

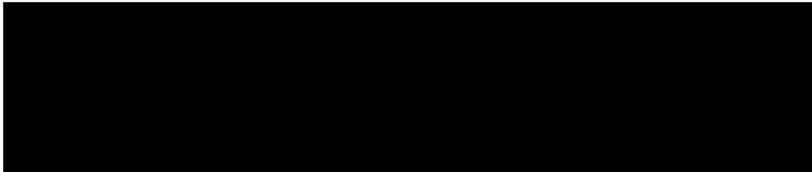
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U.S. Citizenship  
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JUN 07 2005**  
EAC-02-255-53544

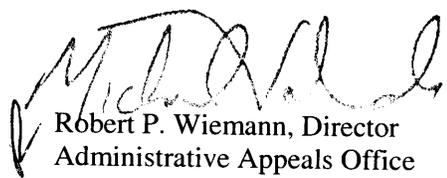
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:  
[REDACTED]

**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<sup>1</sup>. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a garment sample-maker. 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 October 28, 1996. The proffered wage as stated on the Form ETA 750 is \$17.88 per hour, which amounts to \$37,190.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner but indicated that she worked various jobs in the New York metropolitan area.

On the petition, the petitioner claimed to have been established on July 11, 1995 and to have a gross annual income of \$643,874. In support of the petition, the petitioner submitted Form 1065, U.S. Partnership Return of Income, for 1996 and 1997.

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 21, 2003, the director requested additional evidence pertinent to that ability. 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 director specifically sought evidence pertaining to 1996, 1998, 1999, 2000, 2001, and 2002, and any evidence of wages paid by the petitioner to the beneficiary.

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<sup>1</sup> The other Visa petitions from the petitioner for the same beneficiary were previously denied in January 2001 and February 2002 because of the petitioner's failure to establish its continuing ability to pay the proffered wage beginning on the priority date. Those denials were not appealed.

In response, the petitioner submitted its Form 1120-A Corporate short-form income tax returns for the petitioner for the years 1999 through 2002 and its partnership returns previously submitted.

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

	<u>1996</u>	<u>1997</u>	
Net income <sup>2</sup>	\$12,466	\$52,892	
Current Assets	\$18,754	\$38,293	
Current Liabilities	\$0	\$17,456	
Net current assets	\$18,754	\$20,837	
	<u>1998</u>	<u>1999</u>	<u>2000</u>
Net income <sup>3</sup>	\$n/a	\$77,744	\$79,743
Current Assets	\$n/a	\$5,821	\$5,367
Current Liabilities	\$n/a	\$1,525	\$1,077
Net current assets	\$n/a	\$4,296	\$4,290
	<u>2001</u>	<u>2002</u>	
Net income <sup>4</sup>	\$89,505	\$101,725	
Current Assets	\$23,028	\$0	
Current Liabilities	\$995	\$0	
Net current assets	\$22,033	\$0	

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, 2003, denied the petition.

On appeal, the petitioner resubmits its 1996 partnership income tax return and asserts that the petitioner's business increases every year, but in 1996, its net income and net current assets added together show an ability to pay the proffered wage.

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 1996, 1997, 1998, 1999, 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

<sup>2</sup> Ordinary income (loss) from trade or business activities as reported on Line 22.

<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 24.

<sup>4</sup> See note 3, *supra*.

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). 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.<sup>5</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. 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. In 1996, the petitioner shows a net income of only \$12,466 and net current assets of only \$18,754, which are both lower than the proffered wage, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

In 1997, the petitioner shows a net income of \$52,892 and net current assets of \$20,837, of which its net income is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income.

The petitioner failed to submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage in 1998. Thus, the petitioner has not demonstrated its ability to pay the proffered wage in that year.

In 1999, the petitioner shows a net income of \$77,744, but net current assets of only \$4,296, of which its net income is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income.

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<sup>5</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In 2000, the petitioner shows a net income of \$79,743 but net current assets of only \$4,290, of which its net income is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income.

In 2001, the petitioner shows a net income of \$89,505 and net current assets of \$22,033, of which its net income is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income.

In 2002, the petitioner shows a net income of \$101,725, which is greater than the proffered wage, and no net current assets and has, therefore, demonstrated the ability to pay the proffered wage out of its net income.

Although the petitioner has demonstrated its ability to pay the proffered wage in 1997, 1999, 2000, 2001, and 2002, the problem in this case is the deficiency in the petitioner's net income and net current assets in 1996 and the complete lack of evidence for 1998. The petitioner has not demonstrated that any other funds were available to pay the proffered wage in 1998. Although the petitioner asserted that adding its net income and net current assets would illustrate its ability to pay the proffered wage, doing so double-counts the petitioner's income contrary to the utilization of either a cash-basis or accrual-basis of general accounting principles. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income, which is a figure that summarizes the petitioner's revenues, costs, and expenses over a period of time. Schedule L reflects figures for a specific point in time used to compose the final summary presented on the income statement's net income figure. Thus, to add the figures together essentially double counts money and distorts the true picture of the petitioner's financial standing. The petitioner failed to explain the omission of regulatory-prescribed evidence for 1998. The petitioner has not, therefore, shown the ability to pay the proffered wage during the 1996 and 1998.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1996 and 1998. 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.