

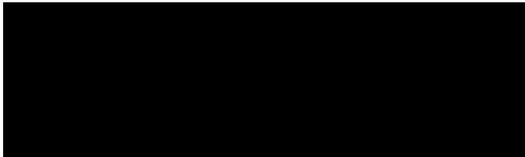
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC-02-222-54088 Office: VERMONT SERVICE CENTER Date: MAY 18 2005

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

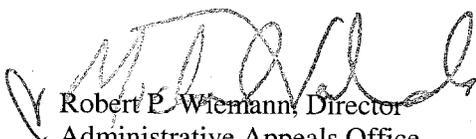
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 landscaper. It seeks to employ the beneficiary permanently in the United States as a climber. 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. The director also determined that the petitioner failed to establish that the beneficiary had the requisite qualifying employment experience to perform the duties of the proffered position.

On appeal, the petitioner submits a letter and previously submitted evidence.

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 first issue to be discussed in this case is whether or not the petitioner established its continuing ability to pay the proffered wage.

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.

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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$19.62 per hour, which amounts to \$40,809.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to work for the petitioner since November 2001.

On the petition, the petitioner claimed to have been established in 1986, to have a gross annual income of \$685,196, and to currently employ ten workers. In support of the petition, the petitioner submitted its U.S. Income Tax Return for an S Corporation on Form 1120 for 2001 and a state tax return.

The federal tax return for 2001 reflects the following information:

2001

Net income <sup>1</sup>	\$5,301
Current Assets	\$7,639
Current Liabilities	\$114,316
Net current assets	-\$106,677

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 1, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies 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 requested evidence of wages paid to the beneficiary and pointed out that the petitioner's net income and net current assets in 2001, as reported on the petitioner's 2001 corporate tax return, were lower than the proffered wage and did not demonstrate its continuing ability to pay the proffered wage. Additionally, the director noted that the petitioner filed two other petitions and requested how the petitioner could demonstrate an ability to pay the proffered wage for all three.

In response, the petitioner submitted a letter from its certified public accountant (CPA), R. Cray Anderson of Mintz Rosenfeld & Company, LLC, that explained "significant items affecting the [petitioner's] income," such as depreciation and shareholder compensation.

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 July 1, 2003, denied the petition.

On appeal, the petitioner resubmits its 2001 corporate tax return and states that its corporate taxes show that it paid "\$145,200.00 in compensation to officers, \$23,580 in salaries and wages, and \$116,997 in cost of labor." The petitioner states that the beneficiary "is currently providing his services for [the petitioner] and has been doing so since May of 1999, thus the amount we paid him, equal to the prevailing wage rate is already included in the tax return." The petitioner asserts that depreciation/amortization deductions should be considered since there is no actual monetary loss to the company and the fact that it paid compensation to officers, which would only occur "if the [petitioner] has the ability to do so."

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 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. In the instant case, despite stating so, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 the petitioner'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

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

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 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 petitioner's net income in 2001 is insufficient to illustrate its ability to pay the proffered wage in that year because it is lower than the proffered wage.

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.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 in 2001 were negative and thus cannot illustrate its ability to pay the proffered wage in that year.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of \$5,301, but negative net current assets, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in that year. Thus, the petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date<sup>3</sup>.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 2, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and

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<sup>2</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.

<sup>3</sup> The AAO also notes that any additional proceedings on this matter would have to address any multiple petitions pending that would further extend the petitioner's obligation to pay proffered wages.

experience that an applicant must have for the position of climber. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	N/A
	High School	N/A
	College	N/A
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "Pruning and removing trees using various [sic] roping, rigging and cranes." Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated employment with the petitioner since May 2001 to present in the same position with similar duties as the proffered position, and prior employment at Petro Production in Ecuador as a forester pruning trees, bushes, planting vegetation, flowers, etc., using riding mowers and tractors, hand pruners, loppers, shears, pole pruners and pruning saws, as well as such special tools such as border forks and spades, forestry hoes, chippers and shredders, chainsaws, tillers and cultivators. The beneficiary also removed trees using various tools at that job. The beneficiary represented that he was with Petro Production between February 1993 and January 1998.

With the initial petition, the petitioner submitted a letter, dated February 19, 2001, stating that it employed the beneficiary in the proffered position, performing the duties as listed on the Form ETA 750A, since 1999.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on April 1, 2003. The director specifically requested evidence certifying the beginning date of any qualifying employment experience. The petitioner failed to submit any additional evidence or explanation pertaining to this portion of the director's request for evidence.

The director's decision stated that the evidence contained in the record of proceeding was insufficient to establish that the beneficiary had two years of the required employment experience prior to the priority date because the letter is signed on February 19, 2001 and states a beginning date of employment as 1999. Since no specific date was set forth in 1999, the director stated that he had to use December 1, 1999 as the employment commencement date, and since the letter was dated February 19, 2001, that was less than a two-year period of time.

On appeal, the petitioner concedes that the beneficiary's employment with its business was less than two years, but asserts that the beneficiary has been in the same field since 1993 and performed duties similar to the proffered position for another company in his home country. The petitioner does not submit any additional evidence.

There is no regulatory-proscribed evidence that the beneficiary has two years of qualifying employment experience prior to the priority date. The petitioner conceded that it cannot establish that the beneficiary has the required employment experience at its business prior to the priority date. The petitioner has failed to provide corroborating evidence of the beneficiary's employment with Petro Production in Ecuador as required under

8 C.F.R. § 204.5(l)(3)<sup>4</sup>. As noted above, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Thus, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

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.

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<sup>4</sup> The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.