

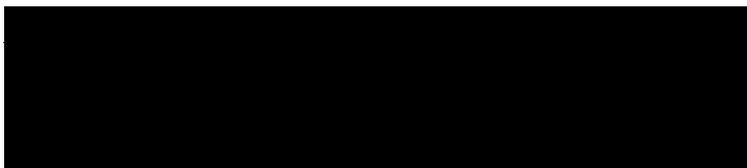
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

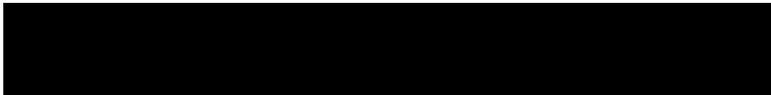
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FILE: WAC-03-146-51129 Office: CALIFORNIA SERVICE CENTER Date: **MAY 23 2005**

IN RE: Petitioner:
Beneficiary:



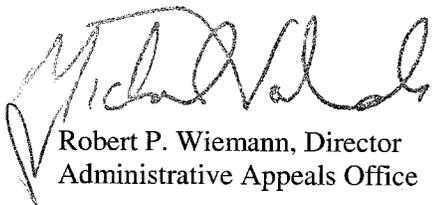
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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

The petitioner is a furniture manufacturing company. It seeks to employ the beneficiary permanently in the United States as a slipcover cutter. 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, the petitioner submits a brief 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 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 March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$18.52 per hour, which amounts to \$38,521.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 2000.

On the petition, the petitioner claimed to have been established on August 6, 1999, to have a gross annual income of \$1,368,295, and to currently employ 22 workers. 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 June 30, 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 the petitioner's tax returns for 2001, any W-2 forms issued to the beneficiary in 2000, 2001, or 2002, and the petitioner's quarterly wage reports for the last eight quarters.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001 and 2002. The tax returns reflect the following information:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$3,971	\$22,478
Current Assets	\$n/a	\$n/a
Current Liabilities	\$n/a	\$n/a
Net current assets	\$n/a	\$n/a

In addition, the petitioner submitted a copy of an unaudited profit and loss report, as well as copies of Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2000², 2001, and 2002. The Forms W-2 Wage and Tax Statements reflect wages of only \$6,332 in 2001, \$32,189.60 less than the proffered wage, and \$12,216 in 2002, \$26,305.60 less than the proffered wage.

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 21, 2003, denied the petition. The director noted that the petitioner was unable to pay the difference between the wages actually paid to the beneficiary and the proffered wage due to its low net income.

On appeal, the petitioner asserts that its total income, indicated on its corporate tax returns, reflects its ability to pay the proffered wage. The petitioner resubmits previously submitted tax returns.

The unaudited financial statements that the petitioner submitted in response to the director's request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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 or 2002. Instead, the petitioner established that it paid the beneficiary \$6,332 in 2001, which is \$32,189.60 less than the proffered wage, and \$12,216 in 2002, which is \$26,305.60 less than the proffered wage.

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

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

² Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 the full proffered wage to the beneficiary in 2001 or 2002. In 2001, the petitioner shows a net income of only \$3,971, and no evidence of its net current assets, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage, \$32,189.60, out of its net income or net current assets in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Likewise, in 2002, the petitioner shows a net income of only \$22,478, and no evidence of its net current assets, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage, \$26,305.60, out of its net income or net current assets in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, there is insufficient evidence contained in the record of proceeding that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not

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.

identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

For a visa petition 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 March 23, 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 experience that an applicant must have for the position of slipcover cutter. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states the following:

Cuts material for slipcovers according to size and shape of furniture to match patterns and ensure economical use of material. Reads order to determine type and amount of material required, and obtains materials form [sic] stockroom. Determines from experience and knowledge of material approximately yardage necessary to cover furniture, allowing most economical use and to serve as guide in matching shades, colores [sic], and designs in cloth. Determines cutting lines by pinning or marking fabric, using shape of furniture as outline. Cuts fabric along marked lines. Pins cut pieces together and fits assembled unit over furniture, making adjustment with pins to attain required fitting Cuts out slipcover parts from patterns, using rotary knife and scissors.

Item 15 indicates that other special requirements include having the required experience and references.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she worked for the petitioner since November 2000. Prior to that, she indicated that she was employed as a slipcover cutter for Omega Furniture Mfg (Omega Furniture) in California from October 1999 through November 2000. Prior to that, she indicated that she was employed as a slipcover cutter for New Trend Furniture Manufacture (New Trend Furniture) in California from June 1998 to September 1999. The descriptions of her work for Omega Furniture and New Trend Furniture show duties akin to the duties of the proffered position.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications to perform the duties of the proffered position.

The director failed to request evidence of the beneficiary's qualifications; however, the petitioner submitted a letter from Omega Furniture confirming her one year of employment experience at that business entity as a slipcover cutter. The director's decision failed to discuss the issue of the beneficiary's qualifications.

The regulation at 8 C.F.R. § 204.5(1)(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.

Presumably the director considered the experience the beneficiary gained with the petitioner prior to the priority date, but that was only four months. Adding those four months to the one year of experience the beneficiary has documented through her employment experience at Omega Furniture, is less than the two years of qualifying experience required by the proffered position. The petitioner failed to provide a letter establishing the beneficiary's experience with New Trend Furniture. Because the petitioner failed to provide regulatory-sanctioned evidence as delineated at 8 C.F.R. § 204.5(1)(3) of the beneficiary two years of qualifying experience, the petitioner must also be denied for the petitioner's failure 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.