



U.S. Citizenship
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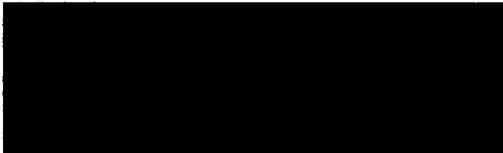
Office: VERMONT SERVICE CENTER

Date: JUL 18 2005

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

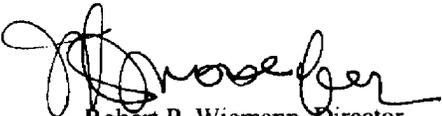
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a floor designer, installer and builder. It seeks to employ the beneficiary permanently in the United States as a carpenter specializing in hardwood floor installation and finishing. 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 and additional 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 April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$13.21 per hour, which amounts to \$27,476.80 annually. 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 1994, to have a gross annual income of \$1,545,256, and to currently employ 10-plus workers. In support of the petition, the petitioner submitted:

- An approved Form ETA 750;
- An experience verification letter;
- A 2001 Form 1099 the petitioner had issued to other employees;
- The petitioner's 2001 Form 1120S return; and,
- A Form G-28.

On July 24, 2003, the director sent a request for evidence (RFE) pertaining to the ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested 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. The RFE further asked for any of the following types of evidence of the petitioner's ability to pay:

- The petitioner's 2002 Form 1120S return;
- Any Form W-2 Wage and Tax Statements the petitioner has issued to the beneficiary;
- Annual reports for 2001 and 2002 accompanied by audited or reviewed financial statements;
- Evidence of any earlier employees that have held the proffered position; and,
- As supplementary only to the above, documents such as accredited profits and loss statements, or bank and personnel records.

In response, the petitioner submitted:

- The petitioner's 2002 Form 1120 return;
- Two 2001 Form 1099s showing the petitioner paid two non-employees \$31,980.19 and \$15,068.64 each for work performed;
- A 2002 Form 1099 issued to a third individual for \$51,419.73; and,
- A letter dated October 16, 2003, from the petitioner's president asserts, citing the documents being submitted, that despite its growing business, the petitioner has been forced by labor shortages to hire outside help for work the beneficiary would otherwise be able to perform for less money.

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

	<u>2001</u>	<u>2002</u>
Net income	-\$23,399	-\$94,915
Current Assets	\$20,885	\$63,127
Current Liabilities	\$71,506	\$229,431
Net current assets	-\$50,621	-\$166,304

On December 12, 2003, 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, accordingly, denied the petition.

On appeal, counsel asserts that the director erred in that the petitioner did establish ability to pay the proffered wage from evidence of previously hired contractors compensated at a higher rate of pay than that of the proffered position. Thus, by hiring the beneficiary, the petitioner would reduce its labor costs. Further, the beneficiary will likely generate income in excess of the proffered wage.

The petitioner submits no additional evidence on appeal.

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

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. 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 the instant case, the petitioner's income tax returns for 2001 and 2002 reflect a net loss in each year, and accordingly do not establish the petitioner's ability to pay.

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. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 the years in question, 2001 and 2002, however, were negative. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. Counsel persuasively asserts, however, that because of a labor shortage among workers trained to install and finish hardwood floors, it had to expend more than twice the proffered wage in contractors' fees to subcontract out the proffered position's duties. Based upon the October 16, 2003 letter, the petitioner has been paying more than the proffered wage established in the Form ETA 750 for the work specified for the proffered position. The evidence establishes that continuously from April 9, 2001, the petitioner has expended large sums on subcontractors for installing and finishing hardwood floors, with such spending increasing from \$508,520 in 2001 to \$736,955 in 2002, according to item 3 on schedule A of each year's Form 1120 return. Accordingly, on that basis alone, this office finds that the petitioner has sustained its burden of proving that it has the continuing ability to pay the proffered wage.

Counsel has cited *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898, (D.C. Cir. 1989) in support of his assertion that the beneficiary will as a matter of course generate income for the petitioner. First, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same

¹ 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.

district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Although part of the [REDACTED] decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a hardwood floor installer and finisher will significantly increase profits for a flooring company, particularly one that ostensibly whose workforce consists largely of those with expertise as installers and finishers. This hypothesis, that the beneficiary will generate more income than the contractors the petitioner seeks to replace, is not supported in the record, nor can such an assertion outweigh the evidence presented in the petitioner's income tax returns.

In 2001 and 2002, the petitioner has shown a negative net income in each year, along with negative net current assets. Counsel and the petitioner's president, persuasively assert that the losses and net liabilities reflect excessive labor costs that could be partially offset were the petitioner able to hire the beneficiary. Therefore, the petitioner has sufficiently demonstrated its ability to pay the proffered wage during the salient portion of 2001 and 2002.

The petitioner having submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001, 2002 or subsequently, has therefore, 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 met that burden. The appeal will be sustained. The petition will be approved.

ORDER: The appeal is sustained. The petition is approved.

[REDACTED]