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U.S. Citizenship
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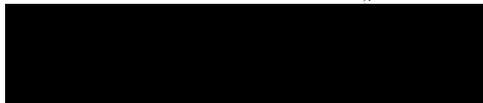


FILE: 
EAC 02 225 53692

Office: VERMONT SERVICE CENTER

Date: **MAY 25 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company that manufactures and installs fences. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. 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 and 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$36,000 annually.

The petitioner stated it was established in 1990, and has six employees and a gross annual income of \$152,882. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001, and a letter of employment verification from Tony's Fence Company, Inc., Millis, Massachusetts.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 11, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner had filed another I-140 petition for [REDACTED] and that the petitioner had to provide additional evidence that it has the capability to pay the proffered salary of both beneficiaries. In addition, the director also requested that the petitioner possessed the requisite two years of work experience and that the petitioner should provide a letter from current or former employers with details such as name, address, and title of the writer and a specific description of the duties performed by the beneficiary or of the training received. The director also stated that if the petitioner employed the beneficiary in 2001, the petitioner should submit a copy of the beneficiary's Form W-2. The director also requested clarification

on whether the position was a new position. If it was not a new position, the director requested more information on the person who held the position before, and the salary for the position.

In response, counsel resubmitted the letter from Tony's Fence Company, and stated the letter established almost eight years of experience working in fence construction. Counsel also submitted a letter from the petitioner's treasurer, Irena Kruczynski. The treasurer stated that she was responsible for maintaining all financial records for the company and used accepted accounting principles. The treasurer then stated the petitioner has been in business for over 15 years, and sought to add an additional finish carpenter in 2001. The treasurer further asserted that the petitioner had sufficient funds in April of 2001 to pay the proffered wage of \$36,000, but since no worker was hired in 2001, the petitioner decided to invest in a CNC Flexi-Nailer for \$117,320. The treasurer stated the investment was not needed to conduct the regular course of business and did not have to be made that that time. The treasurer further stated that the petitioner could not find a U.S. worker who was qualified, and that as soon as the beneficiary was issued employment authorization, he was hired. The petitioner submitted two weekly paychecks issued in 2003 for the beneficiary in the amount of \$528.25.

The petitioner also submitted a quotation received by it for the Flexi-Nailer, an invoice dated May 25, 2001 received by the petitioner for the machine, and the cancelled check used to pay for the machine. Accordingly, the treasurer asserted that the petitioner had more than enough funds to pay 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 September 19, 2003, denied the petition. The director stated that a review of the petitioner's tax return failed to reveal where the assets for the Flexi-Nailer purchase were claimed. In addition the director stated that these assets could not be considered available funds as the funds were already spent on equipment.

On appeal, counsel states that the petitioner's tax return indicates the assets used to purchase the Flexi-Nailer, in the line item of purchases, in the amount of \$930,435. Counsel asserts that the \$117,320 purchase price for the Flexi-Nailer was a part of the petitioner's reported purchases. Counsel states that the petitioner's cancelled check for the purchase of the Flexi-Nailer is evidence that \$117,320 was available in the spring of 2001 when the labor certification application was filed. Counsel states that it is also well established that depreciation and cash on hand can be considered with taxable income in evaluating the ability to pay an additional employees and cites two AAO decisions, *Matter of X*, EAC 00 157 50740, and *Matter of X*, WAC 98 071 53033, as reported in the *Immigration Case Reporter*.

On appeal, counsel refers to decisions issued by the AAO concerning the petitioner's ability to pay the proffered wage and the use of depreciation figures, but counsel does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its 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 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. Although the beneficiary indicated on ETA Form 750 that he had not worked for the petitioner as of the priority date, the petitioner stated that it hired the beneficiary in 2003 and provided two pay stubs. Nevertheless, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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. Contrary to counsel's assertion, neither depreciation or other expenses are considered in the CIS examination. 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. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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, now CIS, should have considered income before expenses were paid rather than net income. With regard to the instant petition, the petitioner's corporate income tax return shows a net income of \$15,543. This figure is not sufficient to pay the proffered wage, namely, \$36,000. In addition, the director stated that the petitioner submitted another petition, which assertion the petitioner does not contest. This petition is not currently available to this office. However, if another beneficiary were offered a similar position and wage, the petitioner would not have been able to pay both proffered wages based on the petitioner's net income.¹

Nevertheless, counsel is correct that 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. In addition, 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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or

¹ In the event that this inductive conclusion is incorrect and results in denial of an otherwise approvable petition, that error may be redressed on a motion. In any future actions, the petitioner should include information with regard to the other pending petition, including the priority date and the proffered wage.

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.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the year 2001:

	2001
Taxable income ³	\$ 15,543
Current Assets	\$ 33,591
Current Liabilities	\$ 2,782
Net current assets	\$ 30,809

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$15,543, and net current assets of \$30,809. With regard to the petitioner's net current assets, the petitioner lacks \$5,191 to pay the proffered wage as of the priority date. As stated previously, if another beneficiary's salary was also to be paid at a similar level, the petitioner would lack an additional \$36,000. It, therefore, has not demonstrated the ability to pay either the proffered wage of the beneficiary in the instant petition or any additional beneficiary.

Although the petitioner has demonstrated that it purchased a Flexi-Nailer in 2001 for \$117,320, the petitioner's assertion that this purchase is discretionary and is included in the amount of \$930,435 identified as purchases at number 2, Schedule A, is not persuasive. The petitioner would have to provide further evidentiary documentation to establish that the purchase was discretionary. Generally funds that have already been expended cannot be utilized to show the petitioner's ability to pay the proffered wage. The assertions of the director, as well as of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Furthermore, if the petitioner's assertion were accepted, the petitioner would only have established that it had the ability to pay the proffered wage as of the priority date. It would not have established that the petitioner had the ability to pay the proffered wage in 2002 and up until the beneficiary was hired in 2003. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2001. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001. As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

³ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.