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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN 02 278 50467 Office: NEBRASKA SERVICE CENTER Date: SEP 15 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: 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, 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 retail bridal shop. It seeks to employ the beneficiary permanently in the United States as a custom design specialist. 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, the petitioner submits additional evidence and asserts that it has the financial 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 February 6, 2002. The proffered wage as stated on the Form ETA 750 is 17.20 per hour, which amounts to $35,776 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, filed September 5, 2002, the petitioner claims to have been established in 1997, to have a gross annual income of $207,000, and to currently employ three workers. In support of its ability to pay the proffered wage, the petitioner initially submitted no evidence.

To determine the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 28, 2002, 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.

In response, the petitioner submitted a copy of Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. It was signed on March 12, 2002 and indicates that the petitioner files its taxes using a standard calendar year. It is marked as the petitioner's "final return."[1] The petitioner also submitted a copy of its 2000 corporate tax return, which was signed on January 16, 2002 and similarly marked as a "final return." Although this tax return data is less relevant than the information contained in the petitioner's 2001 return, with regard to the petitioner's ability to pay the proffered wage as of the priority date of February 6, 2002, the information contained in both tax returns is presented below:

	2000	2001
Net income	-$2,695	$13,614
Current Assets	$29,443	$ 9,625
Current Liabilities	$ -0-	$ -0-
Net current assets	$29,443	$ 9,625

It is also noted that that the petitioner declared no salaries and wages paid in either year, however, labor costs of $26,504 were reported in 2000 and $24,773 were declared as labor costs in 2001.

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 February 19, 2003 , denied the petition.

On appeal, the petitioner submits a letter, dated March 17, 2003, from its president [redacted] states that two workers who had been on her payroll in 2000 and 2001, left her employ in 2002 and she planned to replace them with the beneficiary, so that the net effect to her payroll will be zero. She further states that she, her mother and daughter are working to fill the gap. In support of her assertion, Ms [redacted] submits a copy of a state of Illinois "Notice of Change" form signed by Ms [redacted] on January 26, 2003. It indicates that the petitioning business ceased employing workers on June 30, 2002. It also lists two employees, [redacted] and [redacted] who were paid "$-0-" wages during the fourth quarter of 2002. Along with this, four copies of the petitioner's internally generated accounting records are submitted, including a document entitled "Suta Report" showing no wages paid to [redacted] and [redacted] during the last quarter of 2002, and a document entitled "940 Annual Futa Report," covering the period from January 1, 2002 to December 31, 2002. It shows that during the first quarter of 2002, the petitioner paid $4,668.15 in wages and during the second quarter in 2002, the petitioner paid $1,996.75 in wages, totaling $6,664.90.

Petitioner's assertion that its ability to pay the proffered wage is established because the alien beneficiary is replacing two employees is not persuasive. The evidence submitted does not clearly name which two employees that the beneficiary will replace. Moreover, the evidence does not show whose wages the $6,664.90

[1] Filing a final return and the loss of all employees suggests that the business may no longer be operational.

represents or what kinds of duties were performed to receive this compensation in 2002. Rather the evidence suggests that the petitioner has never paid any wages, equivalent to the annual proffered wage of $35,776, to perform the same duties as those set forth in the offered position described in the Form ETA 750. It is finally noted that the petitioner's claim that the alien beneficiary is considered a replacement worker was raised for the first time on appeal. On Part 6 of the visa petition, the petitioner described the position being offered as a new position. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). As noted by the director, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The petitioner must show its continuing ability to pay the proffered wage as of the priority date of February 6, 2002. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner provide federal tax returns, annual reports, or audited financial statements that demonstrate this financial ability. In evaluating a petitioner's ability to pay a proffered wage, Citizenship and Immigration Services (CIS) generally will review 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 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.

In the instant matter, the petitioner's net income of $13,614, as shown on its 2001 federal income tax return, was insufficient to cover the proposed wage offer of $35,776. CIS will also review a petitioner's net current assets as an alternative method of evaluating a petitioner's ability to pay the proposed salary. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] 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, Schedule L of the 2001 corporate tax return shows that the petitioner's net current assets of $9,625 was also insufficient to pay the proffered wage.

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[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.

Upon review of the financial information contained in the record, it is concluded that the evidence fails to demonstrate that the petitioner has had a continuing ability to pay the proffered wage beginning at the priority date.

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.