U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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MAR 11 2003

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 03 094 50903

IN RE: Petitioner: [redacted]
Beneficiary:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director for further investigation and entry of a new decision.

The petitioner is an industrial painting firm. It seeks to employ the beneficiary permanently in the United States as an industrial 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 additional evidence and asserts that the director failed to properly consider the petitioner's accountant's letter.

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) provides:

> *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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $25.00 per hour, which amounts to $52,000 per annum. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claims to have worked for the petitioner since March 1999.

On Part 5 of the visa petition, filed on January 30, 2003, the petitioner claims to have been established in 1980 and to currently employ ten workers. In support of its ability to pay the beneficiary's proposed wage offer of $52,000 per year, the counsel initially submitted a copy of the petitioner's Form 1120, U.S. Corporation Income

Tax Return for 2000. It reflects that the petitioner files its federal tax returns using a fiscal year running from October 1st until September 30th of the following year. Thus, the 2000 tax return reflects the petitioner's financial data covering the period from October 1, 2000 until September 30, 2001. It shows that the petitioner reported a taxable income before the net operating loss (NOL) deduction of $21,305. Schedule L of the tax return shows that the petitioner had $430,187 in current assets and $185,243 in current liabilities, resulting in $244,944 in net current assets. Besides net income, CIS will examine net current assets as an alternative method of evaluating a petitioner's ability to pay a proposed wage offer. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a corporate petitioner's liquidity during a given period.[1] A corporation's year-end current assets are shown on line(s) (1) through (6) (d) of the balance sheet and current liabilities are shown on lines (16) through (18)(d) Schedule L of its federal tax return. If a corporation'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.

With the initial submission, counsel also provided a letter, dated December 18, 2002, from its certified public accountant, [redacted] affirms that the petitioner has the ability to pay the proffered wage and explains that it used the cash basis of accounting to complete its federal tax returns. Ms. [redacted] points to several amounts on the list of Schedule L assets and liabilities and concludes that the petitioner had $244,944 in working capital. As this figure also represents its end-of-year net current assets as discussed above, the AAO does not disagree with this number.

Because insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On June 20, 2003, consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner to submit either federal tax returns, audited financial statements, or annual reports in support of its ability to pay the proffered wage of $52,000 per year as of April 30, 2001 and continuing until the present.

In response, counsel provided a copy of the petitioner's 2001 federal tax return, which covered the period from October 1, 2001 until September 30, 2002. This return shows that the petitioner declared a taxable income before the NOL deduction of $412. Schedule L of the return reflects that the petitioner had $657,044 in current assets and $398,443 in current liabilities, yielding $258,601 in net current assets.

The director reviewed the petitioner's net income as shown on its 2000 and 2001 corporate tax. The director concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 30, 2001. The director noted that the petitioner had filed three separate petitions with the same proffered wage of $52,000.

On appeal, counsel resubmits the petitioner's 2000 and 2001 corporate tax returns, as well as Ms. [redacted] December 2002 letter. Counsel asserts that the director failed to consider the petitioner's other cash assets.

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[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.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

In this case, as mentioned by the director, this petitioner has filed multiple petitions. The AAO is remanding this and two other similar cases (LIN0309450755) and (LIN0309450964) presently on appeal. All three cases share the same priority date, the same certified position and the same wage of $25.00 per hour annualized to $52,000, although the other two alien beneficiaries do not claim to have worked for the petitioner. Here, although Part B of the ETA 750 indicates that the petitioner has employed the beneficiary since 1999, no evidence of wages paid to the beneficiary was solicited or provided. The AAO finds that along with other data to consider as discussed below, the director should request additional evidence relating to this issue. It is also noted that electronic records available to the AAO indicate that the petitioner has had four other petitions approved with a priority date in April 2001,[2] and also has an additional petition (LIN 0312650303) pending, totaling eight petitions either approved or pending. Neither the certified wage nor a description of the certified position is available to the AAO through these records relevant to these other cases, so it is impossible to determine if the financial data contained in this case would suffice to allow another wage of $52,000 per year. Further, as stated above, it is not certain if wages actually paid to a respective alien beneficiary would have been a factor.

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 is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage or has already distributed officer compensation at a specified level 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. The court in *Chi-Feng Chang* further noted:

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[2]LIN0309450563, LIN0229850389, LIN0207951735 and LIN0207951778 were approved under the petitioner's name as either "[redacted] Painting Inc" or "[redacted] Painting."

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

In this case, the petitioner demonstrated its ability to pay a proffered wage of $52,000 per year on its 2000 tax return because although its taxable income of $21,305 before the NOL deduction was insufficient to cover the full certified wage, its net current assets of $244,944 was more than enough to pay the proffered wage.

Similarly, although the 2001 tax return reflected $412 taxable income before the NOL deduction, the petitioner's net current assets of $258,601 were sufficient to cover the certified wage offer of $52,000 per annum.

As a petitioner must demonstrate the continuing ability to pay for multiple alien beneficiaries from the respective priority date(s) until the present, the final decision in this case cannot be made until the specific information relating to the other alien beneficiaries is taken into consideration. The AAO finds that this case should be remanded to the director to conduct further investigation relevant to the other approved and pending petitions to determine specifically how many and which alien beneficiaries' wages this petitioner's net current assets or net income could cover if the same federal tax returns were used as the underlying documentation provided in support of the petitioner's continuing ability to pay a particular certified wage. In this case, the director should also consider any credible documentation the petitioner may provide, such as a Wage and Tax Statements (W-2) that may have been issued to the beneficiary, as a relevant component in calculating its ability to pay the proffered salary.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.