U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 04 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general automotive repair firm. It seeks to employ the beneficiary permanently in the United States as an auto 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 asserts that the petitioner's evidence establishes its continuing 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 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 12, 2001. The proffered wage as stated on the Form ETA 750 is $630.00 per week, which amounts to $32,760 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1999.

In Part 5 of the petition, filed November 21, 2002, the petitioner claims to employ three workers. In support of its ability to pay the proposed wage offer of $32,760, the petitioner initially submitted some payroll records from 2002 and a copy of a Wage and Tax Statement (W-2) issued by the petitioner to the beneficiary for the year 2000. It shows that the petitioner paid the beneficiary $28,047 in wages that year.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on February 24, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that the evidence must contain 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 instructed the petitioner to

submit a copy of the beneficiary's 2002 W-2, copies of its federal quarterly tax return and a copy of its state unemployment compensation report.

In response, the petitioner failed to provide any federal income tax returns, annual reports, or audited financial statements. It did submit a copy of the beneficiary's 2002 W-2, which showed that the petitioner paid the beneficiary $27,500 in wages. The petitioner also supplied copies of two quarterly federal tax return for 2001, four quarterly tax returns filed in 2002, and its March 2003 quarterly tax return. During 2002, it paid an average of $12,300 in total wages each quarter. In 2003, it paid $8,975 in cumulative wages. It also provided quarterly wage reports showing that it paid $10,920 in wages to the beneficiary during the first and second quarters of 2001.

In addition, counsel submitted copies of three of the petitioner's checking account statements. One statement is dated December 31, 2001, and shows a balance of approximately $26,480. One statement is dated March 31, 2003, and shows a balance of approximately $24,775. The third statement does not reveal a date, but shows a balance of approximately $17,530.

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 September 22, 2003, denied the petition. The director reviewed the financial documentation submitted, but noted that the evidence failed to demonstrate that the petitioner could pay the difference between the actual wages paid to the beneficiary and the proffered wage.

On appeal, counsel asserts that the director erred in interpreting the financial evidence submitted and stated that it showed the petitioner's ability to pay the difference between wages paid to the beneficiary and the proffered wage. The appeal was filed October 24, 2003. Part 2 of the notice of appeal indicates that counsel is submitting a brief and/or evidence to the AAO within 30 days. As of this date, nothing further has been received to the record. The AAO's decision is based on the record as it currently stands.

As noted by the director, reliance on a few bank statements to show the petitioner's continuing ability to pay the beneficiary's proposed wage offer is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, the three bank statements submitted in this matter, show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

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 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 less than the proffered wage, consideration will be given to that compensation. In this case, the record discloses that the petitioner paid the beneficiary $4,713 less than the proffered wage in 2000, $21,840 less in 2001, and $5,260 less than the proffered wage in 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, as noted by the director, 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid other wages in excess of the proffered wage is insufficient. 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 an alternative method of evaluating a petitioner's ability to pay a proffered wage, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets and current liabilities are shown on Schedule L. 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.

In this case, as the petitioner failed to submit copies of its federal tax returns, audited financial statements or annual reports, no further analysis can be made in examining whether the petitioner's net income or net current assets could have covered the difference between the wages paid to the beneficiary and the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that the documentation submitted in support of the beneficiary's qualifying past experience for the job offered of auto mechanic does not appear to satisfy the terms of the labor certification. The labor certification stipulates only that an applicant must have two years of experience in the related occupation of auto mechanic to qualify for the position offered. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) requires letters from employers or trainers specifically describing the experience, job duties and length of time served in a past position. In this case, the record contains a letter that attests to the beneficiary's past experience as an "industrial electrician" and a "mechanic electrician," but fails to describe any experience as an auto mechanic. Another letter submitted to the record by "Kris Best" of Mercer Automotive, states that the beneficiary worked for that employer in 1997 and 1998, as an auto mechanic, but was not able to provide the exact date of hire.

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[1] 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 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.