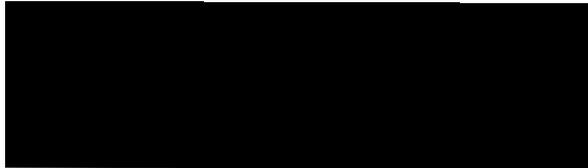


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U.S. Citizenship
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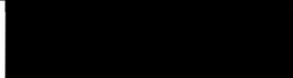
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FILE:



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Office: TEXAS SERVICE CENTER

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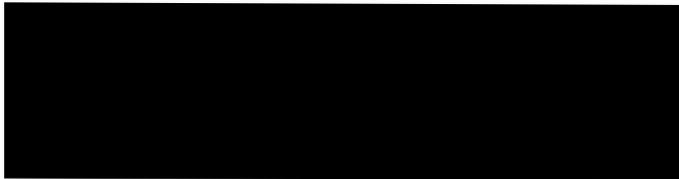
Petitioner:

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an underground communication and cable installation firm. It seeks to employ the beneficiary permanently in the United States as a cable supervisor. 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 director erred in failing to determine the petitioner's continuing financial ability to pay the proffered wage.

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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 30, 2001. The proffered wage as stated on the Form ETA 750 is 27.48 per hour, which amounts to \$57,158.40 per year. The ETA 750B, signed by the alien beneficiary on March 23, 2001, indicates that he has worked for the petitioner from an undetermined date until the present. A subsequent affidavit from the employer establishes his work commencement date as June 1998.

On Part 5 of the visa petition, filed on January 13, 2004, it is claimed that the petitioner was established in 1998, has a gross annual income of \$289,259.17, a net annual income of \$51,745.70, and currently employs fifteen workers that are "paid as independent contractors."

As evidence of its continuing financial ability to pay the certified wage of \$57,158.40 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. They indicate that the petitioner files its taxes using a standard calendar year. The tax returns contain the following information:

	2001	2002	2003
Ordinary Income ¹	\$ 17,291	-\$ 21,597	\$101,151
Current Assets (Sched. L)	\$209,803	\$217,052	\$268,452
Current Liabilities (Sched. L)	\$266,576	\$296,292	\$273,413
Net Current Assets	-\$ 56,773	-\$ 79,240	-\$ 4,961

As noted above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets.² Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The Wage and Tax Statements (W-2s) provided to the record also show that the petitioner paid compensation to the beneficiary as follows:

Year	Wages
2001	\$19,604
2002	\$13,136.50
2003	\$25,761.50

The director denied the petition on March 30, 2005. She determined that although the petitioner's net income in 2003 was sufficient to pay the proffered wage, the petitioner had failed to establish its continuing ability to pay the proffered wage beginning at the priority date because either its net income or payment of actual wages was far less than that necessary to demonstrate that it had sufficient funds to pay the certified salary.

On appeal, counsel provides a letter from the petitioner's accountant, [REDACTED] CPA and asserts that the petitioner has demonstrated its continuing ability to pay the proffered wage. Mr. [REDACTED] explains that the petitioner elected from its inception that it would report income and deductions using the accrual method of accounting. In order to better demonstrate the petitioner's ability to pay the proffered wage, he states that he is providing financial statements using the 'percentage of completion method of accounting.' In this way, he states that there were sufficient funds to pay the beneficiary's proposed wage offer in 2001 and 2002. Accompanying this letter, Mr. [REDACTED] provides compiled financial statements for 2001 and 2002.

Regarding this documentation, it is noted that such compiled financial statements are not probative evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the

¹ For the purpose 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. A compilation is a presentation of financial information that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). By its own terms it is based upon the representations of management. As these documents provided on appeal are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during 2001 and 2002. Although the regulation allows additional evidence such as bank account records, profit/loss statements, or personnel records may be submitted by the petitioner or requested by the director in appropriate cases, it neither suggests nor implies that CIS is obliged to accept unaudited financial statements in lieu of the previously supplied federal tax returns.

Moreover, the amounts shown on the petitioner's tax returns shall be considered as they were submitted to the Internal Revenue Service (IRS), not as amended pursuant to the accountant's adjustments as shown on the unaudited financial statements prepared under a different accounting method. If the petitioner wished to persuade this office that such accounting methodology supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles should have been submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

In this matter, as shown above, the \$19,604 in wages paid to the beneficiary in 2001 was \$37,554.40 less than the proffered wage of \$57,158.40 per year. In 2002, the beneficiary's wages of \$13,136.50 were \$44,021.90 less than the proffered salary.

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 (or net current assets) as 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). 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.

As noted above, it is noted that in 2003, the petitioner's net income of \$101,151 could have covered the \$31,396.90 difference between the beneficiary's actual wages and the certified wage. Thus, for 2003, the petitioner established its ability to pay the proffered wage.

In 2001, however, neither the petitioner's net income of \$17,291 nor its net current assets of -\$56,773 could cover the \$37,554.40 shortfall resulting from the comparison of the actual wages paid to the beneficiary and certified wage as set forth in the alien labor certification. Similarly, in 2002, neither the petitioner's net income of -\$21,597 nor its net current assets of -\$79,240 could pay the \$44,021.90 difference between the beneficiary's actual wages and the proffered salary. The evidence did not demonstrate that the petitioner had the financial ability to pay the proffered salary in 2001 or 2002.

Based on a review of the evidence contained in the underlying record and submitted on appeal, the AAO concurs with the director's determination that the petitioner has not demonstrated its continuing ability to pay the \$57,158.40 annual proffered wage, beginning at the visa priority 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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.