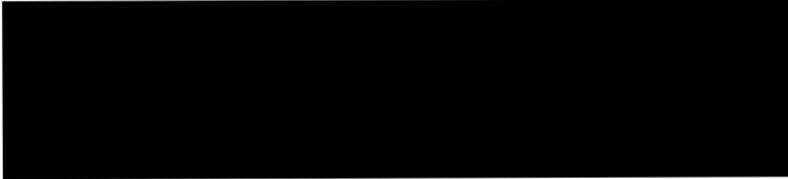




U.S. Citizenship  
and Immigration  
Services

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BC

FILE: WAC 04 025 51551 Office: CALIFORNIA SERVICE CENTER Date: **MAY 15 2006**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a construction worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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. 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 March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$17.44 per hour (\$36,275.20 per year). The Form ETA 750 states that the position requires one-year experience.

On appeal, the petitioner submits additional evidence.

With the petition, the petitioner submitted the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 12, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements for 2001, 2002, and 2003. As the Form ETA 750 stated that the petitioner employed the beneficiary since December 1996, the director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements from that date until the present. The director requested a job verification from the petitioner on its letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the beneficiary's U.S. Internal Revenue Service (IRS) Form 1040 tax return for year 2001, and, documents concerning petitioner, and the beneficiary's job as requested above.

The director issued a notice of intent to deny the petition on September 21, 2004. In response, the petitioner submitted it U.S. federal tax returns for 2001, 2002 and 2003

The director denied the petition on December 8, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that it has the means to pay the proffered wage.

The petitioner has submitted an explanatory letter dated January 6, 2005 to accompany the appeal statement.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary since December 1996. In 2001, the petitioner paid the beneficiary \$30,270.00, \$31,560.00 in 2002; and, \$36,165.00 in 2003 according to the Forms MISC-1099 submitted.<sup>1</sup> Since the proffered wage is \$36,275.20 per year, the petitioner has not paid the beneficiary the proffered wage according to the evidence submitted.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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); *Ubada v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the

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<sup>1</sup> According to the partial Form 1040 personal tax returns for the beneficiary, in 2001, line 12 (business income) states \$7,933.00, and in 2003, Line 12 states \$9,258.00. There was no explanation provided for this variance between income received and income stated on the returns.

petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,275.20 per year from the priority date of March 23, 2001:

- In 2001, the Form 1120 stated taxable income loss<sup>2</sup> of <\$157.00><sup>3</sup>.
- In 2002, the Form 1120 stated taxable income of \$285.00.
- In 2003, the Form 1120 stated taxable income of \$20,299.00.

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 2001, the petitioner paid the beneficiary \$30,270.00. In 2001, the Form 1120 stated taxable income loss of <\$157.00>. As the proffered wage is \$36,275.20 per year, the sum of wage paid and taxable income loss is less than the proffered wage.
- In 2002, the petitioner paid the beneficiary \$31,560.00 in 2002. In 2002, the Form 1120 stated taxable income of \$285.00. As the proffered wage is \$36,275.20 per year, the taxable income is less than the proffered wage.
- **2003, the petitioner paid the beneficiary \$36,165.00.** In 2003, the Form 1120 stated taxable income of \$20,299.00. As the proffered wage is \$36,275.20 per year, the sum of wages paid and the taxable income is more than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

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<sup>2</sup> IRS Form 1120, Line 28.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120 return stated current assets of \$1,000.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$1,000.00 in net current assets. Since the proffered wage is \$36,275.20 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$1,000.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$1,000.00 in net current assets. Since the proffered wage is \$36,275.20 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$3,000.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$3,000.00 in net current assets. Since the proffered wage is \$36,275.20 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

The petitioner's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor in years 2001 and 2002.

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.