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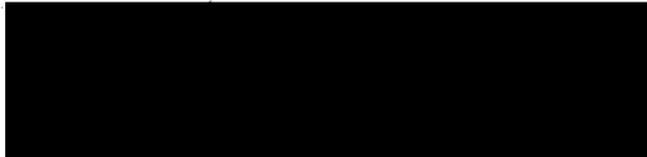
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: DEC 11 2006

EAC 05 048 50300

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, Chief
Administrative Appeals Office

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

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer. 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 states that erroneous information was submitted to Citizenship and Immigration Services (CIS). Counsel submits a brief and additional 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$36.57 per hour for a 35 hour workweek, which amounts to \$66,577.40 annually. On the Form ETA 750, the beneficiary indicated he had worked for the petitioner since April 2000.

On the petition, the petitioner indicated it was established in 1996, had ten employees, and \$776,867 in gross annual income. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001. This document indicated that the petitioner had taxable income before NOL deduction and special deductions of \$6,226.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 13, 2005, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal income tax returns for the years 2002 and 2003, with all schedules and attachments. As an alternative, the director stated

the petitioner might submit annual reports for 2001, 2002, and 2003 accompanied by audited or reviewed financial statements.

The director also noted that the record indicated the beneficiary had worked for the petitioner since April 2000, and requested that the petitioner submit copies of the beneficiary's W-2 forms to show how much the petitioner had paid the beneficiary in the years 2000, 2001, 2002, and 2003. Finally the director noted that the record contained no evidence that the beneficiary had the requisite two years of job experience stipulated by the Form ETA 750. The director requested that the petitioner submit documentation in the form of letters from current or former employers with the name, address, and title of the writer and a specific description of the duties performed by the beneficiary and the dates that such experience occurred. The director stated that the petitioner had to establish that the beneficiary possessed the required two years of experience as of April 30, 2001, the priority date.

In response, former counsel submitted letters of work experience from Shafi HIC & Corporation, Brooklyn, New York, and from Modern Construction and Engineering Works, Dhaka, Bangladesh. The petitioner also submitted Form 1120 corporate tax returns for the petitioner for the years 2002 and 2003. These two documents indicated that the petitioner had taxable income before NOL deduction and special deductions of \$4,776 in 2002¹ and - \$4,977 in 2003. In a cover letter, former counsel stated that the petitioner had sufficient funds to pay the \$66,557.40 annual salary. In his analysis, former counsel added the petitioner's taxable income, cash on hand, and depreciation figures as indicated on the petitioner's 2001 Schedule L. By adding these figures for tax year 2001, former counsel calculated that the petitioner had available funds of \$115,454 in tax year 2001. For tax year 2003, former counsel added the petitioner's cash on hand and accumulated depreciation figures, taken from the petitioner's 2003 Schedule L, and stated that \$167,085 was available to pay the proffered wage. Former counsel stated that the cash on hand alone in tax year 2003 was sufficient to pay the proffered wage. Counsel stated that the accumulate depreciation is an artificial tax expense, a paper loss and does not represent an actual expenditure, but rather it represents actual money available to pay the proffered wage of \$66,557. The petitioner did not submit any further documentation as to any wages paid to the beneficiary as of the April 2001 priority date year and onward. Counsel also did not comment on the petitioner's ability to pay the proffered wage in tax year 2002, based on its federal income tax return.

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 April 11, 2005, denied the petition. The director examined the petitioner's federal income tax returns, and noted that in 2001, the priority date year, the petitioner's income² was \$6,226 with net current assets of -\$14,483. The director further noted that in tax year 2002, the petitioner's income was \$4,776 with 0 (zero) net current assets. The director then noted that in tax year 2003, the petitioner's income was -\$4,977 with net current assets of -\$79,069. The director stated that without information on any wages paid to the beneficiary by the petitioner, CIS was unable to determine if the petitioner's income

¹ In the petitioner's 2002 tax return, Schedule L is blank, which appears to be a typographical or accounting error, since page 1 of the IRS Form 1120 indicates business activity.

² The director used the term "income" to indicate the petitioner's taxable income before net operating loss deduction and special deductions, noted on line 28. The AAO refers to this figure as the petitioner's net income when it examines the petitioner's net income and net current assets further in these proceedings.

and net current assets demonstrated the petitioner's ability to pay the proffered wage specified on the Form ETA 750. The director determined that the petitioner had not establish its ability to pay the proffered wage as of the priority date.

On appeal, new counsel states that incorrect information was erroneously submitted to CIS with regard to the petitioner's assets and receivable income. Counsel submits amended corporate tax returns for the years 2001, 2002, and 2003. Counsel also submits Forms 1099-MISC for tax years 2000,2001,2002, and 2003. Counsel states that these documents show that the petitioner is able to pay the proffered wage. In the IRS Forms 1120X, Amended U.S. Corporation Income Tax Return, submitted to the record on appeal, the petitioner stated that it incorrectly had left out account receivables of \$55,000 in 2001, \$75,500 in 2002, and \$80,000 in 2003. On appeal counsel also submitted Forms 1099-MISC for the beneficiary that indicated he earned \$10,200 in tax year 2000, \$22,060 in tax year 2001, \$24,100 in tax year 2002, and \$28,000 in tax year 2003.

In addition, Mr. [REDACTED] the petitioner's president, submits a letter to the record. Mr. [REDACTED] states the wages paid by the petitioner to the beneficiary in the years 2000, 2001, 2002, and 2003. Mr. [REDACTED] further states that the amended Federal income tax return for 2001 indicated the petitioner's net income was \$6,226 with net current assets of \$123,267. For tax year 2002, Mr. [REDACTED] continues, the petitioner's income plus net current assets was \$70,986, and for tax year 2003, based on the amended tax return, the petitioner's income plus net current assets was \$81,855. Mr. [REDACTED] states that the position that the beneficiary will fill was vacated by an employee whose wages are included in salary expenses for the years 2000, 2001, 2002, and 2003. Mr. [REDACTED] submits no further documentation to further substantiate his assertion with regard to the beneficiary's replacement of another employee.

Former counsel in his response to the director's request for further evidence examined the petitioner's depreciation expenses, cash on hand, and taxable income when calculating the petitioner's ability to pay the proffered wage as of the 2001 priority date and onward. However, the AAO does not consider depreciation expenses in its examination of the petitioner's ability to pay the proffered wage. The issue of depreciation will be examined further in these proceedings.

Former counsel also stated that the petitioner's Schedule L Cash should be added to its taxable or net income in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income. Furthermore, while it does consider cash on hand in its consideration of the petitioner's current assets, and does examine the petitioner's taxable income in its consideration of the petitioner's net income, the AAO does not combine the petitioner's net income and its net current assets when examining the petitioner's ability to pay the proffered wage.

On appeal, newly hired counsel submits the petitioner's amended tax returns, and also the beneficiary's Form 1099-MISC for tax years 2000, 2001, 2002, and 2003. The priority date for the instant petition is April 30, 2001, and thus, the beneficiary's prior wages in tax year 2000 are not dispositive in these proceedings. Furthermore,

counsel provides no explanation for why these documents are submitted on appeal, rather than in response to the director's request for further evidence.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the beneficiary's Forms 1099-MISC to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the beneficiary's Forms 1099-MISC submitted on appeal.

With regard to the amended corporate tax returns submitted on appeal, it is noted that the petitioner's original Form 1120 for tax year lacked any information on its Schedule L, and the submission of an amended tax return for tax year 2003 does appear in order. Furthermore, the petitioner did provide evidence that the amended returns were filed with IRS. With regard to tax years 2001, and 2003, the Schedules L for these two years on the original returns do contain figures for items such as retained earnings, depreciation, or accounts payable. Thus the addition of accounts receivables following the denial of the instant petition is seen as less credible than the submission of the petitioner's amended 2002 tax return. In its examination of the petitioner's net current assets for the years 2001, 2002, and 2003, the AAO will examine the original tax returns and comment on the amended tax returns.

Finally, on appeal, the petitioner's president combines the petitioner's net income with the petitioner's net current assets, as calculated by the petitioner's president to arrive at funds available to pay the proffered wage. However, this approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of the petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

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 beneficiary indicated on ETA Form 750 that he had worked for the petitioner from April 2000 to the present; however, the petitioner did not submit any documentation of such employment when the director requested it. As stated previously, the petitioner submitted the beneficiary's Forms 1099-MISC for the years 2000 to 2003 to the

record on appeal. However, the AAO does not accept this evidence. Therefore there is no evidence on the record as to the beneficiary's wages. The petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. It also has the obligation to establish that it can pay the beneficiary the entire proffered wage, namely, \$66,577.40, as of the 2001 priority date year and onward.

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, and contrary to former counsel's assertion, 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.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. In tax years 2001 to 2003, the petitioner's net income was as follows: \$6,226, \$4,776, and -\$4,977. None of these figures is sufficient to pay the proffered wage of \$66,577.40.

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. In addition, 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 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. As stated previously, the AAO will examine the original tax returns submitted to the record and then comment on the amended tax returns. The original tax returns submitted to the record reflect the following information for the tax years 2001, 2002, and 2003:

	2001	2002	2003
Taxable income ⁴	\$ 6,226	\$ 4,776	\$ -4,977
Current Assets	\$ 8,967	\$ 0	\$ 71,415
Current Liabilities	\$ 23,450	\$ 0	\$ 150,484
Net current assets	\$ 14,483	\$ 0	\$ -79,069

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$6,226, and net current assets of \$14,483, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$4,776 and net current assets of \$0 (zero). The petitioner has not demonstrated that it paid any wages to the beneficiary during 2003. In 2003, as previously illustrated, the petitioner shows a taxable income of -\$4,977 and net current assets of -\$79,069, and has not, therefore demonstrated the ability to pay the proffered wage.

As stated previously, the AAO will comment on the amended tax returns submitted by the petitioner on appeal. It is noted that the petitioner's net income would remain unchanged during tax years 2001 to 2003. Based on the petitioner's amended Schedules L for tax year 2001, 2002, and 2003, the petitioner would have had current assets of \$63,967, current liabilities of \$40,517, and net current assets of \$40,517 in tax year 2001. Thus even with its amended Schedule L, the petitioner did not establish its ability to pay the proffered wage in tax year 2001. In tax year 2002, the petitioner's amended Schedule L indicates current assets of \$236,156, current liabilities of \$246,094, and net current assets of -\$9,938. Thus, the petitioner, based on its amended 2002 tax return cannot establish its ability to pay the proffered wage of \$66,477.40 based on its net current assets. Finally, in tax year 2003, the petitioner's amended tax return indicates current assets of \$151,415, current liabilities of \$150,484, and net current assets of \$931. Thus, the petitioner also cannot establish its ability to pay the proffered wage in tax year 2003.⁵

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 As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

⁵ It is also noted that even if the beneficiary's Forms 1099-MISC had been accepted into the record, the

On appeal, the petitioner's president states that the beneficiary would replace another employee whose wages are included in the petitioner's salary expenses for the years 2001 through 2003, but provides no further documentation with regard to his assertion. The record does not, however, name this worker, state his or her wages, verify his or her full-time employment, or provide evidence that the petitioner has replaced or will replace the employee with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the other worker involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Thus the petitioner has not established additional sources of funds from which to pay the proffered wage.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the 2001 priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

beneficiary's claimed wages of \$22,000 in 2001, \$24,100 in 2002, and \$28,000 in 2003 would not have been sufficient to establish that the petitioner could pay the difference between the beneficiary's wages and the proffered wage, namely, \$44,477.40, \$42,477, and \$38,577.40.