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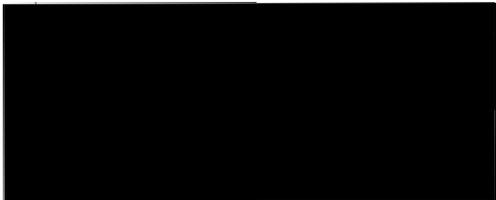


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 18 2006
EAC 05 031 50069

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, Chief
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 a waste handling equipment service company. It seeks to employ the beneficiary permanently in the United States as a secretary. 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 that the beneficiary had the requisite years of work experience as stipulated on the Form ETA 750, and denied the petition accordingly.

On appeal, counsel states that the petitioner has the ability to pay the proffered wage. Counsel submits a brief and further 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 21, 2001. The proffered wage as stated on the Form ETA 750 is a hourly wage of \$18.53, or an annual salary of \$38,542.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999, to have more than three employees, and a gross annual income of more than \$600,000. In support of the petition, the petitioner submitted IRS Forms 1120S, the petitioner's corporate income tax return for tax years 2001, 2002, and 2003. These documents indicated that the petitioner had ordinary income of \$2,900 in 2001, of -\$5,271 in 2002, and -\$5,937 in 2003.

On December 29, 2004, the director denied the petition. The director noted a memo dated May 4, 2004 and signed by William R. Yates, Citizenship and Immigration Services (CIS) Associate Director of Operations

that allowed that under certain circumstance a petition could be denied without benefit of a request for additional evidence. The director then examined the petitioner's federal tax returns for 2001, 2002, and 2003. The director determined that the petitioner's ordinary income in the years 2001 to 2003, namely, \$2,900, -\$5,271, and -\$5,937, was not sufficient to pay the proffered wage in any of the three years.

The director also determined that the petitioner's net current assets in the years 2001 to 2003 were \$25,092, \$16,962, and \$192,368, respectively. The director determined that the petitioner had only established its ability to pay the proffered wage of \$38,542.40 in tax year 2003. The director then noted that the petitioner must establish its ability to pay the proffered wage at the time the petition is filed, not at the time of the actual adjudication. The director cited *K.C. P. Food Co., Inc. v Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), as well as *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989).

The director also noted that the petitioner had not submitted any evidence to establish that the beneficiary possessed the requisite two years of experience as a secretary prior to the October 2001 priority date. The director stated that if the petitioner chose to file another petition, it should be prepared to submit evidence with regard to the beneficiary's qualifications. The director stated that such evidence should be in the form of letters from current or former employers and should include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary.

On appeal, counsel submits copies of the petitioner's checking account statements from DIME bank and Washington Mutual Bank.¹ Counsel states that the petitioner has the ability to pay the proffered wage based on its monthly bank statements. Counsel also states that in 2001, the amount needed by the petitioner to show its ability to pay the proffered salary was \$35,642.² Counsel then noted that the amount needed to pay the proffered wage divided by twelve months was \$2,970.17. Counsel then asserts that the petitioner needs to show that each month it had available at least \$2,970.17. Counsel also states that the petitioner's bank statements submitted to the record on appeal show an average minimum balance during the period of October to December 2001 of \$29,862.78. Counsel states that proof of an employer's ability to pay the prevailing wage as of the priority date may not be based simply upon whether the balance sheets or financial statements indicate that the petitioner's gross income, less expenses, leaves sufficient net profit to pay the proffered wage. Counsel asserts that a balance sheet or bank statement is only a snapshot of the petitioner's assets at a given moment, and it would be unrealistic to expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceeds their wages. Counsel cites *Masonry Masters, Inc. V. Thornburgh*, 277 U.S. App D.C. 341, 875 F2d 898(1989).

With regard to tax year 2002, counsel states that the proffered wage of \$38,543 divided by twelve months equals \$3,211.83. Counsel states that the petitioner's bank statement for 2002 submitted to the record show an average minimum balance throughout the year of \$23,585.16, which is in excess of the minimum needed to show the ability to pay the proffered wage. Counsel again cites *Masonry Masters, Inc.* and states that CIS

¹ The petitioner's checking account statements from DIME are from October 2001 to April 2002, while its checking account statements from Washington Mutual Bank are from May 2002 to December 2003.

² Counsel subtracted the petitioner's 2001 ordinary income of \$2,900 from the proffered wage of \$38,542 to arrive at this figure.

must weigh the average funds available to pay the beneficiary over the entire year, and that the petitioner's bank statements clearly show the ability to pay the proffered wage during 2002.

With regard to tax year 2003, counsel states that the director should have found that the petitioner did have the ability to pay the proffered wage during 2003. Counsel states that the petitioner's Schedule L line 1 of its 2003 federal income return shows cash on hand at the end of the year of \$150,298. Counsel states that this figure alone is sufficient proof of the petitioner's ability to pay the proffered wage during 2003. Counsel states that the director made no reference to this fact. Counsel also asserts that the petitioner's 2003 bank statements are further proof that the petitioner had the ability to pay the proffered wage during each month of 2003.

Counsel also submits the beneficiary's letter of work experience from [REDACTED] New York, New York that confirms the beneficiary's employment with the company from September 12, 1998 to December 31, 2002 as a secretary. Counsel states that the letter was originally filed along with the petitioner's Form ETA 750 with the state of New York Department of Labor.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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 paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Furthermore on appeal, counsel prorates the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. Thus the petitioner has the obligation to establish it can pay the entire proffered wage as of the 2001 priority date 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, 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 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 evidence indicates that the petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. Thus, the petitioner's tax returns for 2001, 2002, and 2003 show the following amounts of net income: \$2,900, -\$5,271, and -\$5,937. As correctly noted by the director, these figures fail to establish the ability of the petitioner to pay the proffered wage.

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. 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 to 2003:

	2001	2002	2003
Ordinary Income	\$ 2,900	\$ -5,271	\$ -5,937
Current Assets	\$ 109,842	\$ 137,477	\$ 288,017
Current Liabilities	\$ 84,750	\$ 120,515	\$ 95,649
Net current assets	\$ 24,092	\$ 16,962	\$ 192,368

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of \$2,900 and net current assets of \$24,092, and has not, therefore, demonstrated the ability to pay the proffered wage of \$38,542.40 out of its net income or net current assets. In 2002, the petitioner shows a net income of -\$5,271, and net current assets of \$16,962, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2003, the petitioner shows a net income of -\$5,937, and net current assets of \$192,368. Therefore, as correctly noted by counsel and inferred by the director, the petitioner has demonstrated the ability to pay the proffered wage out of its 2003 net current assets. Thus, the petitioner had the ability to pay the proffered wage during 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present.

On appeal, counsel cites to *Masonry Masters, Inc.* in support of using the funds identified in the petitioner's bank statements as evidence of additional funds available to the petitioner to pay the proffered wage. First, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993) Furthermore, *Masonry Masters, Inc.* is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. The CIS does now follow the formula outlined above involving examination of the petitioner's federal income tax returns, audited financial statements or annual reports, in determining whether a petitioner has the ability to pay the proffered wage. This formula does not include the examination of the petitioner's bank checking account statements.

While *Masonry Masters, Inc.*, also comments on employers hiring workers whose marginal contribution to the value of the company's production would equal or exceed their wages, as stated by counsel on appeal, the record is not clear as to the relevancy of counsel's reference to this comment to the instant petition. Furthermore, the primary finding by the court in *Masonry Masters, Inc.* was that legacy INS could not insist on the petitioner's ability to pay anything more than the prevailing wage at the time of the application of labor certification. CIS has not made such an assertion, and counsel has made no comment on such an assertion on appeal.

Thus, the petitioner has also not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to 2003.

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.