

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

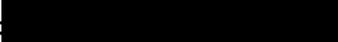


U.S. Citizenship
and Immigration
Services

B6



FILE: LIN 03 225 51777 Office: NEBRASKA SERVICE CENTER Date: **OCT 21 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 preference visa petition was denied by the director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner is an auto body shop. It seeks to employ the beneficiary permanently in the United States as an auto body 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 the beneficiary had the requisite work experience to satisfy the terms of the ETA 750. The director also found that the petitioner had failed to demonstrate 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 additional evidence and asserts that the petitioner has established its financial ability to pay the proffered wage and that the beneficiary possessed the requisite employment experience to fill the certified position.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the

training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on November 25, 2002. The proffered wage as stated on Form ETA 750 is \$25.26 per hour or \$52,540.80 per year. On Form ETA 750B, signed by the beneficiary on September 25, 2002, the beneficiary does not claim to have worked for the petitioner.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 states that an applicant for the certified position of "auto shop mechanic" must have two years of experience in the position offered.

On Part 5 of the visa petition, filed July 21, 2003, the petitioner claims to have been established in 1989, have a gross annual income of \$781,636 and an annual net income of -\$3,914. In support of its continuing financial ability to pay the proposed wage offer, the petitioner initially provided an incomplete copy of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001, consisting of the first two pages. They indicate that the petitioner files its taxes using a fiscal year running from July 1st to June 30th of the following year. Thus, the 2000 tax return contains information covering the period from July 1, 2000 to June 30, 2001. It reveals that the petitioner reported \$48,109 in net taxable income before the net operating loss (NOL) deduction during that period. It also suggests that the petitioner's name listed on the preference petition is merely a trade name and that the petitioner's corporate name is "Majic Triangle Repair, Ltd.," as given on the 2000 tax return. The 2001 tax return covering the period between July 1, 2001 and June 30, 2002 is more relevant to the priority date. It shows that the petitioner reported net taxable income of -\$3,914 before the NOL deduction.

The petitioner also provided copies of documents related to the beneficiary's formal training as a mechanic. Included among these is a certificate from a Bulgarian firm called [REDACTED] in Ruse, Bulgaria. It indicates that the beneficiary was employed as a car body mechanic from April 1, 1990 until September 30, 1994.

The director issued a request for additional evidence on February 9, 2004, requesting additional evidence from the petitioner in support of its financial ability to pay the proposed wage offer of \$52,540.80 per year and evidence supporting the beneficiary's past qualifying work experience as an auto body mechanic.

In response, the petitioner, through counsel, submitted a copy of the petitioner's 2002 U.S. Income Tax Return for an S Corporation, consisting of only the first page. It shows that the petitioner declared -\$12,982 in ordinary income.

The director denied the petition on May 14, 2004, concluding that the petitioner had failed to submit evidence supporting the beneficiary's requisite prior employment experience and had failed to establish that its declared income in 2001 or 2002, as shown on the tax returns, demonstrated an ability to pay the proffered salary of \$52,540.80 per year. The director also noted that the petitioner failed to offer an explanation why the petitioner's name was not the same on the tax returns and on the preference petition.

On appeal, counsel submits a letter from the petitioner's manager, [REDACTED] explaining the petitioner had been operating under the name of [REDACTED] since its inception. Mr. [REDACTED] also states that a position is available for the beneficiary upon his arrival and that his position will be vacated by a current employee. This proposition does little to support the petitioner's ability to pay the proffered wage as no details concerning the identity, duties or salary of this employee are provided. Moreover, it is noted that the intent of the labor certification process and immigrant preference petition is not to replace U.S. workers with immigrants, but to fill positions for which qualified U.S. workers are not available. Counsel also resubmits a copy of the job certificate from [REDACTED] as evidence of the beneficiary's prior employment experience. As mentioned above, this job certificate is consistent with the experience listed by the beneficiary on the ETA 750B and demonstrates that he has acquired 4 ½ years of experience as an auto body mechanic prior to the November 25, 2002, priority date set forth on the approved labor certification.

In support of the petitioner's continuing financial ability to pay the proffered wage, on appeal, counsel provides copies of the petitioner's Schedule L balance sheet from its 2001, 2002, and 2003 federal tax returns, as well as a copy of a bank statement from May 28, 2004, showing a balance of \$54,661.08 held in the petitioner's corporate checking account.

Although the information contained on the petitioner's 2000 and 2001 tax returns is not directly relevant because the priority date is November 25, 2002, the figures contained on the Schedule L balance sheets present the following information:

	2001	2002	2003
Current Assets	\$57,247	\$60,663	\$44,349
Current Liabilities	\$ 2,662	\$ 1,617	\$ 1,505
Net Current Assets	\$54,585	\$59,046	\$42,844

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

period and as an alternative method of demonstrating a petitioner's financial ability to pay the proposed wage offer. A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation's year-end 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.

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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence in the record suggesting that the petitioner has employed the beneficiary.

CIS will also examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as asserted here by counsel. 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). 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.

While it is noted that the petitioner's bank statement from May 28, 2004, shows a substantial ending balance that particular month, it is a snapshot of one month's cash flow and does not establish the petitioner's continuing ability to pay the proffered wage. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage.

In this case, as set forth on the incomplete copies of the petitioner's 2001 and 2002 corporate tax returns contained in the underlying record, neither the -\$3,914 in net taxable income reported on the 2001 tax return, nor the net taxable income of -\$12,982 reported on the 2002 federal return, was sufficient to pay the proffered wage of \$52,540.80. The two copies of the petitioner's Schedule L from these years, however, submitted on appeal, suggests that the petitioner's net current assets of \$54,585 in 2001 and \$59,046 in 2002 could pay the proffered wage during this period. Schedule L offered as part of the petitioner's 2003 tax return does not indicate that the petitioner's net current assets of \$42,844 could meet the proffered wage. However, because the record does not contain a complete tax return or audited financial statement for the period covering the fiscal year from July 1, 2003 to June 30, 2004, we are unable to determine the petitioner's ability to pay the proffered wage during this fiscal year. It is also noted that the 2003 balance sheet purports to cover the fiscal year ending June 30, 2004, but

the appeal was filed 16 days prior to the expiration of this period. The case will be remanded to allow the director to further investigate the petitioner's financial ability to pay the proffered wage during this fiscal year. In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional updated financial evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.