

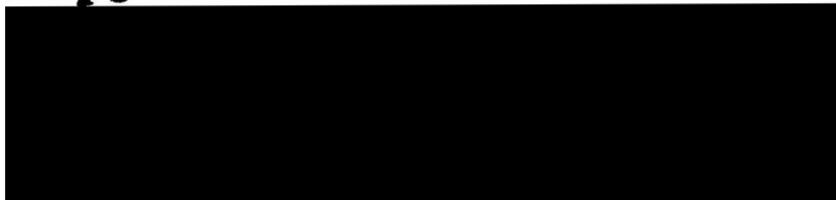
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: EAC 02 179 53421 Office: VERMONT SERVICE CENTER Date: **JUL 11 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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition. The petitioner appealed the decision and the AAO subsequently dismissed the appeal. The matter is now before the Administrative Appeals Office (AAO) as a motion to reopen. The motion will be granted. The appeal will be sustained.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a horticultural supervisor, with a nursery specialty. 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 1996 priority date of the visa petition and denied the petition accordingly. On June 3, 2004, the AAO determined that the petitioner had established its ability to pay the proffered wage as of the 1996 priority date, based on the beneficiary's wages for 1996 and the fact that the petition was filed on December 24, 1996.¹ However, the AAO also determined that the petitioner did not submit any copies of the petitioner's federal income tax returns, audited financial statements, or annual reports for any of the years from 1997 and continuing, pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2). The AAO also determined that the financial resources of the principal shareholder, as documented on the individual tax returns submitted on appeal, would not be considered in the petitioner's ability to pay the proffered wage. Finally, the AAO stated that without additional documentation it could not conclude that the petitioner had submitted sufficient evidence to establish the petitioner's continuing ability to pay the proffered wage.

On motion, counsel submits the petitioner's IRS Forms 1120S for the years 1996 to 2003. Counsel states that the petitioner's tax returns do establish the petitioner's ability to pay the proffered wage. Counsel states that the eight years of tax returns indicate that the petitioner earned gross revenues close to or in excess of one million dollars. Counsel states that the petitioner also showed a payroll close to or in excess of \$300,000. Counsel states that although the AAO previously stated that selected monthly bank account statements do not represent a petitioner's complete financial status, the bank statements do provide sufficient information to establish that the petitioner has sufficient and continuing business viability.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted the petitioner's IRS Forms 1120S for the tax years 1997 to 2003. Counsel also correctly points out that this evidence was neither requested nor submitted previously. This evidence is viewed as sufficient to reopen the proceedings.

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.

¹ The AAO also determined that the director had miscalculated the proffered wage as stated on the labor certification. The AAO stated the actual proffered wage is \$21.94 an hour or \$45,635.20 a year.

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 December 24, 1996. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$21.94, or an annual salary of \$45,635.20. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 1989.

On the petition, the petitioner claimed to have been established in January 1976, have 27 employees, and a gross annual income of \$875,000. The petitioner submitted a letter from [REDACTED] Associates, the petitioner's accountant. Mr. [REDACTED] stated that the petitioner's gross income and cash flow for the year 1996 was in excess of \$875,000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 5, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 1996 federal income tax return with all schedules and attachments, for either a corporation or a sole proprietorship. The director also requested that the petitioner submit copies of the beneficiary's Form W-2, if he was employed by the petitioner in 1996.

In response, the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax return for 1996, the beneficiary's 1996 W-2 Form that indicated he earned \$15,954, and a letter of employment verification from the beneficiary's former U.S. employer.

On February 3, 2003, the director denied the petition, stating that the 1996 federal tax return and the beneficiary's W-2 Form for 1996 were not sufficient to establish that the petitioner had the ability to pay the proffered as of the priority date. The director stated that the beneficiary earned \$15,954, and thus the petitioner had not established that the beneficiary was compensated at a level equal to or greater than that of the proffered wage of \$39,930.50.² The director also examined the petitioner's net income and net current

² As stated previously, the proffered wage is 45,635.20. Thus, the petitioner had to establish that it either paid the beneficiary a salary equal to or greater than this salary, or that its net income or net current assets were sufficient to pay the difference between the proffered wage and actual wages paid to the beneficiary.

assets for 1996 and stated both were insufficient to pay the difference between the beneficiary's wages and the proffered wage.

On appeal, the petitioner asserted that it was established in 1976, and has employed the beneficiary since 1989. The petitioner also stated that it had sent the beneficiary to various seminars, schools and training that help to build the petitioner's business. The petitioner's president stated that the petitioner guaranteed the beneficiary a yearly salary of \$39,930 even if it meant reducing the president's annual compensation. The petitioner stated that its business had a high turnover rate as workers continue to move on to more lucrative opportunities. The petitioner stated it was vital to the stability of her company to keep someone with the ability and experience of the beneficiary on its staff. Counsel submitted copies of the principal shareholder's individual federal tax return for 1996, copies of some of the petitioner's checking account statements for 1996, and selected copies of the petitioner's checking account statements for 1997 through 2002. Counsel also submitted copies of the beneficiary's W-2 form for 1997 to 2001, as well as a letter from a tax and financial consultant [REDACTED]

As previously stated, on appeal, the AAO determined that the petitioner has established its ability to pay the proffered wage during the final week of 1996; however, the AAO also determined that the petitioner had not submitted sufficient evidence to establish it had the ability to pay the proffered wage as of the 1996 priority date *and to the present time*. (Emphasis added.) On motion, counsel states that there was more than sufficient evidence to establish the petitioner's continued ability to pay past the 1996 priority date, and points out the beneficiary's W-2 statements, bank statements, and the letter from the petitioner's accountant. Nevertheless counsel submits all tax returns from 1996 to 2003. Counsel notes that in each tax year the petitioner earned gross revenues close to or in excess of one million dollars, and that each year the petitioner showed a payroll close to or in excess of \$300,000. Finally counsel notes that in tax year 2003, the petitioner had ordinary income of \$76,720. Counsel states that the petitioner shows a consistent increase in revenues and even in net income over the last eight years. Counsel cites to a previous AAO decision in which a petitioner showed a steady increase in income and had indicated on the I-140 petition that the position was not a new position.

Upon review of the record, counsel refers to a decision issued by the AAO concerning a petitioner's consistent increase in revenues, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore the AAO does not find its prior decision with regard to the petitioner's ability to pay the proffered wage in tax year 1996 to be binding on these proceedings. The AAO in its decision on the earlier appeal found that the petitioner's net current assets of \$4,221 could cover the wage for the one week remaining in tax year 1996 following the priority date of December 24, 1996, or \$1,050. However, the previous AAO decision was in error because 12 months of income should not be considered 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. Therefore in these proceedings, the AAO will examine the petitioner's ability to pay the proffered wage as of tax years 1996 to 2003.

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. The petitioner submitted W-2 salary statements for the beneficiary for the years 1996 to 2001. These documents indicate that the petitioner paid the beneficiary \$15,954 in 1996, \$16,882 in 1997, \$16,450 in 1998, \$19,150 in 1999, \$24,528 in 2000, and \$24,960 in 2001. Although these documents establish the petitioner employed the beneficiary from 1996 to 2001, they do not establish that the petitioner paid the beneficiary a salary equal to or greater than the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1996 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 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 net income for the tax years for 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003 are as follows: -\$8,625 in 1996, -\$5,165 in 1997, -\$10,273 in 1998, \$5,127 in 1999, \$16,220 in 2000, \$35,238 in 2001, \$54,816 in 2002, and \$76,720 in 2003. Since the petitioner established that it employed the beneficiary during the years 1996 to 2003, the petitioner has to only establish that it had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. In the tax years 2002 and 2003, the petitioner had sufficient net income to pay the entire proffered wage of \$45,635.20. In tax year 2001, the petitioner's net income of \$35,238 and the beneficiary's actual wages of \$24,960 are sufficient to pay the proffered wage of \$45,635.20. Thus, the petitioner has established that based on its net income, it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2001, 2002, and 2003. With regard to the tax years 1996, 1997, 1998, 1999, and 2000, the petitioner cannot establish its ability to pay the proffered wage based on its net income.

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.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. The petitioner submitted the following information for tax years 1996, 1997, 1998, 1999, and 2000:

	1996	1997	1998	1999	2000
Ordinary Income	\$ -8,625	\$ -5,165	\$ -10,273	\$ 5,127	\$ 16,220
Current Assets	\$ 100,350	\$ 47,350	\$ 47,350	\$ 50,850	\$ 47,520
Current Liabilities	\$ 96,029	\$ 36,884	\$ 55,466	\$ 59,891	\$ 4,492
Net current assets	\$ 4,321	\$ 10,466	\$ -8,116	\$ 9,041	\$ 42,758

These figures fail to establish the ability of the petitioner to pay the proffered wage in the years 1996 to 1999. As stated previously, the actual proffered wage is \$45,635.20.⁴ In 1996, the petitioner has demonstrated that it paid the beneficiary \$15,954. In 1996 the petitioner shows a net income of -\$8,625 and net current assets of \$4,221, and, therefore, has not demonstrated the ability to pay the difference between the wages paid and the proffered wage, namely, \$29,681.20, out of its net income or net current assets. In 1997, the petitioner has demonstrated that it paid the beneficiary \$16,882. In 1997, the petitioner shows a net income of -\$5,165 and net current assets of \$10,466, and, therefore, has not demonstrated the ability to pay the difference between the wage paid and the proffered wage, namely, \$28,753.20, out of its net income or net current assets. In 1998, the petitioner has demonstrated that it paid the beneficiary \$16,450. In 1998, the petitioner shows a net income of -\$10,273 and net current assets of -\$8,116, and, therefore, has not demonstrated the ability to pay the difference between the wage paid and the proffered wage, namely, \$29,185.20, out of its net income or net current assets. In 1999, the petitioner has demonstrated that it paid the beneficiary \$19,150. In 1999, the petitioner shows a net income of \$5,127 and net current assets of \$9,041, and, therefore, has not demonstrated the ability to pay the difference between the wage paid and the proffered wage, namely, \$26,485.20 out of its net income or net current assets.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ An hourly wage of \$21.94 multiplied by 2080 annual hours of work equals \$45,635.20.

With regard to tax year 2000, the petitioner demonstrated that it paid the beneficiary \$24,528. In 2000, the petitioner shows a net income of \$16,220 and net current assets of \$42,758, and, therefore, has demonstrated the ability to pay the difference between the wage paid and the proffered wage, namely, \$21,107.20 out of its current assets. Therefore, the petitioner established its ability to pay the proffered wage in tax years 2000, 2001, 2002, and 2003.

It is noted that the petitioner's president in correspondence submitted to the record stated that she was willing to reduce her annual compensation as one of the petitioner's officers in order to guarantee the beneficiary's salary. The AAO has considered the use of officer compensation in petitions involving personal services corporations and other similar corporations. Such cases involve petitions in which the officer is the sole shareholder and officer, and the record indicates the officer compensation is considered discretionary funds, among other issues. However the petitioner in the instant petition has not established that it only has one officer or shareholder with the flexibility to utilize part of the officer compensation to establish the petitioner's ability to pay the proffered wage. Thus, the use of the petitioner's president's compensation is not viewed as an additional source of funding with which to pay the proffered wage.

On motion, counsel states that the AAO should consider the petitioner's business viability, and also points to the petitioner's longevity, and continued business operations as factors to examine in determining the petitioner's ability to pay the proffered wage.

In reviewing the totality of the petitioner's circumstances, the AAO acknowledges that the petitioner is a firm that had been in business for 20 years at the time the Form ETA 750 was filed. The petitioner had \$869,791 in gross receipts and paid out \$275,370 in wages and salaries during the year in which the priority date was established. Counsel's argument concerning the petitioner's longevity, and number of employees cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1976 and employs approximately 27 employees. For the past eight years, the petitioner's gross income has consistently grown from close to \$900,000 to over a million dollars. In addition, the petitioner has paid increasing salaries and wages each year that have risen from an aggregate of \$250,000 in 1996 to close to \$350,000 in 2003. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained.