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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

[redacted]

FILE: EAC 03 054 52200 Office: VERMONT SERVICE CENTER Date: SEP 30 2005

IN RE: Petitioner:
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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body shop. It seeks to employ the beneficiary permanently in the United States as an auto body repairer. 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, the petitioner states that the beneficiary's weekly salary is incorrectly identified in Citizenship and Immigration Services (CIS) records. The petitioner submits no further documentation.

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 11, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of $24.31 for a 35-hour workweek, or a weekly salary of $850.85, and an annual salary of $44,244,20.[1] On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 2000.

On the petition, the petitioner claimed to have been established in July 1981, to have seven employees, and a gross annual income of $625,000. In support of the petition, the petitioner submitted a letter of employment verification from the beneficiary's former employer in El Salvador, and copies of the petitioner's federal income tax return, Form 1120S for 2000 and 2001. These two documents indicated the petitioner's ordinary income in 2000 was $1,745, and in 2001 was $3,268.

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[1] The annual salary is $44,244.20, which is calculated by multiplying 35 hours times the hourly wage of $24.31, and in turn, the weekly salary of $850.85 times 52 weeks.

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 September 11, 2003, the director requested additional evidence to demonstrate the petitioner's continuing ability to pay the proffered wage of $44,244 as of April 2001 priority date and continuing to the present. The director stated that the petitioner could submit copies of annual reports, federal tax returns, or audited financial statements. If the petitioner employed the beneficiary since 2000, the director requested copies of the beneficiary's Form W-2 Wage and Tax Statement for 2001 and 2002.

In response, counsel submitted the beneficiary's W-2 Forms for 2001 and 2002. These documents indicated that the petitioner paid the beneficiary $7,200 in 2001 and $24,500 in 2002. Counsel also submitted the petitioner's Form 1120S for 2002. This document indicated the petitioner's ordinary income in 2002 was -$20,921.

In his denial of the petition, the director stated that the petitioner did not have sufficient ordinary income or net current assets in 2001 and 2002 to pay the difference between the beneficiary's actual wages and the proffered wage. The director stated that the beneficiary's actual salary in 2001 was $37,044 less than the proffered wage, and the beneficiary's 2002 salary was $19,744 less than the proffered wage. The director further stated that the petitioner must establish, with some degree of certainty, that it was financially viable and that the beneficiary's employment would not end or change because the petitioner was unable to pay the proffered wage. The director then determined that the petitioner did not have the ability to pay the proffered wage as of the priority date.

On appeal, the petitioner states that CIS had indicated that the beneficiary was offered a weekly salary of $850.85, and that the beneficiary was currently earning $570 a week. The petitioner requested that the CIS record be updated.

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. The petitioner submitted W-2 salary statements for the beneficiary for the years 2001 and 2002. As correctly noted by the director, the petitioner paid the beneficiary $7,200 in 2001, which is $37,044 less than the proffered wage. In 2002, the petitioner paid the beneficiary $24,500 in 2002, which is $19,744 less than the proffered wage. Based on these documents, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

On appeal, the petitioner states that the beneficiary currently earns $570 a week in gross pay, which is less than the weekly salary for the proffered wage, which is $850.85. The record is not clear why the petitioner makes this assertion. However, it is noted that there is nothing in the law or regulations that requires the beneficiary's employment to conform to the terms of the ETA 750 prior to the beneficiary's adjustment of status. The AAO simply utilizes the examination of the beneficiary's wages, if any, as one analysis in determining whether the petitioner has the ability to pay the proffered wage. As discussed below, there are other analyses based on the petitioner's federal income tax returns that also help to establish whether the petitioner has the ability to pay the proffered wage.

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 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2000, 2001, and 2002 show the following amounts of ordinary income: $1,745, $3,268, and -$20,921. As correctly stated by the director, these figures fail to establish the ability of the petitioner to pay the proffered wage. It is also noted that since the priority date for the instant petition is April 2001, the petitioner's tax return for 2000 is not dispositive of whether the petitioner has the ability to pay the proffered wage. The petitioner's 2000 tax return will not be examined further in these proceedings.

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.[2] 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 submitted the following information for tax years 2001 and 2002:

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[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.

	2001	2002
Ordinary Income	$ 3,268	$ -$20,921
Current Assets	$ 16,133	$ 10,986
Current Liabilities	$ 3,592	$ 7,605
Net current assets	$ 12,531	$ 3,381

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a net income of $3,268, and net current assets of $12,531. As stated previously, the petitioner paid the beneficiary $7,200 in 2001, which is $37,044 less than the proffered wage. Neither the petitioner's net income nor its net current assets in 2001 is sufficient to pay the difference between the beneficiary's actual wage paid and the proffered wage of $44,024.20.

In 2002, the petitioner shows a net income of -$20,921, and net current assets of $3,381. As stated previously, the petitioner paid the beneficiary $24,500 in 2002, which is $19,744 less than the proffered wage. Neither the petitioner's net income nor its net current assets is sufficient to pay the difference between the beneficiary's actual wage paid and the proffered wage.

The petitioner has not identified any additional source of funds from which to pay the beneficiary's wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and onward.

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.