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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: EAC 04 147 51322 Office: VERMONT SERVICE CENTER Date: APR 04 2006

IN RE: Petitioner:
Beneficiary: [redacted]

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. 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 Citizenship and Immigration Services (CIS) overlooked the fact that the petitioner is replacing independent contractors. Counsel 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.

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 25, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of $30.08, or an annual salary of $62,566.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since November 1996.

On the petition, the petitioner claimed to have been established in January 1998, to have a gross annual income, based on sales, of over $890,000. The petitioner did not indicate the number of its employees on the petition. In support of the petition, counsel submitted a letter that stated the petitioner's Schedule A, contained in its tax return for 2001, indicates $112,315 on line 3, Cost of Goods Sold. Counsel stated that within this

[1] The record reflects that the director rejected the I-290B Notice of Appeal because it had not been signed by the affected party, whom the director identified as the attorney of record. However, CIS computer records do not indicate the appeal was rejected, therefore the AAO will review the appeal with the record as presently constituted. It is also noted that the attorney of record signed the I-290B.

amount were salaries paid to subcontractors, and that the total amount under the cost of labor is greater than the proffered wage of $62,556. The petitioner also submitted IRS Form 1120, the petitioner's corporate income tax return for 2001, that indicated the petitioner had taxable income before net operating loss deductions and special deductions of -$4,435. The petitioner also submitted W-2 Forms for the beneficiary for tax years 2001, 2002, and 2003. These forms indicated the petitioner paid the beneficiary $18,596.96 in tax year 2001, $11,979.72 in 2002, and $20,773 in 2003.

On September 1, 2004, the director denied the petition. In his denial of the petition, the director stated that the petitioner's 2001 tax return showed taxable income of -$4,435, and that the Schedule L of the petitioner's tax return indicated current assets of $1,459 and net liabilities of $73. The director also noted the beneficiary's wages for tax years 2001, 2002, and 2003, as identified on the beneficiary's W-2 Forms.[2] The director then determined that the petitioner had not established that it had the ability to pay the proffered wage as of ht priority date and until the beneficiary obtained lawful permanent residency status.

On appeal, counsel states on the I-290B form that CIS overlooked the fact that the beneficiary is replacing independent contractors, and that the wages formerly paid to independent contractors exceed the proffered wage. Counsel states that the petitioner has unequivocally demonstrated that it has sufficient funds to pay the proffered wage. The petitioner's IRS Form 1120 for tax year 2001 is resubmitted to the record. Another employee of the law firm submits an additional letter that states the prevailing wage for the position is $1,203 and the annual salary is $98,646.[3] [4] The letter writer points out that the petitioner's 2001 tax return, in its Schedule A, indicates that $112,315 was paid as cost of labor, and that this amount was paid to subcontractors who performed the same work as the beneficiary.[5]

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The petitioner submitted W-2 salary statements for the beneficiary for the years 2001, 2002 and 2003. Based on these documents, the petitioner paid the beneficiary an annual salary of $18,596.96 in 2001, $11,979.72 in 2002, and $20,773 in 2003. Thus, the petitioner did not establish that it paid the beneficiary a salary equal to or greater than the proffered wage of $62,566.40, as of the 2001 priority date 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

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[2] Although the director did not explicitly state this, the record reflects that the beneficiary's wages are not equal to the proffered wage of $62,566.40 in 2001, 2002 or 2003.

[3] [redacted] submits this letter, and is also identified on the letterhead of the law firm that submitted the I-140 petition, namely [redacted] P.C. However, the I-290B appeal notice is signed by [redacted], whose G-28 is in the record.

[4] Although Mr. [redacted] states the proffered wage is $98,646, the wage stipulated on the ETA 750, based on the hourly rate of $30.08 is $62,566.40.

[5] It is noted that although the petitioner's Schedule A for 2001 reflects this figure as cost of labor, the accompanying Statement 4 for Schedule A states that $80,519 was paid to subcontractors.

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.

The evidence indicates that the petitioner is structured as a corporation. CIS considers taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax return for 2001 shows the following amount of ordinary income: -$4,435. This figure fails to establish the ability of the petitioner to pay the proffered wage.

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.[6] 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 submitted the following information for tax year 2001:

	2001
Taxable Income[7]	$ -4,435

[6] 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.

[7] As stated previously, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

Current Assets	$ 1,459
Current Liabilities	$ 73
Net current assets	$ 1,386

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a net income of -$4,435, and net current assets of $1,386, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 2001 priority date and onward.

With regard to counsel's assertion that the petitioner will replace its subcontracted workers with the beneficiary, and thus the wages paid to the subcontractors will be available to pay the beneficiary, the assertions of counsel do not consist evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel advises that the beneficiary will replace subcontracted workers. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, 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. Moreover, there is no evidence that the position of the subcontracted labor involves the same duties as those set forth in the Form ETA 750. Furthermore, the petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. It is also noted that the cost of labor figure in the petitioner's 2001 tax return would include the beneficiary's wages paid in 2001, and thus lower the funds available to the petitioner based on the replacement of subcontracted workers by the beneficiary.[8] The petitioner has not specified any other funds on the petitioner's 2001 tax form that would have been utilized to pay the beneficiary's and other workers' wages.

It is noted that the only other remuneration noted on the first page of the petitioner's 1120 tax form is the compensation of officers that is identified as $190,000 in tax year 2001. Neither counsel nor the petitioner has indicated that this sum is available to pay the proffered wage, or that the petitioner's officers would be willing and able to use their compensation as a source of funding of the proffered wage. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

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.

[8] In addition, the petitioner's 2001 tax return indicates that only $80,000 was paid to subcontractors as opposed to the $112,315 figure used on appeal.