

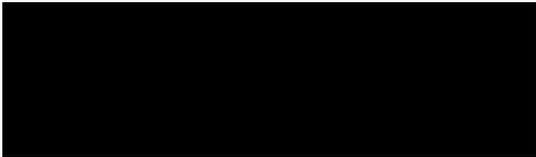
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
EAC-03-251-53139

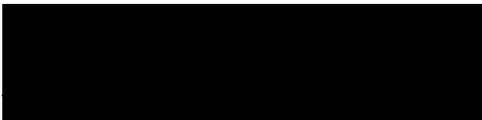
Office: VERMONT SERVICE CENTER

Date: OCT 19 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:



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 a 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 and resubmits 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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$21.26 per hour, which amounts to \$44,220.80 annually. On the Form ETA 750B, signed by the beneficiary in March 2001, the beneficiary did not claim to have worked for the petitioner¹.

On the petition, the petitioner claimed to have been established in 1976, to have a gross annual income of \$136,520, and to currently employ one worker. In support of the petition, the petitioner submitted its 2001 and 2002 corporate income tax returns prepared on Form 1120S, U.S. Income Tax Return for an S Corporation.

The petitioner's tax returns reflect the following information for the following years:

| | <u>2001</u> | <u>2002</u> |
|-------------------------|-------------|-------------|
| Net income ² | \$35,200 | \$40,200 |
| Current Assets | \$33,707 | \$40,000 |

¹ On Form G-325, Biographic Information sheet accompanying the beneficiary's application to adjust status to lawful permanent resident, signed in August 2003, the beneficiary indicated that he commenced employment with the petitioner in November 2002 and continues to work there presently.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

| | | |
|---------------------|----------|----------|
| Current Liabilities | \$10,917 | \$4,722 |
| Net current assets | \$22,790 | \$35,278 |

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 November 18, 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 noted that the petitioner's net incomes and net current assets in both 2001 and 2002 were less than the proffered wage and sought additional evidence that the petitioner could pay the proffered wage beginning on the priority date.

In response, the petitioner submitted a letter from counsel who stated that adding the petitioner's net income and net current assets would show sufficient income for the petitioner to pay the proffered wage in both 2001 and 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 May 24, 2004, denied the petition, stating that counsel set forth an erroneous calculation for determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that she consulted with an accountant who told her that the petitioner's current liabilities are reflected on Line 18 of Schedule L, and that adding back depreciation expenses to the petitioner's net income as well as the petitioner's net current assets results in sufficient income for the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner resubmits additional copies of its 2001 and 2002 corporate tax returns.

At the outset, the record of proceeding does not contain any statement from an accountant. Counsel's appellate assertions that she consulted with an accountant who made certain statements pertaining to this case are uncorroborated and do not constitute evidence. Absent corroborating evidence, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

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 contrary to counsel's appellate assertion³. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the

³ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or

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 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.⁴ 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 18⁵. 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 AAO also rejects counsel's argument that the petitioner's cash or net current assets can be added to its net income in 2001 and 2002 in order to have sufficient funds to pay the proffered wage as it double-counts the petitioner's income contrary to the utilization of either a cash-basis or accrual-basis of general accounting principles. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income, which is a figure that summarizes the petitioner's revenues, costs, and expenses over a period of time. Schedule L reflects figures for a specific point in time used to compose the final summary presented on the

business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). In this case, the petitioner did not reflect income from other sources.

⁴ 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.

⁵ Counsel is incorrect that Line 18 reflects the petitioner's current liabilities. Line 18 reflects additional "other current liabilities" not reflected on Lines 16-17 that must be added together.

income statement's net income figure. Thus, to add the figures together essentially double counts money and distorts the true picture of the petitioner's financial standing.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of \$35,200 and net current assets of only \$22,790, amounts which are both individually less than the proffered wage of \$44,220.80, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. Likewise, in 2002, the petitioner shows a net income of \$40,200 and net current assets of only \$35,278, amounts which are both individually less than the proffered wage of \$44,220.80, 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 sole shareholder of an S corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, compensation of officers was only \$5,000 in both years, which would be insufficient in 2001, and there is no evidence in the record of proceeding that the petitioner's sole shareholder could forego compensation in either year. 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.

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.