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

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FILE: EAC-02-132-50242 Office: VERMONT SERVICE CENTER

Date: **MAY 23 2005**

IN RE: Petitioner:
Beneficiary:



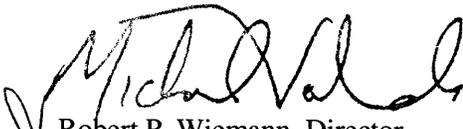
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner provides tailoring and cleaning services. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 a brief statement.

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 the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$21,840 annually based on a 35-hour work week. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on November 1, 1998 and to currently employ one worker. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

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 May 29, 2002, 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.

In response, the petitioner submitted its Form 1120-A, short-form corporate tax returns for the petitioner for the years 2001 and 2000¹. The relevant tax return reflects the following information for the following years:

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability

	<u>2001</u>
Net income ²	-\$1,191
Current Assets	\$1,754
Current Liabilities	\$0
Net current assets	\$1,754

In addition, the petitioner submitted a letter stating that it “paid out for services rendered to independent contractors, Saldel and Empire Cleaners, . . . \$23,518 in the year 2001. By having the services of the beneficiary, my company would have been able and will be able to cease paying the independent contractors for services rendered and use these monies to pay the offered wage to the beneficiary.”

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on July 30, 2002, the director again requested additional evidence pertinent to that ability. The director specifically requested IRS-certified tax returns and more specific information about the type of services provided by Saldel and Empire Cleaners.

In response, the petitioner stated that Saldel and Empire Cleaners “performed cleaning and tailoring (alterations) for our company,” but that it did not issue 1099 forms to the entities since they were “specifically listed on our Form 1120-A-line 22 other Deductions (Schedule).” The petitioner submitted copies of its tax returns submitted previously with a stamp from the IRS on the first page. The financial data is the same as previously reflected on the copies submitted in response to the director’s first request for evidence.

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 November 3, 2003, denied the petition. The director determined that the petitioner’s net income and net current assets were too insignificant to establish its continuing ability to pay the proffered wage beginning on the priority date, and also stated that the compensation provided to its independent contractors represented monies already expended and unavailable for use to pay the proffered wage.

On appeal, counsel asserts the following: “Petitioner relies on its early argument that by having the services of the beneficiary, the company would not have had to pay out monies to its subcontractors and said monies would have been used to pay the offered wage to the beneficiary.”

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, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

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

to pay the proffered wage beginning on the priority date.

² Taxable income before net operating loss deduction and special deductions as reported on Line 24.

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 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.

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.³ 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 has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a negative net income and net current assets of only \$1,754 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. While the petitioner set forth a plausible argument that it would replace independent contractors with the beneficiary⁴, wages already paid to others are not usually 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 the services provided by Saldel and Empire Cleaners involve the same duties as those set forth in the Form ETA 750⁵. The petitioner has

³ 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.

⁴ Even if this theory could be proven, the totality of circumstances does not weigh in the petitioner's favor. The petitioner's corporate tax return reflects that it only generated approximately \$56,000 in gross receipts in 2001 and paid no wages. The only apparent employee is the owner. The petitioner's business does not show the type of strength and viability of an entity with a continuing ability to pay an additional employee's wage.

⁵ The AAO notes that the proffered position, as delineated on Form ETA 750A, reflects that the beneficiary would only perform alterations and not cleaning services.

not documented its use of those services for alteration tailoring duties. If Saldel and Empire Cleaners were compensated for other kinds of work, then the petitioner would not be able to use all of those wages to demonstrate its ability to pay the proffered wage. 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).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 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.