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U.S. Citizenship  
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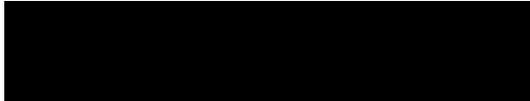


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FILE: EAC 03 080 50200 Office: VERMONT SERVICE CENTER

Date: MAY 18 2005

IN RE: Petitioner:  
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:



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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a carpentry firm. It seeks to employ the beneficiary permanently in the United States as a carpenter (trim and stairs). 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 contends that the director erred in her analysis and that the petitioner has demonstrated its continuing financial ability to pay the proffered salary

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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$25.75 per hour, which amounts to \$53,560 per annum. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed January 11, 2003, the petitioner claims to have been established in 2000 and to currently employ one worker. In support of its ability to pay the beneficiary's proposed wage offer of \$53,560 per year, the petitioner initially failed to submit any evidence. On November 4, 2003, the director instructed the

petitioner to provide additional evidence pertinent to that ability. She advised the petitioner that such evidence should demonstrate the petitioner's ability to pay the proffered wage beginning on the priority date of April 12, 2001 and continuing until the present. She further informed the petitioner that it should either provide copies of any Wage and Tax Statements (W-2s) issued to the beneficiary for 2001 and 2002, if it employed the beneficiary during that period, or copies of its 2001 and 2002 federal tax returns.

In response, the petitioner, through counsel, supplied copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. They reflect that the petitioner files its returns using a standard calendar year. The tax returns contain the following information:

Year	2001	2002
Net taxable income before net operating loss (NOL)		
Deduction	-\$5,230	\$ 18,566
Current Assets	\$ 627	\$ -0-
Current Liabilities	\$ -0-	\$ -0-
Net Current Assets	\$ 627	\$ -0-

As set forth above, besides net income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of demonstrating a petitioner's ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

Counsel's transmittal letter, dated December 2, 2003, which accompanied these submissions, additionally notes that the petitioner claimed labor costs of \$357,677 in 2001 and \$580,250 in 2002. He states that by obtaining the beneficiary's services, the petitioner will be able to replace his use of sub-contract labor and pay the offered wage to the alien beneficiary.

The director reviewed the documentation submitted in response to her request for additional evidence and concluded that it failed to establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 12, 2001. The director denied the petition on February 9, 2004.

On appeal, counsel states that the director failed to address the petitioner's projected use of the beneficiary as a replacement for contract labor and relies on his statements contained in his December 2, 2003 letter previously submitted to the record.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Although counsel is correct in observing that the director did not address this issue, it is also noted that the record does not, however, identify any specific contract labor the beneficiary would obviate, name the workers, specify their compensation, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Compensation already paid to others is not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that contracted services paid by the petitioner in 2001 or 2002 involved the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary would not replace him or her. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 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. This case does not indicate that the petitioner employed the beneficiary.

CIS will also 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. 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 this case, in 2001, the petitioner's ability to pay the proposed wage offer of \$53,560 could not be established during this period by its reported net taxable income of -\$5,230 or its \$627 in net current assets. Neither amount is sufficient to pay the certified wage.

Similarly, neither the petitioner's net taxable income of \$18,566, nor its net current assets of \$-0- could pay the certified wage in 2002. The petitioner's evidence has not persuasively demonstrated its continuing ability to pay the proffered wage in either 2001 or 2002.

Based on the evidence contained in the record, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the 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.

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**ORDER:** The appeal is dismissed.