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U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC-03-064-55949 Office: CALIFORNIA SERVICE CENTER Date: AUG 11 2004

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

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 dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a shop mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 a brief and additional evidence.

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 the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $18.36 per hour, which amounts to $38,188.80 annually.

With the petition, the petitioner submitted its Form 1120 U.S. corporation income tax return for 1998 through 2001. The tax returns reflect the following information for the following years:

	1998	1999	2000	2001
Net income[1]	-$20,718	$16,963	$15,138	$0
Current Assets (from Schedule L)[2]	$38,499	$37,107	$43,985	$35,696
Current Liabilities (from Schedule L)	$24,286	$17,289	$11,715	$13,379
Net current liabilities	$14,213	$19,818	$32,270	$22,317

[1] Taxable income before net operating loss deduction and special deductions on Line 28.
[2] The AAO explains from where these figures are obtained in greater detail on pages 4-5 of this decision.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 28, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested evidence of the relationship between the petitioner and Foothill Express, the name of the sponsoring employer on the Form ETA 750A.

In response, counsel for the petitioner requested an additional thirty (30) days to respond stating that the request for evidence was misplaced in his files.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 15, 2003, denied the petition. The director noted that the petitioner could not pay a proffered wage of $38,188.80 out of either its net income or net current assets for any of the relevant years.

On appeal, counsel asserts that the CIS is full of "ninnies" who intentionally misstated figures on the petitioner's tax returns as a communist conspiratorial act of sabotage. The petitioner submits the first page of its previously submitted tax returns as well as the first page of its 2002 tax return showing net income of $6,020.[3]

At the outset, the director erred in accepting the petitioner's untimely response to the request for evidence.[4] The petitioner was provided 84 days (twelve weeks) to provide a response to the director's request for evidence. Three additional days were provided because the request for evidence was sent to the petitioner by mail. The request for evidence was issued on April 28, 2003. The response was due on July 24, 2003, including the additional three days. No response was ever received by the petitioner other than a late request to extend the response time due to misplacing the request for evidence received on August 7, 2003, and the director's decision was dated August 15, 2003 denying the petition.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

> Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

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[3] A copy of the 2002 tax return submitted in a late response to the director's request for evidence contains the complete return with Schedule L, which reflects current assets of $47,055, current liabilities of $16,063, and net current assets of $30,992.

[4] The director correctly noted that no extension of time may be granted for a response to a request for evidence.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "(13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The regulations are clear that failure to respond to a request for evidence *shall* be considered abandoned and denied (emphasis added). Thus, the director should not have exercised favorable discretion in accepting late evidence and should have denied the petition as abandoned for failure to provide a timely response to the director's request for evidence.

Since the director adjudicated the case on the merits, the AAO will address the substantive issues that arise on appeal.

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 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, 2001, or 2002.

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 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner's net income for 1998 through 2002 was -$20,718, $16,963, $15,138, $0, and $6,020, respectively, of which no figures could cover the proffered wage of $38,188.80 for any year. Thus, the petitioner did not establish its ability to pay the proffered wage out of its net income for 1998 through 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. On appeal counsel severely chastises the director for allegedly misstating "net current assets." Counsel then proceeds to state the petitioner's total assets. The petitioner's total assets, however, include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

While counsel confuses net current assets with total assets, net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 net current assets during the years in question, 1998 through 2002, however, were only $14,213, $19,818, $32,270, $22,317, and $30,992, respectively, all figures which are lower than the proffered wage of $38,188.80. As such, the petitioner has not established its ability to pay the proffered wage out of its net current assets for 1998 through 2002. The petitioner's net current assets were correctly calculated by the director in 1999, 2000, and 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998. In 1998, the petitioner shows a net income of -$20,718 and net current assets of only $14,213, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1998.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a net income of only $16,963 and net current assets of only $19,818, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of only $15,138 and net current assets of only $32,270, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only $0 and net current assets of only $22,317, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a net income of only $6,020 and net current assets of only $30,992, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not

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[5] 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.

demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 through 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Additionally, the AAO concurs with the director's findings in his request for evidence requesting evidence of the relationship between the petitioner and the employing entity on the Form ETA 750A, Foothill Express. The record contains no evidence that the petitioner qualifies as a successor-in-interest to the predecessor entity, Foothill Express. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Even if a petitioner was doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest.[6] In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.

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[6] In this case, the address of the petitioner does not match the address of Foothill Express.