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**U.S. Citizenship
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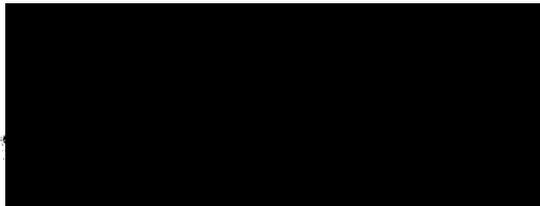
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FILE: WAC 03 030 51906 Office: CALIFORNIA SERVICE CENTER Date: **MAR 04 2005**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a paint and body shop. It seeks to employ the beneficiary permanently in the United States as a transportation equipment painter. 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 statement.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 6, 2001. The proffered salary as stated on the labor certification is \$31.25 per hour or \$65,000 per year.

With the petition, counsel submitted a copy of the front page of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The director considered this documentation insufficient and on January 29, 2003, May 19, 2003, and September 22, 2003, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of March 6, 2001 and continuing to the present. The petitioner was informed that the evidence must be either in the form of copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. The director specifically requested a complete copy of the petitioner's 2001 and 2002 federal tax returns, copies of the beneficiary's 2000, 2001, and 2002 Forms W-2, Wage and Tax Statements, and copies of the petitioner's Forms DE-6, Quarterly Wage Reports, for all employees for the last eight quarters that were accepted by the State of California to include the names, social security numbers and number of weeks worked for all employees.

In response, counsel submitted complete copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements, and the petitioner's Forms DE-6, Quarterly Wage Reports, for the quarters ended June 30, 2001 through March 31, 2003. The 2001 tax return reflected an ordinary income of \$3,165 and net current assets of -\$79,699. The 2002 tax return reflected an ordinary income of -\$6,598 and net current assets of -\$86,723. The beneficiary's 2001 and 2002 Forms W-2 reflected wages earned of \$30,351.10 and \$49,946.00, respectively. The Forms DE-6 indicated that the petitioner employed the beneficiary from the quarter ended September 30, 2001 until the present.

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 7, 2003, denied the petition.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage based on its gross receipts and the amount it paid in salaries and wages in 2001 and 2002.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 and 2002 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.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 2001 and 2002 were -\$79,699 and -\$86,723, respectively. The petitioner could not have paid the proffered wage in 2001 and 2002 from its net current assets.

The 2001 tax return reflects an ordinary income of \$3,165 and net current assets of -\$79,699. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2001. Even when adding the wages paid to the beneficiary in 2001 to the ordinary income, the result is still \$31,483.90 less than the proffered wage. ($\$30,351.10 \text{ wages paid} + \$3,165 \text{ ordinary income} = \$33,516.10$, $\$65,000 \text{ proffered wage} - \$33,516.10 = \$31,483.90$)

The 2002 tax return reflects an ordinary income of -\$6,598 and net current assets of -\$86,723. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2002. Since both the ordinary income and the net current assets are negative numbers, there are no additional funds to be added to the wages paid to the beneficiary in 2002. The wages paid to the beneficiary are \$15,054 less than the proffered wage. ($\$65,000 \text{ proffered wage} - \$49,946 \text{ wages paid} = \$15,054$)

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.

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.