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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY



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FILE: SRC-03-070-51801 Office: TEXAS SERVICE CENTER Date: JUN 07 2005

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

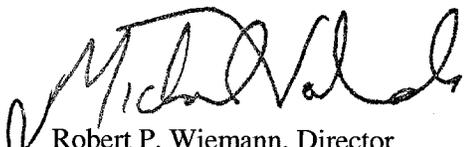
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

CC: [Redacted]

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a store manager. 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, the petitioner submits previously submitted evidence. The petitioner was represented by counsel during proceedings before the director, but no correspondence was received from counsel on appeal. The petitioner did not indicate that he terminated the relationship with counsel and therefore a copy of this decision will be sent to counsel of record.

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 September 6, 2000. The proffered wage as stated on the Form ETA 750 is \$23.39 per hour, which amounts to \$48,651.20 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 on June 15, 1998, to have a gross annual income of \$1,490,221, and to currently employ two workers. In support of the petition, the petitioner submitted, in duplicate, its Form 1120, U.S. Corporation Income Tax Return, for the years 2000 and 2001; its quarterly wage reports for all four quarters in 2001 and first three quarters in 2002; and a copy of the beneficiary's individual income tax returns for 1997, 1998, and 1999. The quarterly wage reports and the beneficiary's individual income tax returns did not reflect that the petitioner paid any wages to the beneficiary.

The petitioner's tax returns reflect the following information for the following years:

2000

2001

Net income ¹	\$18,938.47	\$25,547.72
Current Assets	\$71,173	\$0
Current Liabilities	\$40,000	\$0
Net current assets	\$31,173	\$0 ²

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 July 16, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner showed no wages paid on its taxes and only appeared to employ its two co-owners, and its net income and net current assets did not show its continuing ability to pay the proffered wage beginning on the priority date. The director informed the petitioner that there were three ways to prove it could pay the proffered wage, including evidence that the wage was already actually paid to the beneficiary in 2000 or 2002, or through net income or net current assets that are greater than the proffered wage.

In response, the petitioner submitted a notarized and sworn “Affidavit of Financial Obligation” from the petitioner’s president, [REDACTED] who stated that the proffered position is not net but is a replacement of [REDACTED] position, who is no longer interested to work.” No description of [REDACTED] position was provided, but the petitioner’s tax returns reflect that he is a 50% owner of the petitioning entity’s business. The petitioner’s quarterly wage reports, which were submitted with its initial filing, reflect wages paid to [REDACTED] of \$18,000 in 2001 and \$13,500 in 2002.

Mr. Ali’s letter also itemized the petitioner’s available funds from 2000 through 2003, including such items as depreciation and cash that he added to the petitioner’s net income. The petitioner also submitted its 2002 corporate tax return, reflecting net income of \$16,611 and net current assets of \$61,592, as well as compiled, but unaudited, financial statements as of August 31, 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, on November 21, 2003, denied the petition.

On appeal, the petitioner asserts that it would “submit Security Deposit amount of \$50,000 with any Financial Institution, if [the AAO] required, for evidence it proved ability to pay the proffered wages [sic],” stated that it maintained “cash balance in banking institute,” and reiterated assertions about its available funds. The petitioner submitted copies of previously submitted evidence.

The unaudited financial statements that the petitioner submitted in response to the director’s request for evidence are not persuasive evidence. 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. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner’s ability to pay the proffered wage. Thus, the petitioner’s compiled, but unaudited, financial statements for 2003 will not be recognized as probative and relevant evidence in this proceeding.

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

² End of tax year as reported in columns (c) and (d) on Schedule L.

Although the petitioner asserted that it maintained funds in a banking institution, it provided no evidence of that. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In any event, however, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Additionally, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Finally, no evidence was submitted that funds held at the petitioner's bank institution somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 2000, 2001, or 2002.

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 the petitioner's assertion that depreciation should be added back to its net income. 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.

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.³ 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. 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 has not demonstrated that it paid any wages to the beneficiary during 2000, 2001, or 2002. In 2000, the petitioner shows a net income of only \$18,938.47 and net current assets of only \$31,173, which are both less than the proffered wage, and has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets in 2000. In 2001, the petitioner shows a net income of only \$25,547.72 and no net current assets, which are both less than the proffered wage, and has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets in 2001. In 2002, the petitioner shows a net income of only \$16,611 but net current assets of \$61,592, and has, therefore, demonstrated the ability to pay the proffered out of net current assets, which are greater than the proffered wage. Thus, the petitioner has failed to establish that it can pay the proffered wage beginning on the priority date in 2000 and continuing in 2001 out of its net income or net current assets despite its showing that it could pay the proffered wage in 2003 out of its net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Although the petitioner advised that the beneficiary would replace [REDACTED] the record does not support such an assertion. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present, especially if those wages were paid to employees performing duties in positions dissimilar to the proffered position. There is no evidence that [REDACTED] who is a co-owner of the petitioning entity's business, performs the same duties as those set forth in the Form ETA 750. If [REDACTED] performs other kinds of work, then the beneficiary could not replace him⁴. It seems unlikely that an owner and a manager are the same positions involving the same types of duties and responsibilities.

Finally, the petitioner asserts that it could make a security deposit of \$50,000 to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Additionally, the petitioner's assertion is prospective in nature, but 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).

³ 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.

⁴ The petitioner paid [REDACTED] \$18,000 in 2001 and \$13,500. If it could establish that [REDACTED] position is the same as the proffered position, then it would only need to demonstrate that it could pay the difference between the wages actually paid to [REDACTED] and the proffered wage, which would be \$30,651.20 in 2000 and \$35,151.20 in 2001. The petitioner's net current assets in 2000 of \$31,173 would be sufficient to demonstrate its ability to pay the difference between the wages actually paid to [REDACTED] and the proffered wage, which is \$30,651.20, in 2000. However, the petitioner's net income in 2001 is only \$25,547.72, which is less than \$35,151.20, the difference between wages actually paid to [REDACTED] and the proffered wage, and it has no end-of year net current assets. Thus, the petitioner would fail to show its continuing inability to pay the proffered wage in 2001.

Despite its demonstration of its ability to pay the proffered wage in 2002, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 or 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.