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

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 0 2 2005
EAC 02 233 52402

IN RE: Petitioner: [redacted]
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:

[redacted]

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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a stone mason. The director determined the petitioner had not established that it had the ability to pay the proffered wage as of the priority date and onward.

On appeal, counsel states that Citizenship and Immigration Services (CIS) erred in relying strictly upon the federal income tax returns to determine whether the petitioner had the capacity to pay the prevailing wage. Although counsel also stated that she is submitting evidence to the AAO within 30 days, the AAO has received no further evidence. Therefore the AAO will examine the petition based on the record as presently constituted.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is $19.66 per hour, which amounts to $40,892.80 annually. On the Form ETA 750, the beneficiary indicated he had worked for the petitioner since July 1994.

On the petition, the petitioner claimed to have been established in 1974, to have five employees, and to have a gross annual income of $700,000 and a net annual income of $300,000.

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 13, 2002, the director requested additional evidence

pertinent to that ability. The director specifically requested that the petitioner provide a copy of its 2001 federal tax return, with all accompanying schedules, statements and attachments. The director also stated that the petitioner could submit its annual report for 2001, accompanied by audited or reviewed financial statements. The director also asked if the beneficiary would fill a newly created position, and also requested that the petitioner submit evidence to establish that the beneficiary possessed the required two years of experience as a stonemason prior to the 2001 priority date.

In response the petitioner submitted Form 1120 corporate tax return for the petitioner for the year 2001, which indicated a taxable income of $9,365. The tax return also indicated subcontracting costs of $169,516. The petitioner also submitted a letter of work verification from esident, Construction Unlimited Corporation, Plantsville, Connecticut tated that the beneficiary had worked for him from 1991 to 1994 as a stonemason.

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 1, 2003, denied the petition. The director noted that the petitioner had net taxable income of $9,365, and cash reserves in 2001 of $7,253. The director identified the proffered wage as $40,872, and stated that if all available income and cash were applied to paying the proffered wage, the petitioner would still lack $24,254 to pay the proffered wage.[1] The director also noted that the petitioner's tax return indicated no salaries and wages, while on the I-140 petition, the petitioner claimed to have several employees. The director also noted that although the beneficiary indicated on the Form ETA 750 that the petitioner employed him since 1994, no W-2 wage and salary documentation was submitted to support his claim.

On appeal, counsel states that CIS erred in relying strictly upon the income tax returns of the petitioner to determine whether the employer has the capacity to pay the prevailing wage. As previously stated, although counsel states she is submitting a brief and/or evidence to the AAO within 30 days, no further documentation is found in the record. Therefore, the AAO will examine the petition based on the record as presently constituted.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 worked fulltime for the petitioner from July 1994, the petitioner submitted no further documentation to further substantiate this assertion. As noted by the director, the petitioner's 2001 federal tax return does not indicate any salaries and wages paid during the year, although the tax return does indicate $169,516 in subcontracting costs. The petitioner did not establish any relationship between the subcontracting costs and any wages or compensation paid to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of

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[1] The director miscalculated the proffered wage, and the funds lacking to pay the proffered wage after net taxable income and available cash were deducted. The proffered wage is $40,892.80, which is the weekly wage multiplied by 52 weeks, or the hourly wage multiplied by 2080 hours.

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)). Without more persuasive evidence, 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, 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. 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. The petitioner's Form 1120 federal income tax return indicates a net taxable income of $9,365.[2] This sum is not sufficient to pay the proffered wage of $ 40,892.80.

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. 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.[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

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[2] 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.

[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.

of those net current assets. The petitioner's tax return reflects the following information for tax year 2001:

	2001
Taxable income	$9,365
Current Assets	$7,503
Current Liabilities	$ 250
Net Current Assets	$7,253

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 $9,365, and net current assets of $7,253, and has not, therefore, demonstrated the ability to pay the proffered wage as of the priority date. The petitioner also did not submit any documentation with regard to any other funds available to pay the proffered wage as of the priority date and onward.

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.