

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

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER Date: OCT 24 2005
EAC 03 109 50637

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 Acting Center Director (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 (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$16.72 per hour, which amounts to \$34,777.60 per annum. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claims to have worked for the petitioner since August 2000. It is noted that on Part 5 of the visa petition, filed on January 28, 2003, the petitioner claims that it was established in 2001. The petitioner also states that it has four employees, and generates a gross annual income of \$1,401,204 and a net annual income of -\$1,211.

In support of its ability to pay the beneficiary's proposed wage offer of \$34,777.60 per year, the petitioner initially submitted a copy of an April 30, 2001 checking account statement and a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. The tax return reflects that the petitioner files its federal income tax returns using a standard calendar year. It reveals that the petitioner reported -\$1,211 in ordinary income¹ (line 21) for 2001. Schedule L of the tax return reflects that the petitioner had \$35,319 in current assets and \$19,776 in current liabilities, resulting in \$15,543 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On October 7, 2003, the director instructed the petitioner to submit additional evidence supporting its ability to pay the proffered salary beginning at the priority date and continuing until the present. The director also specifically requested the petitioner to provide a copy of the beneficiary's Wage and Tax Statement (W-2) if it employed the beneficiary in 2001.

In response, the petitioner, through counsel, provided a letter, dated October 22, 2003, from a tax-consulting firm, signed by an enrolled agent, [REDACTED] provides an attached balance sheet and notes the figures given for the petitioner's total assets and total liabilities in 2001.

The director issued another request for additional evidence on December 5, 2003. This time, the director specifically requested a copy of the petitioner's 2002 federal income tax return, as well as copies of the beneficiary's W-2s for 2001 and 2002 if the petitioner employed him during that period.

The petitioner responded with a copy of its 2002 corporate tax return. It shows that the petitioner reported \$6,036 in ordinary income. Schedule L reflects that it had \$47,510 in current assets and \$23,964 in current liabilities, yielding \$23,546 in net current assets. The petitioner also provided copies of its quarterly federal tax returns covering the period from the second quarter in 2001 to the quarter ending on September 30, 2003. The petitioner additionally supplied copies of its checking account statements covering January through April 2001. Finally, the petitioner provided another letter from [REDACTED] dated December 12, 2003. He notes the figures given for the petitioner's total assets and total liabilities for 2002 on the attached balance sheet and calculates the net worth of the petitioner to be \$74,826.

¹ For the purpose of this review, ordinary income will be treated as net taxable income.

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.

The petitioner does not submit a W-2, Form 1099-Miscellaneous Income, or any other documentation relating to the beneficiary's employment and payment of compensation. Counsel's transmittal letter, dated January 5, 2004, mentions that mechanics come and go at the petitioner's place of business, but there was always funds available to pay the beneficiary due to such vacancies.

The director reviewed the petitioner's financial data presented on the petitioner's bank statements and on its corporate tax returns from 2001 and 2002, concluding that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 24, 2001.

On appeal, counsel urges additional consideration of the bank statements previously submitted as determinative of the petitioner's 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. This regulation allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. This petitioner did not submit such documents. A petitioner's bank statements may certainly constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's assets and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's selected 2001 bank statements, somehow show additional available funds that would not be reflected on the corresponding tax return.

In an eighteen-page fax submitted on August 31, 2005, counsel asserts that the "employer" has employed the beneficiary since August 1998. Counsel cites an attached copy of a June 19, 2003, AAO case for the proposition that where a petitioner has employed and paid a beneficiary a wage equal to or greater than the proffered wage during the pendency of the petition, then this alone may demonstrate the ability to pay the certified wage offer. Counsel further states:

Although the Employer cannot provide the primary evidence of the payments it has made to the Beneficiary because the Beneficiary has never been placed on the Employer's payroll owing to his lack of a valid social security number, the Employer's own statements should serve as an acceptable secondary evidence where it has been established that the primary evidence is not available. (See attached documentation).

There is no attached documentation of the employer's statements. Moreover, as the petitioner in this case was not established until 2001, as noted on Part 5 of the visa petition, it is unclear to which "employer" counsel refers. The underlying record does contain a letter from [REDACTED] the principal shareholder of this petitioner, submitted to vouch for the beneficiary's employment in another business called "Fresh Pond Mobil." [REDACTED] states that the beneficiary was hired "under contract" and was employed from June 1999 until July 2000. The record here contains no corroborative evidence from this petitioner relating to the beneficiary's employment at any time or the petitioner's payment of wages to the beneficiary. Moreover, as noted in the attached copy of the AAO

case provided by counsel on appeal, an unsupported statement regarding the payment of wages or compensation is not sufficient to sustain the petitioner's burden of proof. See *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)). It is also noted that counsel's discussion of the various vacancies created by coming and going of mechanics at the petitioner's place of business and the ability of the petitioner to put the beneficiary on the payroll as a replacement, when he is already supposed to be working for the petitioner under some different arrangement, does not overcome the evidence presented on the corporate tax returns. Counsel's assertions in this regard do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA, 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel maintains that the petitioner's security deposit of \$33,730, held by [REDACTED] in an escrow account and shown as a longer-term asset (line 14) on Schedule L of the petitioner's 2001 and 2002 tax returns, should be regarded as similar to a line of credit available to the petitioner as a resource out of which the proffered wage may be paid. Counsel cites the discussion of a line of credit as an element in establishing a petitioner's ability to pay a proffered wage, as set forth in the July 7, 2003, (amended) minutes to an American Immigration Lawyers Association (AILA) conference with the Vermont Service Center, which is attached to counsel's brief. It is noted that no documentation relating to this security deposit defining the terms of the underlying contract or escrow arrangement has been submitted to the record. It is also noted that a security deposit typically represents monies given or deposited as surety for the fulfillment of an obligation or promise; i.e., the obligation to meet the terms of a commercial lease of real property or equipment. We find it improbable that such an arrangement would include using the funds to pay a certified wage to an alien worker. Moreover, as represented on the petitioner's tax returns, these funds held as a security deposit are properly characterized as a longer-term asset and would not represent the kind of resource that would be readily available to pay the proffered wage.

With regard to the 2003 AILA/Vermont Service Center conference minutes, it is noted that these events or documents are not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance.³ Similarly, prior AAO cases, such as those initially mentioned by counsel in his brief, are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

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 credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, as noted above, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As discussed

³See *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

above, the record contains no credible documentary evidence that the petitioner has employed and paid wages to the beneficiary in this matter.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets. We reject, however, the rationale that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets, as well as other longer-term 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.

In 2001, neither the petitioner's ordinary income of -\$1,211, nor its net current assets of \$15,543 was sufficient to pay the proffered wage of \$34,777.60.

Similarly, in 2002, neither the petitioner's ordinary income of \$6,036, nor its net current assets of \$23,546 could meet the proposed wage offer.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.