

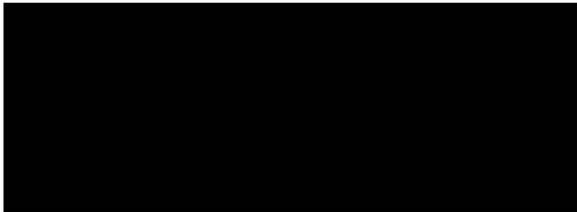


U.S. Citizenship
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Services

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FILE: EAC 04 073 50697 Office: VERMONT SERVICE CENTER Date: JUL 10 2006

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 engine repair and installation company. It seeks to employ the beneficiary permanently in the United States as an automotive technician. 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 Citizenship and Immigration Services (CIS) did not examine items in the petitioner's tax returns such as salaries, compensation of officers, and cost of labor in its examination of the petitioner's ability to pay the proffered wage. Counsel does not submit 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 22, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$19.70, or an annual salary of \$40,976. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1999.

On the petition, the petitioner claimed to have been established in July of 1988, to have more than eight employees, and to have a gross annual income of \$1.4 million dollars. In support of the petition, the petitioner submitted a letter of support that stated the beneficiary began working with the petitioner in January 1999 and outlined his job duties. The petitioner also submitted the first page of its IRS Form 1120S, the petitioner's corporate income tax return for 2001 and 2002. The petitioner also submitted the beneficiary's diploma and transcript from the State University of New York (SUNY) at Farmingdale for an associate's degree in applied science.

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 August 3, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 federal tax return, with all schedules and attachments, or an annual report for 2001 accompanied by audited or reviewed financial statements. The director also requested that the petitioner submit copies of any Form W-2 Wage and Tax statement if the petitioner employed the beneficiary in 2001.

In response, counsel submitted the petitioner's 2001 federal tax return with accompanying schedules and attachments. Counsel noted that Schedule A of the petitioner's federal tax return for 2001 indicates the petitioner's cost of labor was \$205,548 in 2001, and the petitioner's total income was \$427,295 in 2001. Counsel stated that these figures were conclusive evidence of the petitioner's ability to pay the proffered wage. Counsel did not submit any evidence as to the beneficiary's wages in 2001, or any other year.

In his denial of the petition, the director stated that the petitioner's 2001 tax return showed a net income of \$26,358, and that Schedule L indicated the petitioner had current assets of \$10,547 and current liabilities of \$22,888. The director stated that since the petitioner had insufficient net income in 2001 to pay the proffered wage, and that the petitioner's current assets did not exceed its current liabilities sufficiently to pay the proffered wage of \$40,976, the petitioner had not established its ability to pay the proffered wage as of the 2001 priority date. The director denied the petition on November 1, 2004.

On appeal, counsel states that the director's decision was based on an erroneous reading of the petitioner's tax return. Counsel states that the director's statement with regard to the petitioner's 2001 net income failed to take into account that salaries paid by the petitioner were listed both under Item 7 of Form 1120S, compensation of officers-\$52,000, and under Item 3 of Schedule A cost of labor, \$203,548. Counsel states that in 2001, the petitioner paid salaries and wages totaling \$253,548, a figure that is more than six times the proffered wage. Counsel states that these facts demonstrate the petitioner's ability to pay the proffered wage. Counsel also notes that Item 2 of IRS Form 1120S, cost of goods sold, which totaled \$846,951 and included \$203,548 in salaries and wages, was deducted from gross receipts of \$1,274,246 prior to the determination of the net total income of \$427,295. Counsel states that because the cost of goods sold figure was not taken into account, the director incorrectly determined that the petitioner had insufficient net income to pay the proffered wage. Finally, counsel states that although the director stated that Schedule L balance sheets showed that the petitioner had \$10,547 in current assets and \$22,888 in current liabilities, the director failed to take into account that both Schedule L and Item E of Form 1120S indicate total assets of \$52,459, a figure that exceeds 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. Although the director requested that the petitioner provide evidence of any wages paid to the beneficiary in tax year 2001, the petitioner submitted no such documentation to the record. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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.

In his comments on appeal, counsel suggests other methods of analyzing the petitioner's tax return to establish that it is able to pay the proffered wage. However, items such as salaries, wages, and compensation of officers only establish that the petitioner is employing and paying other workers and its officers. The fact that the petitioner is paying a certain amount of its profits in salaries does not establish that it can add another worker at the proffered wage. For example, there is no indication in the record that the beneficiary will be replacing another worker.

Furthermore, the AAO does not examine total assets identified on Schedule L, but rather net current assets, as will be discussed further in these proceedings. Finally the deduction of cost of goods sold, which include salaries and wages of workers, which are not discretionary expenses, from its gross receipts prior to determining its gross profit is normal business practice and mandated by the IRS Form. While the compensation of officers may be viewed as a discretionary expense, the payment of labor costs is not discretionary. Therefore, the AAO would only look at the sums of money remaining after all mandatory expenses were paid. By looking at items such as wages, cost of goods sold, and similar items, the petitioner is not establishing that it has the necessary financial resources to pay the proffered wage. The AAO rather examines the petitioner's net income and net current assets in determining whether a petitioner has the ability to pay the proffered wage.

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 submitted the first pages of its federal income tax return for tax years 2001 and 2002. Based on these incomplete documents, the petitioner had \$26,358 in net income in 2001, and -\$15,476 in 2002. Neither figure is sufficient to pay the proffered wage in either tax year 2001 or 2002.

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.¹ 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 incomplete tax information for tax year 2002. Therefore only the petitioner's tax return for 2001 will be considered in the examination of the petitioner's net current assets in these proceedings.

	2001
Ordinary Income	\$ 26,358
Current Assets	\$ 10,547
Current Liabilities	\$ 22,888
Net current assets	\$ -10,547

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary in 2001. Therefore it has to establish that it has the ability to pay the entire proffered wage of \$40,976 in tax year 2001. In 2001, the petitioner shows a net income of \$26,358, and net current assets of -\$10,547, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. As stated previously, the petitioner did not submit any additional financial documentation as to any subsequent years following the 2001 priority date. The petitioner also did not establish that 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 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 to the present 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.

¹ 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.