

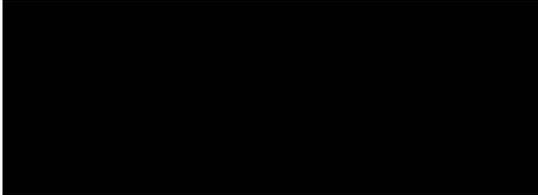
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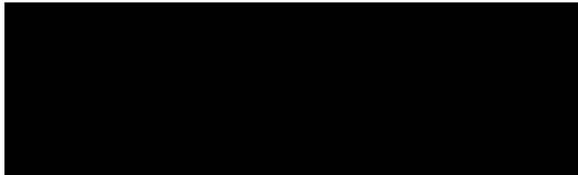


FILE: EAC 04 221 51149 Office: VERMONT SERVICE CENTER Date: APR 10 2006

IN RE: Petitioner: [Redacted]
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:



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

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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 an auto repair company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 50 per cent shareholder and corporate officer of the petitioner received \$66,500 annually, and that the petitioner paid the beneficiary her wages. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is an hourly rate of \$17.53, or an annual salary of \$36,462.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 2001.

On the petition, the petitioner claimed to have been established in February 1998, to have two employees, and to have a gross annual income of \$211,316. The petitioner submitted a letter of work verification from the president of [REDACTED] that stated the beneficiary had worked for the company from March 1997 to May 1999 as an administrative assistant. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001, 2002, and 2003. These documents indicated the petitioner had the following ordinary income in these three tax years: -\$25,865, -\$36,680, and -\$44,752. The petitioner also submitted the beneficiary's IRS Forms 1040, U.S. Individual Income Tax

Return for the years 2001, 2002, and 2003. These two documents indicated the beneficiary had earned wages, salaries, and/or tips, of \$20,628 in 2001, \$22,496 in 2002, and \$22,676 in 2003.

On October 13, 2004, the director denied the petition. The director noted that the petitioner had submitted the beneficiary's income tax returns; however, the director noted that the petitioner had not indicated who employed the beneficiary. The director then stated that in each of the petitioner's corporate tax returns submitted to the record, the petitioner's current total income was less than the petitioner's current deductions, which left the petitioner with net losses each year of \$44,752, \$36,680, and \$25,865, respectively. Based on these yearly net losses, the director determined that the petitioner did not have the ability to pay the proffered wage of \$36,462.40.

On appeal, counsel states that the petitioner is an S Corporation and that the owner, who is a 50 per cent shareholder and the corporate officer, receives \$66,500 annually. Counsel states that the difference between the actual wages received by the beneficiary and the proffered wage could be paid from the 50 per cent shareholder/corporate officer's annual salary. The record reflects a letter signed by the beneficiary addressed to counsel that affirms that the beneficiary was compensated by the petitioner for the total wages reflected in the beneficiary's tax returns.

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. Although the petitioner submitted the beneficiary's individual income tax returns for tax years 2001, 2002, and 2003, as correctly noted by the director, these documents do not indicate the beneficiary's employer. Furthermore, the petitioner submitted no payroll documentation such as W-2 salary statements, or Forms 1099-MISC, or paychecks to further document the statement made by the beneficiary in her letter submitted to the record on appeal. Furthermore the petitioner's corporate tax returns do not indicate any salaries or wages paid to employees, on line 8 of the page 1 of the petitioner's IRS Form 1120S for tax years 2001 to 2003. In addition, the petitioner's tax returns do not indicate the wages found on the beneficiary's tax returns in either line 5 other costs, or line 3, cost of labor, on Schedules A for either tax year. In sum, the petitioner's documentation submitted to the record does not reflect any wages or labor costs associated with the beneficiary's claimed wages. 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.

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, 2002, and 2003 show the following amounts of ordinary income: -\$25,865, -\$36,680, and -\$44,752. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$36,462.40.

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.^{1 2} 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 years 2001 to 2003:

	2001	2002	2003
Ordinary Income	\$ -25,865	\$ -36,680	\$ -44,752
Current Assets	\$ 0	\$ 0	\$ 0
Current Liabilities	\$ 0	\$ 0	\$ 0
Net current assets	\$ 0	\$ 0	\$ 0

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, 2002, or 2003. In all three tax years, the petitioner shows negative net incomes and zero (o) net current assets. The petitioner, therefore, has not demonstrated the ability to pay the proffered wage, out of its net income or net current assets. Although

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.

² It is noted that the petitioner's Schedule L for tax year 2001 indicates very little assets and liabilities, while the petitioner's 2002 and 2003 Schedules L show no assets or liabilities.

counsel on appeal notes that the 50 per cent shareholder and sole corporate officer³ earned \$66,400 in all three tax years documented, the record does not contain any evidence that the sole corporate officer is able and willing to use his compensation to pay the proffered wage. It is also noted that the petitioner's tax returns indicated that there are three shareholders in tax year 2002 and 2003. Thus the officer compensation could be split among three persons. If split equally, [REDACTED] share would be \$21,000, while if split based on shareholder percentage, [REDACTED] share would be \$32,500. Both sums are less than the proffered wage. As stated previously, there is no evidence that the sole corporate officer is able or willing to use any such compensation to pay the proffered wage. Therefore, 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 the salient portion of 2001 and continuing to the present 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.

³ The sole corporate officer as identified by counsel is [REDACTED]