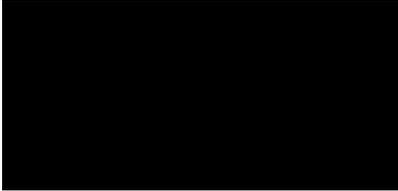


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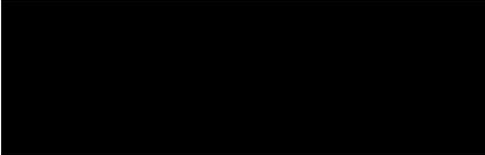
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FILE: EAC 02 218 51570 Office: VERMONT SERVICE CENTER Date: **MAR 10 2005**

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

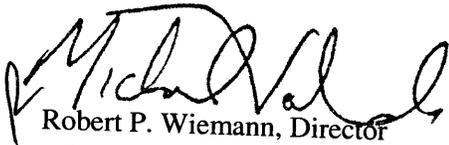
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 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 paint contracting firm. It seeks to employ the beneficiary permanently in the United States as a 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 asserts that the director erred by considering the tax returns in determining the petitioner's ability to pay the proffered wage.

The notice of appeal, filed September 8, 2003, indicates that a brief and/or evidence will be submitted to the AAO within 30 days. As nothing further has been received to the record, this decision will be based on the record as it currently stands.

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$22.27 per hour, which amounts to \$46,321.60 per year. The ETA 750B, signed by the beneficiary on March 16, 2001, indicates that the petitioner had employed him since February 2001.

On Part 5 of the visa petition, filed June 13, 2002, the petitioner claims that it was established in 1996, currently employs two workers, has a gross annual income of \$129,025 and a net annual income of \$10,882.

The petitioner initially submitted no evidence of its ability to pay the proffered wage of \$46,321.60 per year. On March 3, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence must consist 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 instructed the petitioner to submit either its 2000 and 2001 federal tax returns with all schedules and attachments, copies of the beneficiary's 2001 and 2002 Wage and Tax Statements (W-2s) showing how much the petitioner has paid him, or 2001 annual reports accompanied by audited or reviewed financial statements. The director also advised the petitioner that it could submit profit/loss statements, bank account records or personnel records, which would be considered as supplementary evidence.

In response, the petitioner, through counsel, submitted copies of the beneficiary's W-2s for 2001 and 2002. The 2001 W-2 shows that the petitioner paid \$9,647 in wages to the beneficiary. In 2002, the petitioner paid the beneficiary \$19,908 in wages. The petitioner also provided incomplete copies of its 2000 and 2001 Form 1065, U.S. Return of Partnership Income. They contain the following information:

	2000	2001
Net Income	\$10,882	\$15,049

Based on the evidence that was submitted to the record the director determined that the petitioner had failed to demonstrate a continuing ability to pay the proffered wage. The director denied the petition on August 7, 2003.

On appeal, counsel merely states that the tax filings were provided to the director. Counsel then asserts "reliance upon such tax filings on the issue of ability to pay is an incomplete, and misleading, measure of the fiscal vitality of the petitioner, and of its ability to pay."

It is noted that counsel advanced no other argument and provided no other evidence to the record relevant to the petitioner's ability to pay the proffered wage. She cites no legal support for her proposition that a tax return may not be a measure of a petitioner's ability to pay and her claim is not persuasive.

It is noted that the tax returns that were provided to the record did not appear to contain all of the schedules and attachments. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 may have 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. Wages less than the proposed wage offer will also be given relevant consideration. In this case, the difference between the actual wages paid to the beneficiary in 2001 and the proffered wage was \$36,674.60.

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 counsel's assertion, 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. 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.

In some cases, if a Schedule L balance sheet is submitted with the federal tax return, or an audited financial statement is provided, CIS will examine a petitioner's net current assets as an alternative method to evaluate a petitioner's continuing ability to pay a certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ If a petitioner's year-end 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. In this case, no information relevant to the petitioner's net current assets was supplied.

In 2002, the petitioner paid the beneficiary \$26,413.60 less than the certified wage. As the petitioner's 2002 tax return was not contained in the record, no further calculation of the petitioner's ability to pay in 2002 can be made. In 2001, however, the difference (\$36,674.60) between the actual wages paid to the beneficiary and the proposed wage offer of \$46,321.60 could not be met by the petitioner's net income of \$15,049 as shown on its tax return. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* financial ability to pay the proffered wage beginning on the priority date. Based on the evidence contained in the record, the AAO concludes that the petitioner has failed to demonstrate its continuing financial ability to pay the proffered wage as of the March 29, 2001, priority date of the petition.

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