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U.S. Citizenship
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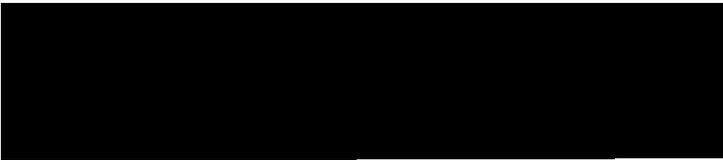
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: 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
for 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 case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a general construction firm doing interior and exterior renovation.¹ It seeks to employ the beneficiary permanently in the United States as a carpenter. 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, additional documentation is submitted to show that the petitioner has had the ability to pay the beneficiary's proffered wage since the priority date.

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).

¹ 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." In this case, the person listed on the Form G-28, Notice of Entry of Appearance as Attorney or Representative, is not an authorized representative. As such, the petitioner shall be considered self-represented.

Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 was originally \$19.45 per hour, which amounts to \$35,399 per annum based on a 35-hour workweek as stated on the labor certification. Additional notations appear in the margin suggesting that the wage was amended to \$37.36 per hour as of 5/15/2003. These notations are initialed by "PD," which coincides with the initials of the petitioner's principal shareholder, but are not stamped by the DOL. As it is unclear if the amendment was approved by the DOL, this decision will use the lower wage for this review. On remand, the director should request clarification from the petitioner.

On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary claims to have worked for the petitioner since November 1999.

On Part 5 of the visa petition, filed on March 19, 2004, the petitioner claims to have been established in 1995, to have a gross annual income of \$250,000, to have a net annual income of \$88,000, and to currently employ one to two laborers. The record contains a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2000. It reflects that the petitioner files its federal tax returns using a fiscal year running from October 1st to September 30th of the following year. Thus, the 2000 return reflects the petitioner's financial data from October 1, 2000 to September 30, 2001. The return contains the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets:

2000	
Taxable Income before NOL	\$ 28,604
Deduction (Form 1040)	
Current Assets (Sched. L)	\$ 21,146
Current Liabilities (Sched. L)	\$ 8,324
Net current assets	\$ 12,822

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.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 possible 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 1120 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.

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.

The director denied the petition on December 28, 2004. Noting that the petitioner's financial data shown on its 2000 federal tax return failed to demonstrate sufficient funds to cover the proffered wage, the director concluded the petitioner had not established its ability to pay the certified salary.

On appeal, the petitioner provides a copy of its 2001 corporate tax return. It covers the period from October 1, 2000 to September 30, 2001. It shows that the petitioner declared net taxable income of -\$14,221 before the NOL deduction. Schedule L reflects that it had \$2,443 in current assets and \$8,200 current liabilities, yielding -\$5,759 in net current assets.

Several assertions are made on appeal including why the proffered wage is reviewed as an annual wage when it appears as an hourly wage on the ETA 750A and that the employer can place the beneficiary on the payroll at a weekly rate of \$1,307.60.

The assertion is also made that the petitioner desires to eliminate payments to subcontractors and to hire the alien as an employee, replacing the subcontractors. No direct evidence is provided in support of this contention, such as a notarized affidavit from the petitioner: which attests to the subcontractors having performed the proffered position from the priority date onwards; which attests to the petitioner's desire to replace the subcontractors with the beneficiary, making their wages available to pay the beneficiary; etc. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the beneficiary claimed on the Form 750B that the petitioner already has him in his employ. It is difficult, then, to conclude that the petitioner could use the beneficiary to replace the subcontractors as it appears to need both the beneficiary and the subcontractors to handle its workload.

The DOL determines whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers. It is noted though that this does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and whether a beneficiary meets the qualifications for the proffered position as set out on the Form ETA 750. CIS is empowered to make a *de novo* determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Under the DOL's interpretation of the labor certification process, the position being offered by an employer must be located in the United States, full-time, and permanent. See 20 C.F.R. § 656.3. Whether expressed as an hourly, weekly, or yearly wage on the approved labor certification, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner's supporting financial documentation consist of either federal tax returns, audited financial statements, or annual reports. CIS generally annualizes the hourly or weekly wages shown on a labor certification in order to more accurately compare it to financial documentation a petitioner may provide, which is usually based on yearly data, such as annual reports, federal tax returns, or audited financial statements. If an employer has the financial ability to place a beneficiary on the payroll at a weekly salary derived from the wage figure shown on the labor certification, it should also mean that the employer can pay a yearly salary derived from the labor certification and that the employer can provide documentation to demonstrate this. Thereby, the petitioner may demonstrate that it has had the continuing ability to pay a given wage for a full-time, permanent

position. In this case, the annual wage \$35,399 is derived from multiplying the original hourly wage of \$19.45 by 35 (hours) and then by 52 (weeks). Moreover, while current regulations do not obligate the petitioner to begin paying the wage offered in the ETA-750A until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification,³ the *ability* to pay the proffered wage, as set forth in 8 C.F.R. § 204.5(g)(2), must be demonstrated as of the priority date and *continuing* until the beneficiary obtains lawful permanent residence.⁴ In this case, the priority date is April 26, 2001.

If the record contains no evidence of the petitioner's employment and payment of wages to the beneficiary, in order to determine the petitioner's continuing ability to pay the proposed wage offer, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If this figure 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)). 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 when determining the petitioner's ability to pay. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income, as is suggested here on appeal.

If an examination of the petitioner's net taxable income or any wages that may have been paid to the beneficiary fail to successfully demonstrate an ability to pay the proffered wage, CIS will review a petitioner's net current assets. As noted above, CIS will consider *net current assets* as an *alternative* method of demonstrating the ability to pay the proffered wage.

The evidence in the record fails to demonstrate the petitioner's ability to pay the proffered wage in 2000 or 2001.

While the beneficiary indicated on the Form ETA 750-B that he was employed by the petitioner, there is no direct evidence of this in the record. It is also noted that the director did not issue a request that the petitioner provide documentation, such as the Form W-2, Wage and Tax Statement, for the beneficiary, to demonstrate that it had employed and paid the beneficiary during the relevant period.

³ This may not foreclose the existence of a separate legal obligation to pay at least the prevailing wage pursuant to different regulatory provisions applying to aliens with non-immigrant status.

⁴ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage, is clear.

The petitioner's 2000 federal tax return shows that neither its \$28,604 net income, nor its \$12,822 in net current assets, was sufficient to cover the certified wage during that year. In 2001, neither the petitioner's -\$14,221 in net income, nor its net current assets of -\$5,759 was enough to pay the proffered salary.

Although the current record indicates that the petitioner has not established its continuing ability to pay the proffered salary, the case will be remanded in order for the director to request additional evidence of the beneficiary's wages or compensation paid as suggested by the ETA 750-B pursuant to 8 C.F.R. § 103.2(b)(8) and a clarification of the amendment to the certified wage as indicated on the ETA 750 and discussed above.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional and updated evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.