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**U.S. Citizenship
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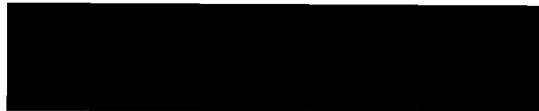
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PUBLIC COPY



FILE: EAC 04 024 53411 Office: VERMONT SERVICE CENTER Date: AUG 09 2006

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 window and glass supply company. It seeks to employ the beneficiary permanently in the United States as a hand glass cutter and trimmer. 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's assets are not just only its cash but also its loans to shareholders and retained earnings. Counsel resubmits documentation previously submitted to the record.

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 26 2001. The proffered wage as stated on the Form ETA 750 is a weekly salary of \$600, or an annual salary of \$31,200. On the Form ETA 750B, signed and dated by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner. In a sworn statement dated January 2, 2003, and submitted with the petition, the petitioner's owner stated that the beneficiary is currently working for him.

On the petition, the petitioner claimed to have been established in September 17, 1997, to have three employees, a gross annual income of \$437,978 and a net annual income of \$247,445. In support of the petition, the petitioner submitted a letter of employment verification from [REDACTED] that stated the beneficiary worked for this company from July 1999 to July 2001. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2002 that indicated the petitioner's ordinary income in 2002 was \$20,170. Finally the petitioner submitted a letter from [REDACTED]. In his letter, [REDACTED]

Certified Public Accountant, reviewed the petitioner's 2002 tax return and stated that the petitioner had the ability to pay the proffered wage and made the following statements:

During 2002, the petitioner paid salaries of \$108,469, which included the salary of a glasscutter of \$27,553;

The petitioner's balance sheet or Schedule L reflected the petitioner's assets exceeded its liabilities by \$68,528;

The petitioner has successfully operated profitably over the years evidenced by the petitioner's accumulated retained earnings of \$61,926;

The shareholder/owners have owned and successfully operated the business since 1997 and have the required knowledge and experience to determine whether they can pay the proffered wage;

The U.S. economy is built on small business; and

As outlined in President Bush's job opportunity speech on January 7, 2003, [the American] economy cannot grow without small businesses.

██████████ further notes that companies such as ██████████ are examples of how companies grow from "small acorns" to worldwide companies.

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 June 25, 2004, the director requested additional evidence pertinent to that ability. The director stated that the petitioner's 2002 federal income tax return showed ordinary income of \$20,170 and the petitioner's Schedule L showed current liabilities greater than current assets.¹ The director specifically requested that the petitioner provide a copy of its 2001 and 2003 federal income tax returns, with all schedules and attachments. The director stated that as an alternative, the petitioner could submit annual reports for 2001 and 2003 that are accompanied by audited or reviewed financial statements. Finally, the director requested that the petitioner submit copies of the beneficiary's W-2 forms if the petitioner had employed the beneficiary in the years 2001, 2002, or 2003.

In response, counsel submitted IRS Forms 1120S, the petitioner's corporate tax returns for the year 2001 and 2003. These two documents indicated the petitioner had ordinary income of \$2,367 in 2001, and ordinary income of \$51,789 in 2003. The petitioner resubmitted ██████████ letter dated July 10, 2003. The petitioner also submitted copies of the beneficiary's IRS Forms 1040, Individual U.S. Income Tax Return for tax year

¹ The director in her decision described the petitioner's ordinary income as its profits. The AAO considers the petitioner's ordinary income identified on line 21 to be the petitioner's net income. The director did not explicitly identify the petitioner's assets and liabilities as current assets and liabilities, although his conclusions were based on current assets, current liabilities, and net current assets. The AAO interpretation of current assets, current liabilities and net current assets will be discussed more fully further in these proceedings.

2002 and 2003. These documents indicated the beneficiary earned \$27,550 in 2002 and \$34,666 in 2003. The petitioner submitted no further documentation, such as W-2 Forms, to further document that the petitioner had paid the beneficiary these reported earnings.

On September 22, 2004, the director denied the petition. In his denial of the petition, the director examined the petitioner's federal income tax returns for 2001, 2002, and 2003, and stated that based on the petitioner's profits and net current assets for 2001 and 2002, the petitioner could not establish its ability to pay the proffered wage in the 2001 priority year or in tax year 2002.² The director noted that the petitioner's 2001 showed a profit of \$2,367 and net current assets of \$12,204, and that the petitioner's 2002 federal tax return indicated a profit of \$20,170 and net current assets of \$1,682. The director also noted that although the petitioner and counsel stated that the petitioner employed the beneficiary in 2002 and 2003, the record did not contain any further evidentiary documentation, such as W-2 Forms and Form 1099-MISC. The director stated that although the beneficiary's 2002 and 2003 tax returns were submitted to the record, they did not indicate by whom the beneficiary was employed.

On appeal, counsel states that the petitioner does have the ability to pay the proffered wage. Counsel submits the petitioner's accountant's statement dated July 10, 2003 to the record for the third time. Counsel states "the director's decision is not only arbitrary and confused but it is based on a failure to understand the simplest of accounting procedures." Counsel further states "the director's statement that the petitioner only had net current assets of \$1,682 in tax year 2002 is a serious miscalculation of fact bordering on incompetence."

Counsel then states that the petitioner's current assets are not only its cash but its loans to shareholders, which amount to over \$5,000 as shown on page 4, line 7, Column B attached to the appeal as Exhibits C, D, and E.³ Counsel states that the petitioner is a Subchapter S corporation where an individual seeks limited liability but can operate a business as an individual proprietorship and be taxed as an individual. Counsel states that the shareholder loans are then actually available capital to the business.

Counsel also asserts that a further review of the petitioner's tax returns show retained earnings of \$61,926.⁴ Counsel describes the petitioner's retained earnings as undistributed dividends retained by the petitioner and available to pay expenses. Counsel asserts that retained earnings are not liabilities but are actually profits that have not been distributed. Counsel notes that on the petitioner's 2002 corporate income tax return the petitioner had a profit of \$20,120 but it also had depreciation of \$14,000 available for payment of the

² Although the director did not explicitly state that the petitioner had established its ability to pay the proffered wage in tax year 2003, he does not further discuss this tax return in his decision.

³ The record is not clear to which tax return counsel refers. There are no loans to shareholders noted on line 7 of the petitioner's 2001 Schedule L. On the petitioner's 2002 Schedule L, there are loans to shareholders at the beginning and end of the tax year identified on line 7; however, the loans are identified as \$51,284 at the beginning of the tax year and \$34,946 at the end of the tax year. Furthermore the record does not contain any exhibits C, D, and E with further information on loans to shareholders. Counsel appears to refer to the first pages of the petitioner's federal income tax returns for tax years 2001, 2002, 2003 that are contained in the appeal materials.

⁴ Counsel refers to the petitioner's 2002 tax return figures, Schedule L, line 24.

beneficiary's wages. Counsel states that the petitioner's profit and depreciation result in a cash flow of \$34,120, which is greater than the proffered wage of "\$34,465."⁵ Counsel states that based on these figures the petitioner had the ability to pay the proffered wage.

Counsel concludes by stating that the petitioner has continuously generated a positive cash flow that is another sign that the petitioner has the ability to pay the proffered wage. Counsel states that it was a shame that the petition was not more carefully reviewed and he requests that either the application be approved or oral argument be granted.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held, other than a negative decision. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Counsel recommends the use of retained earnings to pay the proffered wage. The petitioner's accountant in his letter also states that the petitioner's retained earnings indicate that the petitioner has been overall profitable since its inception. However, neither counsel nor the petitioner's accountant present persuasive arguments for why the AAO should consider the petitioner's retained earnings in its analysis of the petitioner's ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel also states that the petitioner's positive cash flow for the tax years 2001, 2002 and 2003 are a sign that the petitioner has the ability to pay the proffered wage. Counsel refers to Exhibits C, D, and E, which as previously discussed appear to be the petitioner's first pages of its 2001, 2002, and 2003 tax returns. Thus, counsel appears to refer to the petitioner's net income as illustrated on the first page of the Form 1120S. As will be discussed further in these proceedings, the AAO does not examine cash flow per se in its deliberations, but rather examines petitioner's net income or profit in its analysis of whether the petitioner has the ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054

⁵ The proffered wage is \$31,200, based on the weekly wage of \$600.

(S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

On appeal counsel states that the petitioner is a Subchapter S corporation where an individual seeks limited liability but can operate a business as an individual proprietorship and be taxed as an individual. Counsel states that the shareholder loans are then actually available capital to the business. While the AAO realizes that sole shareholder in corporations does have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income, counsel's statement with regard to loans to shareholders appears apposite to this authority. The AAO will further discuss loans to shareholders in its examination of the petitioner's net current assets, further in these proceedings.

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 stated that he employed the beneficiary at least as of January 2003, the petitioner submitted no W-2 salary statements or Forms 1099-MISC for the beneficiary for the years 2003 and onward. Furthermore, as previously stated, although the beneficiary's individual income tax return indicates that he was employed in the years 2001, 2002, and 2003, these documents do not identify the beneficiary's employer. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage as of the April 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 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in

determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The evidence indicates that the petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." The petitioner's tax returns for 2001, 2002, and 2003 show the following amounts of ordinary income: \$2,367 in 2001; \$20,170 in 2002, and \$51,789 in 2003. Because the petitioner did not provide evidence that it employed the beneficiary, the petitioner has to establish that it has the ability to pay the entire proffered wage of \$31,200 as of the April 2001 priority and continuing. Based on the petitioner's net income for tax year 2003, namely \$51,789, the petitioner has established the ability to pay the proffered wage in 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore the petitioner has to establish that it has the ability to pay the proffered as of the priority year and during tax year 2002. Based on the petitioner's net income for tax years 2001 and 2002, the petitioner does not have the ability to pay the proffered wage of \$31,200 in either year.

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. Contrary to counsel's assertion, loans to shareholders are not considered part of the petitioner's current assets. Such loans are not considered assets readily available to pay the proffered wage.⁷ The petitioner's 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.

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 It is noted that in tax year 2001, the petitioner's Schedule L does not reflect any loans to shareholders. Thus, counsel's comments with regard to loans to shareholders being a source of funding for the proffered wage is immaterial to the examination of the petitioner's assets for priority year 2001.

As previously stated, the petitioner established its ability to pay the proffered wage in tax year 2003. Therefore the AAO will only examine the petitioner's net current assets for tax years 2001 and 2003. The petitioner submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ 2,367	\$ 20,170
Current Assets	\$ 17,357	\$ 4,155
Current Liabilities	\$ 5,153	\$ 2,473
Net current assets	\$ 12,204	\$ 1,682

These figures fail to establish the ability of the petitioner to pay the proffered wage. As stated previously the petitioner did not establish that it paid the beneficiary any wages in 2001 or 2002. In 2001, the petitioner shows a net income of \$2,367, and net current assets of \$12,204, and has not, therefore, demonstrated the ability to pay the proffered wage, namely \$31,200, out of its net income or net current assets. In 2002, the petitioner shows a net income of \$20,170, and net current assets of \$1,682, and has not, therefore, demonstrated the ability to pay the proffered wage, namely \$31,200, out of its net income or net current assets. As noted previously, the petitioner's retained earnings and loans to shareholders are not viewed as additional funds to be used 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 established its ability to pay the proffered wage during tax year 2003; however, the petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and during tax year 2002. However, as stated previously, a petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 2001 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.