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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 218 50002 Office: VERMONT SERVICE CENTER Date: **MAR 04 2005**

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

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

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. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a supervisor, carpenters. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a statement.

Section 203(b)(3)(A)(i) of 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 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 January 13, 1998. The proffered salary as stated on the labor certification is \$24.52 per hour or \$51,001.60 per year.

With the petition, the petitioner, through counsel, failed to submit any evidence of its ability to pay the proffered wage. On January 28, 2003, the director requested evidence of the petitioner's ability to pay the proffered wage from 1998 and continuing to the present. The director specifically requested copies of any Forms W-2 that were submitted to the beneficiary from 1998 to the present.

In response, counsel provided copies of the petitioner's 1997 through 2000 Forms 1120, U.S. Corporation Income Tax Returns. It is noted that although the Form ETA 750 lists the beneficiary as having been employed by the petitioner from June 1991 until the present as a self-employed contractor, the petitioner has not provided the beneficiary's Forms W-2 or Forms 1099, Miscellaneous Income, for those years. The 1997 tax return reflected a taxable income before net operating loss deduction and special deductions of \$54,484 and net current assets of \$22,791. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$27,619 and net current assets of \$1,513. The 1999

tax return reflected a taxable income before net operating loss deduction and special deductions of \$0 and net current assets of \$3,997. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$2,311 and net current assets of -\$17,410.

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. On July 25, 2003, the director denied the petition.

On appeal, counsel states:

The Service has denied the I-140 petition filed by [REDACTED] due to the supposed inability of the Petitioner to pay the proffered wages to the beneficiary.

The Service's review of the financial and tax documents of the petitioner was cursory, and inadequate. The petitioner, a company with a long history, has more than sufficient resources to pay the wages of the beneficiary.

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 at a salary equal to or greater than the proffered wage in 1998 through 2000.

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 1998 through 2000 were \$1,513, \$3,997, and -\$17,410, respectively. The petitioner could not have paid the proffered wage in 1998 through 2000 from its net current assets.

Counsel alleges that CIS' review of the petitioner's financial and tax documentation was "cursory, and inadequate." Counsel does not, however, explain how CIS erred in its conclusion. In addition, while the petitioner may have a "long history," a review of the tax returns shows that the petitioner's gross receipts have steadily diminished from 1997 to 2000. Furthermore, as noted on the Form ETA 750, the petitioner has employed the beneficiary from 1991 to the present as a self-employed contractor. While the tax returns do show a cost of labor on each return, the petitioner has provided no evidence that any of the cost of labor was paid to the beneficiary.

The petitioner's 1998 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$27,619 and net current assets of \$1,513. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 1998.

The petitioner's 1999 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$0 and net current assets of \$3,997. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 1999.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$2,311 and net current assets of -\$17,410. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2000.

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.

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

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ORDER: The appeal is dismissed.