

identity information deleted to
protect the privacy of the individual
whose information is provided in this document

FOIA b(7)(C)

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



U.S. Citizenship
and Immigration
Services

B6

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: 11/9/2005
EAC-03-138-50842

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:

[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 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 an auto repair shop. It seeks to employ the beneficiary permanently in the United States as an auto 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, 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 October 18, 1999. The proffered wage as stated on the Form ETA 750 is \$22.26 per hour, which amounts to \$46,300.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner¹.

On the petition, the petitioner claimed to have been established in December 1998, to have a gross annual income of \$91,253, and to currently employ four 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.

¹ The beneficiary represented that he worked as an auto mechanic for [REDACTED] from September 1994 to the "present," and signed the ETA 750B on January 1, 1999. Thus, the beneficiary represented on that form that he worked for [REDACTED] from 9/94 until at least 1/99. On a Form G-325, Biographic Information sheet submitted with the beneficiary's application to adjust status to lawful permanent resident in connection with the instant petition, the beneficiary represented that he worked for [REDACTED] from March 1997 to the "present time." The Form G-325 is undated. On a Form G-325 signed on September 4, 1997 and submitted with a previously filed application to adjust status to lawful permanent resident based upon marriage to a U.S. citizen, a status which was accorded and subsequently terminated, the beneficiary represented that he worked for Swat Auto since February 1995. While the address for [REDACTED] matches the address for [REDACTED] the dates of employment and names used for the employers differ significantly.

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 8, 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 complete 2001 tax return and any evidence of wages actually paid by the petitioner to the beneficiary. In response, the petitioner submitted its 2001 corporate tax return.

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 31, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested the petitioner's complete 1999, 2000, and 2002 tax returns and any evidence of wages actually paid by the petitioner to the beneficiary at any time between 1999 and 2002.

In response, the petitioner submitted its corporate tax returns for 1999 and 2000. The petitioner's tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ²	\$49,864	-\$5,613	\$18,087
Current Assets	\$41,933	\$16,086	\$43,641
Current Liabilities	\$1,549	\$8,699	\$20,038
Net current assets	\$40,384	\$7,387	\$23,603

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 January 21, 2004, denied the petition, noting that although the petitioner had sufficient net income in 1999 to pay the proffered wage, the petitioner's net income and net current assets were both lower than the proffered wage in 2000 and 2001 and did not reflect the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has sufficient net income in 1999 and up until the last tax year, 2002, in which the petitioner's net income was \$41,855 and "assets [sic] were \$33,512." The petitioner did not submit any additional evidence. The record of proceeding does not contain the petitioner's 2002 corporate tax return.

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 1999, 2000, or 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 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*

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 1999, 2000, or 2001. In 1999, the petitioner shows a net income of \$49,864, which is greater than the proffered wage of \$46,300.80, and has therefore demonstrated the ability to pay the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during 1999.

In 2000, the petitioner shows a net income of -\$5,613 and net current assets of \$7,387, which are both less than the proffered wage of \$46,300.80 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. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000.

In 2001, the petitioner shows a net income of \$18,087 and net current assets of \$23,603, which are both less than the proffered wage of \$46,300.80 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. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

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.

Despite its demonstration that it could pay the proffered wage out of its net income in 1999, the petitioner failed to submit evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage during 2000 or 2001⁴. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.

⁴ The information contained in the petitioner's tax returns contradict counsel's appellate statements.