

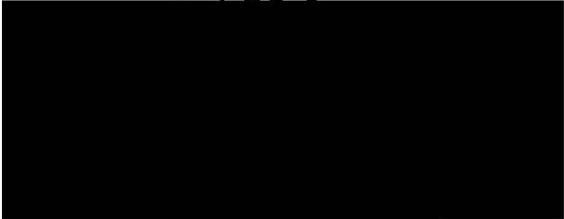


U.S. Citizenship
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Office: VERMONT SERVICE CENTER

Date: APR 04 2006

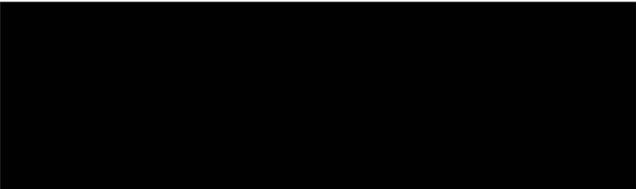
IN RE:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction and restoration company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A list of subcontractors and payments made for 2000–2004;¹
- Copies of Form 1099-MISC for the subcontractors the petitioner hired for 2001–2003; and,
- Copies of the petitioner's Form 1120 for 2000–2002.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$26.45 per hour (\$55,016 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in July 1, 1993, to have a gross annual income of \$1.5 million, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal years lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- An approved ETA 750;
- Copies of the petitioner's Form 1120 for 2001 and 2002;
- Counsel's G-28;

¹ Though mentioned in the cover letter, the list omits those subcontractors the petitioner paid in 2001.

- Copies of the beneficiary's Form 1099-MISC for 2001 and 2002.

The director denied the petition on October 20, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel emphasizes that the size of the petitioner's contract labor payments for 2001 and 2002 to demonstrate its ability to pay the proffered wage.

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 has established that it compensated the beneficiary starting in 2001, paying him \$7,743 in 2001, and \$13,008.50 in 2002. Thus, the partial wages the petitioner paid were \$47,273 less than the proffered wage for 2001, and \$42,007.50 less than the proffered wage in 2002. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$55,016 per year from the priority date.

In 2002, the Form 1120 stated net income² of -\$39,884.

In 2001, the Form 1120 stated net income of -\$4,868.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage difference between the wage paid and the 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. We reject, however, the idea 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 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the years 2001 and 2002 were -\$29,137, and -\$62,704.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the difference between the wage paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the list of subcontractors and the Form 1099-MISC shows the following:

<u>Year</u>	<u>Name of Subcontractor</u>	<u>Payments to Subs</u>	<u>Totals for All Subs</u>
2001 ⁴		\$6,360	
		\$26,523	
		\$4,300	
		\$20,855	
		\$46,060	

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

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.

⁴ The information for 2001 is drawn from the Forms 1099-MISC.

<u>Year</u>	<u>Name of Subcontractor</u>	<u>Payments to Subs</u>	<u>Totals for All Subs</u>
2001 (cont.)	[REDACTED]	\$42,183	
		\$13,173	
		\$14,280	
		\$7,743	
		\$41,600	
		\$19,304	
		\$6,646	
	TOTAL SUBCONTRACT LABOR FOR 2001		\$249,027⁵
2002 ⁶	[The beneficiary]	\$13,008.50	
	[REDACTED]	\$5,340	
		\$6,700	
		\$4,500	
		\$59,090	
		\$6,700	
		\$13,386	
		\$33,500	
		\$25,000	
		\$5,700	
		\$56,100.	
		\$9,168	
		\$700	
		\$300	
		\$38,720	
		\$31,680	
		\$5,500	
		\$26,377.48	
		\$1,100	
		\$500	
		\$1,675	
		\$1,300	
		\$500	
		\$3,975	
	TOTAL SUBCONTRACT LABOR FOR 2002		\$350,544.98⁷
	TOTAL SUBCONTRACT LABOR FOR 2003		\$482,534.50⁸
	TOTAL SUBCONTRACT LABOR FOR 2004		\$296,880

⁵Counsel's subcontractor payments total for 2001 is less by \$7,743, the amount the petitioner paid the beneficiary.

⁶The information for 2002–2004 is drawn from the Form 1099-MISC and subcontractors' lists.

⁷Total dollar amount corroborates with the petitioner's Form 1120 for 2002, Statement 4.

⁸We only present the totals for 2003 and 2004. We note the beneficiary's name does not appear on the 2003 or 2004 subcontractors' lists or among the Form 1099-MISC for those years.

Neither counsel nor the petitioner stated that the beneficiary would replace any of the subcontractors, whom the petitioner had been hiring since 2000. Rather, counsel states that the amount paid for subcontractor labor demonstrates the petitioner's ability to pay the proffered wages. The evidence does not show whether any of the subcontractors worked as roofers, and there is no indication that the beneficiary will replace any specific subcontractor(s). While the evidence in the record names contract workers, it does not specify their duties or that the petitioner has replaced or will replace any with the beneficiary. In the instant case, therefore, the petitioner has not established that the beneficiary will replace any contract worker performing the duties of the proffered position or that such workers' wages would be available to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. And as stated previously, the simple fact that the petitioner paid a specific amount for subcontractor labor in each of the pertinent years does not show its ability to pay the proffered wages. Wages paid generally are not considered as funds available to show an employer's ability to pay the proffered wage.

Counsel's assertions on appeal have not overcome the director's decision to deny the petition. The evidence submitted does not establish that the petitioner 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.