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20 Mass. Av. NW, Rm. A3100
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U.S. Citizenship
and Immigration
Services

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JUN 14 2005

FILE:

[REDACTED]
EAC 03 031 50932

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner: [REDACTED]
Beneficiary: [REDACTED]

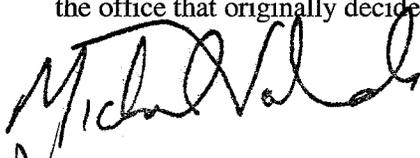
PETITION:

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 dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$21.50 per hour, which amounts to \$44,720 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petition states that the petitioner was established in September 1979, has gross annual income of \$890,866, and employs three workers. In support of the petition, the petitioner submitted:

- A certified Form ETA 750;
- A job offer letter;
- The petitioner's 1999 fiscal year Form 1120 income tax return for the year ending August 31, 2000;
- A prior employer's letter confirming the beneficiary's prior work experience; and,
- A Form G-28.

On December 4, 2002, the director issued a request for evidence (RFE) seeking evidence of ability to pay the proffered wage. Specifically, the RFE asked to see the petitioner's income tax return for the petitioner's 2000 fiscal year and a Form W-2 Wage and Tax Statement for 2001. The director also asked if proffered position was new and to see the Form 941 employer's quarterly reports for the "periods in question."

In response, counsel's letter of February 27, 2003, stated the petitioner had an extension to file its fiscal Form 1120 Corporate tax return for the year ending August 2001, and asked for 45 more days to respond unless the previous year's tax return submitted would suffice when considered with the following: The letter stated the position was not new but had existed from the beginning of the petitioner. The letter continued that the prior return established ability to pay in reporting \$663,579 in gross receipts, \$15,370 in salaries and wages, and the sole owner's compensation of \$31,875, which partly represented compensation for work performed in the proffered position.

On appeal, counsel has submitted the petitioner's fiscal Form 1120 return for the year ending August 31, 2001.

The two returns reflect the following information for the petitioner's fiscal years ending August 31:

	1999-2000	2000-2001
Net income	-\$6,070	-\$17,975
Current Assets	\$33,990	\$29,477
Current Liabilities	\$34,956	\$26,123
Net current liabilities	-\$966	\$3,354

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 August 11, 2003, denied the petition.

On appeal, counsel asserts the tax return for 2000 demonstrates ability to pay based upon the return's report that gross receipts were \$599,316 and officer's compensation was \$30,000 for performing "many of the duties of Diesel Mechanic." Counsel submits the fiscal 2000 Form 1120 return and a copy showing the petitioner's had filed for an extension to file its 2001 income tax return.

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). Showing that the petitioner's gross receipts exceeded the proffered wage by a substantial amount, is not sufficient to establish ability to pay. 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. 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 year in question, 2001, however, were only \$3,354. 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. Counsel's asserts that compensation paid the sole shareholder, in part for the work the petitioner seeks to employ the beneficiary, demonstrates the petitioner's ability to pay. The petitioner's owner's officer received \$30,000 in officer's compensation in 2001. Counsel is, by implication, asserting that officers' compensation can be used to establish ability to pay, in the same manner as a beneficiary's wages received can show ability to pay. The officers' compensation involved is less than the annualized proffered wage, however. And while a sole stockholder might plausibly refuse compensation to cover a beneficiary's wage, the totality of the circumstances here do not establish that the petitioner is a viable, profitable enterprise according to the factors, cited in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), such as longevity, number of employees, reputation etc. *Sonogawa* is less apt here because it relates more to petitions filed during uncharacteristically unprofitable or difficult years in a larger timeframe of profitable and successful years.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Counsel has further not offered proof that the sole shareholder is willing to work substantially full time in his own vehicle repair shop without being paid.

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.

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.

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The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently. 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.