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U.S. Citizenship
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Services

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FILE: EAC 04 029 52073 Office: VERMONT SERVICE CENTER Date: **OCT 20 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 preference visa petition was denied by the Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile body repair firm. It seeks to employ the beneficiary permanently in the United States as a foreign auto body repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$22.00 per hour, which amounts to \$45,760 per annum. On the Form ETA 750B, signed by the beneficiary on October 10, 2002, the beneficiary claims to have worked for the petitioner since July 2000.

On Part 5 of the visa petition, filed on November 10, 2003, the petitioner claims to have been established in 1997, to currently employ three workers, to have a gross annual income of \$565,576, and to have a net annual income of \$361,336. In support of its ability to pay the beneficiary's proposed wage offer of \$45,760 per year, and in response to the director's request for copies of the petitioner's federal tax returns and any Wage and Tax

Statements (W-2s) issued to the beneficiary in 2001-2003, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002 and 2003. They reflect that the petitioner files its federal tax returns using a standard calendar year. They contain the following information:

	2001	2002	2003
¹ Ordinary Income	\$20,610	\$44,329	\$44,835
Current Assets (Sched. L)	\$ 2,480	\$7,602	\$ 4,908
Current Liabilities (Sched. L)	\$19,332	\$46,308	\$75,854
Net current assets	-\$16,852	-\$38,706	-\$70,946

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120S corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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's response did not include any W-2s issued to the beneficiary showing wages paid. Relevant to the beneficiary's wages, a hand-written notation dated "September 26" on the petitioner's letterhead was submitted showing gross wages of \$880 and net wages of \$671 referencing "[REDACTED]". Copies of three of the beneficiary's bank statements from April, May and June of 2004 have also been provided showing regular deposits of \$671.

The director reviewed the petitioner's financial data and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date. The director further noted that the addresses listed on the beneficiary's bank statements as the origination of the deposits either state "[REDACTED]" or "[REDACTED]". The director determined that without additional documentation, based solely on one handwritten statement, it couldn't be concluded that the deposits originated as wages from the petitioner or that they establish the ability to pay the proffered wage as of the priority date.

On appeal, counsel summarizes the exhibits offered and asserts that they demonstrate the petitioner's ability to pay the proffered wage. Counsel resubmits copies of the petitioner's 2001, 2002 and 2003 corporate tax returns. He also provides a copy of the beneficiary's 2004 W-2 and corresponding individual tax return. The W-2 reflects that the petitioner paid the beneficiary wages of \$46,640 in 2004.

¹ For purposes of this review ordinary income will be treated as net income.

² 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.

Counsel also supplied a letter, dated March 1, 2005, from a certified public accountant [REDACTED] Mr. [REDACTED] maintains that the petitioner's net income before the depreciation expense should be considered and that the employer's knowledge and expertise in meeting overhead is shown by her experience in the industry.

These assertions are not persuasive. 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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As mentioned above, on appeal, the evidence shows that the petitioner paid the beneficiary \$46,640 in 2004, which exceeds the proposed wage offer of \$45,760. No other evidence of wages paid in previous years was provided.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during relevant period beginning at the visa priority date, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Although a depreciation deduction does not require or represent a specific cash expenditure during the year claimed, it does represent the systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. 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. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets.

While the evidence indicates that the petitioner paid slightly more than the proffered salary in 2004, and may be reasonably construed to supply the slight shortfall to its net income in 2003, and thus have the ability to pay the proffered wage of \$45,760 in those years, in 2002, neither its net current assets of -\$38,706, nor its net income of \$44,329 was sufficient to pay the proposed wage offer. Similarly, in 2001, it is apparent that neither the petitioner's net income of \$20,610, nor its net current assets of -\$16,852 was sufficient to pay the proffered wage.

The petitioner has not established its continuing ability to pay the proffered wage beginning as of the priority date as required by the regulation at 8 C.F.R. § 204.5(g)(2). It is further noted that a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the evidence does not establish that the petitioning company had the continuing ability to pay the proffered beginning on the visa priority date of April 26, 2001, the petition may not be approved.

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.