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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-02-268-51191

Office: VERMONT SERVICE CENTER

Date: MAY 23 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

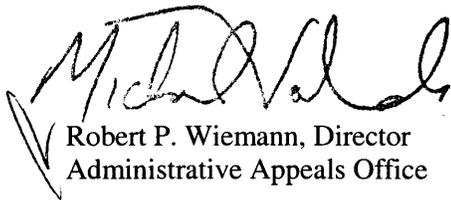
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 automobile mechanic. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. 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 additional 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 February 8, 2001. The proffered wage as stated on the Form ETA 750 is \$21.82 per hour, which amounts to \$45,385.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 1997.

On the petition, the petitioner claimed to have been established on March 1, 1994, to have a gross annual income of \$717,216, and to currently employ two workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for the year 2000.

The tax return reflects the following information:

	<u>2000</u>
Net income ¹	\$10,888
Current Assets	\$6,720
Current Liabilities	\$8,507
Net current assets	-\$1,787

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

The record of proceeding does not contain a copy of any requests for evidence issued by the director; however, the director's decision referenced a request for evidence issued on January 2, 2003, in which the director apparently requested evidence of any wage payments made by the petitioner to the beneficiary. The record of proceeding also does not contain a response from the petitioner; however, the director's decision referenced a response from the petitioner and stated that one W-2 form was submitted for 2002 showing that the petitioner paid \$13,770 to the beneficiary in 2002.

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 October 22, 2003, denied the petition, citing the petitioner's negative net income and negative net current assets in 2000 and that the wages actually paid to the beneficiary in 2002 were less than the proffered wage.

On appeal, the petitioner asserts that the beneficiary has worked for the petitioner as an employee and as a subcontractor, and that "[a]n analysis of the past several years indicates that the cost of using a subcontracted individual and worker salary has exceeded \$45,385.60 per year." The petitioner submits a letter from [REDACTED] its certified public accountant, which states that the petitioner paid total wages of \$98,091 to employees other than the shareholder in 2001; was able to pay total wages of \$87,564.36 to employees other than the shareholder in 2002; and was able to pay total wages of \$71,654.56 to employees other than the shareholder during the first nine months in 2003. Mr. Angowski states that if "management made significant adjustments to the business and work force, it believes it would be able to pay \$45,385.60 to any one employee."

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. The director noted that the petitioner paid the beneficiary \$13,770 in 2002, which is \$31,615.60 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 gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient, contrary to [REDACTED] assertion. 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.² 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 and only partial wages in 2002 leaving it obligated to show an ability to pay the remaining wage of \$31,615.60 for that year. The petitioner has not provided regulatory-prescribed evidence concerning its net income or net current assets for 2001 or 2002 as the record of proceeding does not contain the petitioner's federal income tax return, audited financial statements, or annual report for either of those years. The only evidence submitted in this proceeding is the petitioner's 2000 federal tax return, which is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date since 2000 precedes the priority date in 2001. However, since it is the only regulatory-prescribed evidence in the record of proceeding, despite its date, the AAO will analyze it to ascertain the totality of circumstances in this case concerning the petitioner's financial situation. The petitioner's reported net income and net current assets in 2000 were both negative, which does not reflect favorably upon the petitioner's continuing ability to pay the proffered wage.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The AAO notes that there is no evidence in the record of proceeding to corroborate the petitioner's appellate assertion that "[a]n analysis of the past several years indicates that the cost of using a subcontracted individual and worker salary has exceeded \$45,385.60 per year" or that the beneficiary earned wages as an independent contractor for the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, although Mr. Angowski indicates that the petitioner would have to adjust its payroll and then would be able to demonstrate its ability to pay the proffered wage, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 or 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.

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.

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.