the petitioner has demonstrated its continuing ability to pay the certified 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 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 March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$28.00 per hour, which amounts to \$58,240 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1996.

On Part 5 of the petition, the petitioner claims to have been established in 1984, to have a gross annual income of \$530,227, and to currently employ twelve workers. In support of its continuing financial ability to pay the certified wage of \$58,240 per annum, the petitioner initially submitted an incomplete copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, consisting of only the first page. It shows that the petitioner reported net income of \$13,131.<sup>1</sup>

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on October 2, 2003, the director requested additional evidence pertinent to that ability.

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<sup>1</sup> For purposes of this review, the petitioner's ordinary income (line 21) will be treated as its net income.

The director also specifically requested that the petitioner provide a copy of its last quarterly federal tax return (Form 941) and a copy of the beneficiary's Wage and Tax Statements (W-2s) for 2001 and 2002.

In response, the petitioner, through counsel, submitted the petitioner's corporate tax return for the petitioner for 2002. It reflects the following information:

|                                | 2002    |
|--------------------------------|---------|
| Net income                     | \$5,054 |
| Current Assets (Sched. L)      | \$6,778 |
| Current Liabilities (Sched. L) | \$ -0-  |
| Net current assets             | \$6,778 |

As noted above, Schedule L of the petitioner's federal income tax return shows its current assets and current liabilities. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> Besides net income, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as an alternative method of reviewing a petitioner's ability to pay a proposed wage as they represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

In addition to its 2002 tax return, the petitioner also provided a copy of its September 2003 quarterly federal tax return showing that it reported \$20,000 in wages paid to four employees during this pay period. It also supplied copies of three Internal Revenue Service (IRS) Form(s) 1099, Miscellaneous Income for 1998, 1999 and 2002. Counsel's transmittal letter explains that the petitioner reported compensation paid to the beneficiary using this form rather than a W-2 because the beneficiary did not have employment authorization. The 1099s reflect that the beneficiary received \$35,670<sup>3</sup> in 1998, \$18,500 in 1999, and \$5,800 in 2002 from the petitioner.

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 March 11, 2004, denied the petition.

On appeal, counsel submits a copy of the petitioner's 2001 corporate tax return including its balance sheet presented on Schedule L. It shows that the petitioner had \$2,346 in current assets and declared no current liabilities, resulting in net current assets of \$2,346. Counsel also submits copies of approval notices for two other alien worker petitions. Counsel asserts that those approvals mandate an approval in this matter. Counsel also

<sup>2</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>3</sup> The director reported this sum as \$55,670. The copy submitted to the record is almost illegible, but the amount appears to be \$35,670.

contends that the regulations do not require a petitioner to actually pay the proffered wage, but only demonstrate an ability to pay the salary. He maintains that the petitioner's gross income, as shown on its tax returns, demonstrates the petitioner's continuing financial ability to pay the beneficiary's proposed annual wage offer of \$58,240.

Counsel is correct in claiming that the regulation at 8 C.F.R. § 204.5(g)(2) only requires that the ability to pay the proffered wage be demonstrated, rather than the actual payment of the certified salary. It contemplates that the obligation to pay the proffered wage begins with an alien's entrance into the United States pursuant to the issuance of an immigrant visa or adjustment of status to permanent residence. The AAO concurs with this interpretation but notes that the level of salary being paid to an alien may be a relevant factor in determining a petitioner's ability to pay a proffered wage. *See* 20 C.F.R. § 656.20(c)(2).

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. To the extent that the petitioner may have employed and paid wages at a level less than the proffered salary to the beneficiary during the relevant period, those amounts will also be considered. If either the petitioner's net income or net current assets can cover the difference between the actual amounts paid and the proffered wage, then the petitioner's ability to pay the full, certified wage is established for the given period. In this case, even if Form 1099 for 2002, reflecting the beneficiary's gross compensation paid, is deemed to be equivalent to that of a salaried employee, the \$5,800 paid was \$52,440 less than the proffered wage.

If the petitioner does not establish that it may have 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. 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). The assertion that only gross income should be examined is not persuasive. 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.

Counsel's assertion that approvals issued in other immigrant petitions submitted by this petitioner dictate a similar result in this case is not convincing. If a petitioner submits multiple petitions for alien workers using the same or similar priority dates, as reflected on the individual labor certifications, a petitioner must show that it had sufficient income to pay all the wages at the priority date(s). The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may or may not have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988); *see also 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).

In this case, the petitioner's 2001 tax return shows that neither its net income of \$13,131, nor its net current assets of \$2,346 was sufficient to pay the proffered salary of \$58,240. Similarly, in 2002, neither its net income of \$5,054, nor its net current assets of \$6,778 was enough to pay the \$52,440 difference between the beneficiary's compensation of \$5,800 and the certified wage. The evidence fails to persuasively demonstrate that the petitioner has had the continuing financial 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.