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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAY 02 2007
SRC 03 127 52548

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:
[REDACTED]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a lath and plaster firm. It seeks to employ the beneficiary permanently in the United States as a latherer and plasterer. 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.50 per hour, which amounts to \$34,320 per annum. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claims to have worked for the petitioner since March 1996.

On Part 5 of the visa petition, filed on April 1, 2003, the petitioner claims to have been established in 1993 and to currently employ twelve workers.

With the petition and in support of the petitioner's ability to pay the proffered wage, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002. It reflects that the petitioner files

its federal tax returns using a standard calendar year. The returns contain the following information pertinent to the petitioner's ordinary income¹, current assets and liabilities, and net current assets.

	2002
Ordinary Income	\$24,548
Current Assets (Sched. L)	\$ 6,500
Current Liabilities (Sched. L)	\$ 4,985
Net current assets	\$ 1,515

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 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 also provided an internally generated copy of its profit and loss detail report for 2002 consisting of an itemization of payroll checks issued.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On September 2, 2005, the director advised the petitioner that as it had petitioned for two other beneficiaries, it should submit copies of its complete 2001 and 2003 income tax returns, copies of Wage and Tax Statements (W-2s), as well as copies of the Immigrant Petition for Alien Worker (I-140) filed for the other two beneficiaries in order to determine whether the petitioner had the continuing ability to pay all three beneficiaries as of the priority dates.

In response, the petitioner, through counsel, provided copies of its 2001 and 2003 corporate tax returns. They contain the following:

	2001	2003
Ordinary Income	\$18,741	\$13,052
Current Assets (Sched. L)	\$ 7,575	none listed
Current Liabilities (Sched. L)	\$ -0-	none listed
Net current assets	\$ 7,575	n/a

¹ For the purpose of this review, ordinary income will be considered as net taxable 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.

The petitioner also supplied copies of payroll checks issued on the petitioner's behalf by a firm engaged to provide that function. In her transmittal letter, counsel advised that the payroll company could not locate W-2s for 2001 and was providing these records as a substitution. The records show two checks issued to the beneficiary in 2001. On November 30, 2001, he was paid \$130.00. On November 23, 2001, he was paid \$260.00. Copies of the beneficiary's W-2s for 2002 and 2003 were also provided. They indicate that the petitioner paid the beneficiary \$10,120 in 2002. In 2003, the petitioner paid him \$7,744.

The petitioner also submitted copies of the current petitions of the labor certifications and I-140s that had been filed on behalf of two other beneficiaries. The beneficiary of the current petition and the other two aliens share the same priority date, position and proffered salary.

The director denied the petition on December 2, 2005. Noting that the petitioner's records failed to establish that anyone employed by the petitioner in 2002 and 2003 had been shown to have been compensated at a salary commensurate with the proffered wage, the director concluded that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage as of the priority date of April 30, 2001 to all three beneficiaries.

On appeal, counsel asserts that the director erred in failing to recognize the petitioner's gross receipts had reached over \$631,000 in 2001 and that if depreciation were added back to net income then the result would exceed the proffered wage. Similar calculations using the 2003 figures would also result in an excess of \$2,000 over the proposed wage offer. Counsel also maintains that the director is restricted in reviewing only the petitioner's ability to pay the beneficiary in the instant case and not include any other beneficiaries in her calculations.

These assertions are not persuasive. Although the petitioner may seek to sponsor more than one beneficiary, it must show that it has had sufficient financial ability to pay all the proffered wages beginning at the individual priority dates. In some cases, where the priority and filing dates are the same, but the financial information supports fewer beneficiaries than the petitioner has sponsored, the petitioner may be requested to elect the beneficiaries for whom it wishes to continue the process. The director's decision is pertinent, however, to the specific case under consideration. With respect to the instant beneficiary, 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 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. In this case, in 2001, the record reflects a total of \$390 paid to the beneficiary, which is \$33,930 less than the proffered wage of \$34,320. In 2002, the beneficiary's compensation of \$10,120 was \$24,200 less than the proposed wage offer. In 2003, his compensation was \$26,576 less than the proffered wage.

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 taxable 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*, and *Ubeda v. Palmer*; 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, rather than the petitioner's gross income as emphasized here on appeal. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. 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 taxable 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. As noted above, CIS will consider *net current assets* as an *alternative* method of demonstrating the ability to pay the proffered wage.

In this case, even if this beneficiary were the only one for whom an I-140 has been filed, the petitioner's 2001 federal tax return shows that neither its \$18,741 ordinary income, nor its net current assets of \$7,575, was sufficient to cover the \$33,930 deficit resulting from a comparison of actual compensation paid and the proffered wage. The ability to pay the proffered wage has not been established for 2001.

In 2002, the petitioner's \$24,548 in ordinary income was sufficient to pay the \$24,200 difference between the beneficiary's actual compensation of \$10,120 and the proffered wage of \$34,320. The ability to pay the certified wage has been demonstrated for 2002 if this were the only beneficiary under consideration. The remaining \$348 could be applied to one of the other two beneficiaries for whom the petitioner has filed an I-140.

In 2003, the petitioner's reported ordinary income of \$13,052 was not enough to cover the \$26,576 difference between the beneficiary's actual compensation of \$7,744 and the proposed wage offer of \$34,320.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. Regarding this beneficiary, based on the evidence contained in the underlying record and after consideration of the argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.