U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

AUG 0 3 2004

FILE: WAC-03-053-50576 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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: 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a car wash. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic, car wash. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed 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. On appeal counsel states that the petitioner's gross income has been sufficient to pay the proffered wage to the beneficiary.

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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification 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 petition's priority date in this instance is February 16, 2001. The beneficiary's salary as stated on the labor certification is $17.78 per hour or $36,982.40 per year.

The evidence submitted initially and in response to an RFE issued by the director included the following: a copy of a letter dated April 11, 1988 from a former employer of the beneficiary in Mexico confirming the beneficiary's experience as a car wash maintenance mechanic from January 1986 until March 1988; copies of the beneficiary's Form W-2 wage and tax statements for the years 1988 through 2002; and copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 2001 and 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief accompanied by the following evidence: additional copies of the beneficiary's Form W-2 wage and tax statements for 2001 and 2002; and copies of the petitioner's Form 100S California S corporation franchise or income tax returns for 2001 and 2002.

Counsel states on appeal that the petitioner had substantial gross sales and substantial total income in 2001 and 2002. Counsel asserts that deductions for salaries and wages included payments to the beneficiary of $19,400.00 as a part-time employee in 2001 and $31,200.00 as a full-time employee in 2002. Counsel states that even though the petitioner's total deductions exceeded its total income in each of those years, the petitioner had sufficient resources to pay the proffered wage in each of those years.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (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.

The beneficiary's Form W-2 wage and tax statements show payments by the petitioner to the beneficiary of $19,400.00 in 2001 and $31,200.00 in 2002. Since each of those figures is less than the proffered wage of $36,982.40 the wage and tax statements are insufficient to establish the petitioner's ability to pay the proffered wage in those years. The amounts needed to raise the beneficiary's wages to the proffered wage were $17,582.40 for 2001 and $5,782.40 for 2002.

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, 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. 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 (7th 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.

The evidence in the record indicates that the petitioner is an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: -$33,878.00 for 2001; and -$9,767.00 for 2002. Since each of those figures is negative they fail to establish the ability of the petitioner to pay the proffered wage.

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 the 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.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$10,264.00 for the beginning of 2001; $23,226.00 for the end of 2001; and $31,919.00 for the end of 2002. The petitioner's net current assets for the beginning of 2001 are negative, and they therefore fail to establish the ability of the petitioner to pay the proffered wage. However, the net current assets of $23,226.00 for the end of the year 2001 are greater than the amount of $17,582.40 which was needed to raise the beneficiary's actual compensation to the proffered wage that year. Therefore, even though the petitioner began the year 2001 with negative net current assets, during the course of that year the petitioner accumulated sufficient net current assets to more than cover the wage increase needed to pay the proffered wage to the beneficiary that year. The net current assets of $31.919.00 for the end of the year 2002 are also greater than the amount of $5,782.40 which was needed to raise the beneficiary's actual compensation to the proffered wage that year.

Based on the foregoing analysis, the net current assets of the petitioner for the end of 2001 and the end of 2002 are sufficient to establish the petitioner's ability to pay the proffered wage in each of those years. The year 2001 is the year of the priority date, and the year 2002 is the most recent year for which a tax return was available as of the August 10, 2003 date of the director's decision. Therefore 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.

In his decision the director correctly stated the petitioner's net income for the years 2001 and 2002 and correctly calculated the petitioner's year-end net current assets for each of those years. The director incorrectly described those net current assets as "cash assets," though, in fact, substantial portions of the petitioner's year-end current assets in each of those years were not cash, but rather were inventories. The director compared the petitioner's net current assets to the proffered wage and found them insufficient to pay the proffered wage in each of the years at issue. The director erred, however, if failing to credit the amounts of the beneficiary's actual compensation in 2001 and 2002 toward the proffered wage. This error caused the director to incorrectly conclude that the petitioner's net current assets were insufficient to pay the proffered wage in each of those years.

For the foregoing reasons, the petitioner's appeal overcomes the director's decision, based on the evidence in the record prior to the director's decision.

On appeal the petitioner submits for the first time copies of the petitioner's Form 100S California S corporation franchise or income tax returns for 2001 and 2002. The information on those returns is consistent with the information on the petitioner's Form 1120S U.S. income tax returns for an S corporation which were submitted prior to the director's decision and which are analyzed above. Nothing in the evidence submitted for the first time on appeal is inconsistent with the conclusion that the appeal overcomes the director's decision.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.