

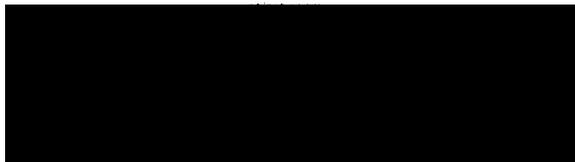
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE:



WAC 03 043 54819

Office: CALIFORNIA SERVICE CENTER

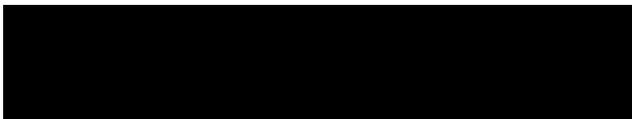
Date:

APR 04 2005

IN RE:

Petitioner:

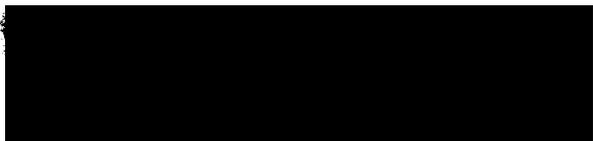
Beneficiary:



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:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail business. It seeks to employ the beneficiary permanently in the United States as a retail sales manager. 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 states that the petitioner has sufficient financial resources to pay the proffered wage and submits additional documentation.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20.23 an hour, or an annual salary of \$42,078. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have nine employees, and to have a net annual income of \$326,507. In support of the petition, the petitioner submitted a letter of support, an unaudited statement of income and balance sheet for the year 2001, and the petitioner's IRS Forms 1120S for 2000 and 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 1, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide signed and certified federal income tax returns for 2001 and 2002. In addition, the director requested further information with regard to the beneficiary's work experience in Sri Lanka.

In response, counsel submitted the petitioner's financial statement for the year ending in December 31, 2002, the petitioner's signed federal income tax return for 2001, and an application for automatic extension of time to submit the petitioner's corporate income tax return for 2002. In addition the petitioner submitted state of California Forms DE-6, Quarterly Wage Reports for all its employees for quarter from March 2002 to March 2003. Finally the petitioner submitted a new letter of employment verification from the beneficiary's previous employer in Sri Lanka, as well as documentation of the wages earned by the beneficiary in the Sri Lanka job.

On July 30, 2003, the director denied the petition, and stated that the petitioner's ordinary income for 200 and 2001 were not sufficient to pay the proffered wage. The director also noted that the petitioner had not submitted its Form 1120S for 2002. Finally, the director stated that the 2002 financial statement submitted by the petitioner was not sufficient to establish the petitioner's ability to pay the proffered wage, as the statement was not audited.

On appeal, counsel states that the petitioner has sufficient financial resources to pay the proffered wage based on its paid inventory and total liquid assets. Counsel resubmits the petitioner's 2001 federal income tax return and submits the petitioner's 2002 federal income tax return. Statements of income and cash flow accompany each return, along with a letter signed by Nimal Abeywardana, South Bay Tax Business Services, Lancaster, California. In his letter, Mr. Abeywardana states that his company has reviewed the cash flow statement and that the company is not aware of any material modifications that should be made to the financial statements in order for them to be conformity [sic] with generally accepted accounting principles. The letter writer adds that the information included in the statements is the representation of the petitioner's management.

The initial petition, the petitioner's response to the director's request for evidence, and the petitioner's appeal include unaudited financial statements as proof of the ability to pay the proffered wage. These unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the 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 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 2001 and onward.

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). 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. With regard to the documentation submitted by the petitioner, since the priority date is April 2001, the petitioner's tax documentation for 2000 is not dispositive in these proceedings. Therefore, only the petitioner's 2001 and 2002 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 and 2002 shows the following amounts of ordinary income: \$19,783 and \$84,629. While the petitioner's net income in 2001 is insufficient to pay the proffered wage, the petitioner's 2002 net income is sufficient to pay the proffered wage of \$42,078. Therefore the petitioner has not established that it has the ability to pay the proffered wage as of the 2001 priority date.

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. The petitioner's total assets 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 submitted the following information for tax year 2001:

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2001
Ordinary Income	\$ 19,783
Current Assets	\$ 113,059
Current Liabilities	\$ 84,358
Net current assets	\$ 28,701

The petitioner's net current assets for 2001 are \$28,701. If the annual salary of \$42,078 paid to the beneficiary were subtracted to this figure, \$13,377 would still be lacking from the petitioner's net current assets to pay the proffered wage. Although on appeal, counsel equates the figure of \$421,114 on page one of the petitioner's 2001 tax return with the purchase of inventory, and by extension, the petitioner's liquid assets in 2002, this figure is actually the cost of goods sold as outlined in Schedule A. The AAO utilizes the end of year inventory figures on Schedule L, which includes line 7 of Schedule A, in assessing the petitioner's liquid assets and how they relate to establishing the petitioner's ability to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The petitioner did not pay the beneficiary the proffered wage in 2001, nor did it establish that it had the capability of paying the proffered wage in 2001 through its net income or net current assets. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the 2001 priority date and to the present time.

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.