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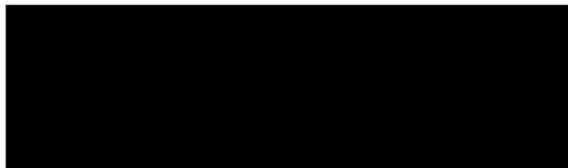
U.S. Department of Homeland Security  
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U.S. Citizenship  
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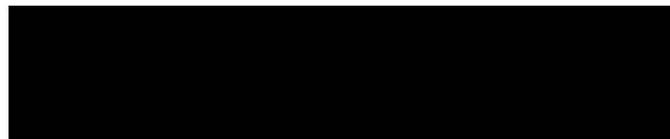
Office: VERMONT SERVICE CENTER

Date: **MAY 19 2006**

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

PETITION: 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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an international trading company. It seeks to employ the beneficiary permanently in the United States as a shipping/receiving supervisor. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 20, 2004 denial, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.25 per hour, which amounts to \$25,480.00 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that bank statements of the petitioner in the record show an average monthly balance sufficient to pay the proffered wage, while still leaving sufficient capital available to the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 14, 2001, the beneficiary claimed to have worked for the petitioner beginning in September 2000 and continuing through the date of the ETA 750B. However the record contains no other evidence corroborating the beneficiary's claim to have worked for the petitioner and no evidence indicating the amount of any compensation paid by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the instant case, the record contains no federal income tax returns for the petitioner. Therefore, the record provides no basis on which to evaluate the petitioner's net income as shown on its tax returns.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus,

the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

As noted above, the record in the instant case contains no federal income tax returns for the petitioner. Therefore the record provides no basis on which to calculate the petitioner's net current assets as shown on its tax returns. Nor has the petitioner submitted evidence in one of the other alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports or audited financial statements.

The record contains a copy of a letter dated April 8, 2004 from the petitioner's president and chief financial officer. The letter states as follows:

This is to certify that [the petitioner] is an international trading/money remittance company that has financial capacity to pay the wages of its employees.

In 2001, the company has had a gross income of \$266,201, while for 2002 its gross profit was \$267,177. During the said two-year period, the company had maintained an average monthly balance of \$15,000 in its business account, with occasional balance of as high as \$30,000.

As proofs of the company's sound financial condition, we are attaching copies of the company's bank statements covering the period from 2001 through 2002.

This certification is being submitted to established [sic] [the petitioner's] capacity to pay the wages of its employees.

(Letter from petitioner's President/C.F.R., April 8, 2004).

The I-140 petition states in Part 5 that the petitioner and employs three employees. The regulation at 8 C.F.R. § 204.5(g)(2) states that where a petitioner employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. Since the petitioner claims to employ only three employees, a statement from a financial officer is not an acceptable form of required evidence, beyond the three alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements. Therefore the April 8, 2004 letter fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

The record also contains copies of bank statements for an account of the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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.

Counsel states on appeal that bank statements of the petitioner in the record show an average monthly balance of approximately \$15,000.00 in the year 2001. Counsel states that the balances represent earnings or surplus, and that they could have been applied to an additional monthly salary of \$2,000.00 per month. Counsel states that disbursing a salary of \$2,000.00 every month would have reduced the average monthly balance to \$13,000.00, which was still a sufficient amount for the petitioner's monthly capitalization.

Notwithstanding counsel's assertions, bank statements show the amount in an account on a given date, and do not show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	2001	2002
January	-	\$31,009.72
February		\$20,456.60
March		\$16,419.26
April		\$20,253.30
May	-	\$15,876.15
June	\$10,025.53	\$18,481.34
July	\$10,908.65	\$14,905.31
August	\$4,202.40*	\$14,806.54
September	\$10,916.32	\$13,176.83
October	\$22,023.67	\$18,055.29
November	\$30,268.90	\$17,232.01
December	\$23,551.56	

\* No statement for August 2001 was submitted, but the August ending balance is shown as the initial balance on the September statement.

The above ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets. Moreover, no copies of bank statements were submitted for April 2001, which is the month of the priority date, nor for May 2001.

The record contains no other evidence relevant to the petitioner's financial situation.

In a letter dated October 8, 2004 counsel states that CIS has disregarded "administrative precedents" in denying the instant petition. (Letter from counsel, October 8, 2004). However, counsel cites no precedent which CIS has allegedly disregarded, nor does counsel point to any part of the director's decision which counsel alleges is specifically in error.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director noted the absence of federal tax returns for the year 2001, 2002 and 2003, and the absence of any Form W-2 Wage and Tax Statement of the beneficiary. The director correctly found that the letter dated April 8, 2004 from the petitioner's president and chief financial officer was not an acceptable form of evidence because the petitioner claimed to employ only three persons. The director noted that the April 8, 2004 letter was not audited or reviewed. The director's statement on that point appears to suggest that a reviewed financial statement would be an acceptable form of evidence. However, the regulation makes no reference to reviewed financial statements, and refers only to audited financial statements as one of the three alternative forms of required evidence. See 8 C.F.R. § 204.5(g)(2).

The decision of the director to deny the petition was correct, based on the evidence in the record before the director. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.