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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 03 238 50961

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:



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
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 produce store. It seeks to employ the beneficiary permanently in the United States as a produce department manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 petitioner has had the continuing financial ability to pay the proffered wage.

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, 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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 19, 2001. The proffered wage as stated on the Form ETA 750 is \$18.13 per hour, which amounts to \$32,996.60 per annum.¹ The ETA 750B, signed by the alien beneficiary on March 15, 2001, does not indicate that he had worked for the petitioner for the last three years.

On Part 5 of the visa petition, it is claimed that the petitioner was established in 1993, has a gross annual income of \$715,432, an annual net income of \$8,385, and currently employs two workers. As evidence of its continuing financial ability to pay the certified wage of \$32,996.60 per year, the petitioner initially submitted a partial copy of its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, consisting of the first two pages, a copy of an undated internally generated journal of wages for the beneficiary for 2001, which suggest that he was paid \$21,670 and that it is to be claimed as "produce expenses," and a copy of the petitioner's corporate tax return for 2000. The petitioner's 2001 tax return, which covers the visa priority date of April 4, 2001, shows the petitioner's declared net income as \$8,385.

¹ Item 10 of the ETA 750 specifies a workweek consisting of 35 hours per week.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on May 13, 2004. The director advised the petitioner supply additional documentation of its continuing ability to pay the proffered salary. She also instructed the petitioner to provide a complete copy of its tax return for 2001, as well as a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001.

In response, the petitioner submitted a letter for the petitioner's president, [REDACTED] indicating that the beneficiary was carried as a produce expense because Ms. [REDACTED] had no social security or tax identification number with which to claim his salary. The petitioner also provided four letters from individuals attesting to the beneficiary's character. Ms. [REDACTED] states that she worked with him at the petitioning business, but gives no dates. Ms. [REDACTED] also states that she worked with the beneficiary at the petitioning business and also fails to specify any dates, but states that he was employed at the petitioner's and in the United States as of the end of 2000. An "O.D. Scaton" claims that he has picked up waste from the petitioning business six days a week and has seen the petitioner there every day for the last several years.

The petitioner also provided two additional copies of a journal record indicating that the beneficiary was paid \$22,360 in 2002 and \$18,490 in 2003. A notation on the 2003 document states that the beneficiary was put on official payroll for remainder of the year after he received work authorization.

The petitioner further submitted copies of its 2002 and 2003 corporate tax returns, as well as a more complete copy of the petitioner's 2001 tax return. Schedule L of this tax return shows that the petitioner had \$12,188 in current assets and \$1,341 in current liabilities, resulting in \$10,847 in net current assets. Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner'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 corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner's 2002 and 2003 corporate tax returns reflect the following information:

Year	2002	2003
Net Income	\$ 4,530	-\$1,709
Current Assets	\$16,406	\$9,395
Current Liabilities	\$ 1,029	\$1,524
Net Current Assets	\$15,377	\$7,871

² 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.

Finally, the petitioner also provided a copy of the beneficiary's individual tax return for 2003 showing that he reported \$3,870 in wages. No W-2, which indicates the source of the beneficiary's income, accompanied this document.

Upon reviewing the net income and net current assets of the petitioner as reflected on its 2001-2003 corporate tax returns, the director concluded that the evidence submitted did not support petitioner's continuing ability to pay the proffered wage beginning on the priority date, and, on September 9, 2004, denied the petition. The director noted that the wage statements submitted by the petitioner were not corroborated by pay stubs, W-2s, or 1099 Misc. Internal Revenue Service (IRS) forms generated to reflect non-employee compensation paid.

On appeal, counsel resubmits copies of various documentation previously supplied to the record, along with copies of the beneficiary's amended individual tax returns for 2001, 2002, and 2003. They were executed in September 2004 and with the exception of \$3,870 previously claimed as wages, they reflect the total monies paid to the beneficiary as self-employment income in each of the three years and identify his occupation as a produce manager on Schedule C of the tax returns, giving the petitioner's business address as his business address. No W-2s or Form 1099s are offered with these documents.

Counsel asserts that the beneficiary's tax returns combined with the petitioner's payroll journal documents and other evidence is indicative of the beneficiary's employment with and remuneration by the petitioner for the time specified. Counsel also contends that such figures as the petitioner's depreciation and retained earnings should also be considered as available resources to pay the certified salary as well as a current ratio formula she asserts is accepted by the director at the Vermont Service Center as a measurement of the petitioner's financial health.

The use of a particular ratio analysis in evaluating a petitioner's ability to pay a proffered wage, that may have been discussed or used by a particular director, as advocated by counsel, may be useful guidance in some cases, but does not constitute a binding precedent and does not supercede regulatory requirements. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In determining a petitioner's ability to pay a proffered salary, CIS will reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as suggested by counsel in this case. 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). 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. Noting that the depreciation, or decreased value of the assets of a business to be a relevant factor in reviewing the financial viability in a business, the court in *Chi-Feng Chang v. Thornburgh*, *supra* at 536, stated:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request 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 *net income figures* in determining petitioner's ability to pay.

Similarly, with regard to adding back a petitioner's retained earnings as set forth on Schedule L of its tax return, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated that "[CIS] fully considered the assets section of Schedule L" and had no need to credit other amounts such as unappropriated retained earnings or common stock.³

CIS will also review whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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.

Relevant to the petitioner's attempts to corroborate the fact of the beneficiary's employment and amount of compensation paid through the retroactive filing of the beneficiary's tax returns, the identically prepared payroll journal records of the petitioner with notations that such payments should be treated as a produce expense, the lack of any other supporting financial documentation such as state quarterly wage reports or Form 1099s issued to persons providing contracted services as non-employees, coupled with the failure to mention this employment on the ETA 750B, which was signed by the beneficiary in 2001, does not compel the conclusion that the director necessarily erred in failing to accept the amounts of wages paid as suggested by the petitioner.

Moreover, it is noted that even taking these monies at face value as evidence of the actual compensation paid to the beneficiary in exchange for services rendered, the shortfalls resulting from the comparison of wages paid to the actual proffered wage would not demonstrate the petitioner's continuing ability to pay the proffered salary. In 2001, the suggested amount of \$21,670 paid to the beneficiary was \$11,326.60 less than the proffered salary of \$32,996.60. This could not be covered by either the petitioner's reported net income of \$8,385 or its net current assets of \$10,847. The suggested compensation paid to the beneficiary in 2002 was \$22,360, or \$10,636.60 less than the proffered wage. Although this amount could not be met by the petitioner's net income of \$4,530, its net current assets of \$15,377 in that year was sufficient. In 2003, however, neither the petitioner's -\$1,709 declared as net income, nor its net current assets of \$7,871 were sufficient to pay the \$10,636.60 shortfall resulting from a comparison between the suggested compensation paid of \$22,360 and the proffered wage of \$32,996.60.

It is noted that net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. If net income during a given period is greater than the amount of the proffered wage, it indicates that a petitioner could have paid the wage during 2001 out of its income. Net current assets at the end of a given period, which are greater than the proffered wage, reflect that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the

³ It is also noted that retained earnings are reflected as longer term liabilities on the Schedule L balance sheet and may represent the non-cash value of the business that is reinvested into the business as opposed to distributed among the shareholders.

petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, it can be concluded that the petitioner has failed to persuasively demonstrate its continuing ability to pay the proffered wage beginning at the visa priority date.

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.