

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

B6



FILE:



WAC-01-230-51640

Office: CALIFORNIA SERVICE CENTER

Date:

APR 01 2005

IN RE:

Petitioner:

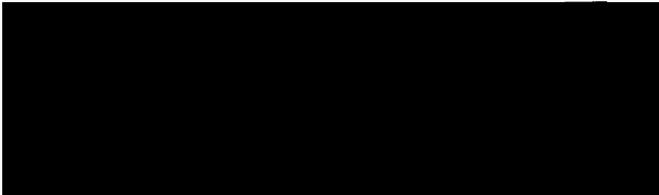
Beneficiary:



PETITION:

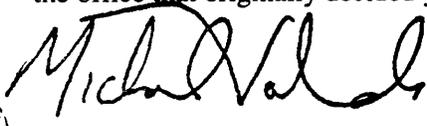
Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 employment-based preference visa petition was initially approved by the Director, California Service Center. After further review, the director served the petitioner with notice of intent to revoke the approval of the petition. In a Notice of Revocation the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a tire sales and auto repair company. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. In his notice of revocation, 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 revoked the petition accordingly.

On appeal, counsel states that although the petitioner’s net income figures on its tax returns are less than the proffered wage, its net current assets were equal to or greater than the proffered wage on each of the tax returns relevant to the instant petition.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition’s priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 8, 1997. The proffered wage as stated on the Form ETA 750 is \$18.70 per hour, which amounts to \$38,896.00 annually. On the Form ETA 750B, signed by the beneficiary on July 3, 1997, the

beneficiary claimed to have worked for the petitioner beginning in May 1994 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on April 26, 2001. On the petition, the petitioner claimed to have been established on February 5, 1995, to have a gross annual income of \$581,000.00, to have a net annual income of \$30,000.00, and to currently have four employees.

In support of the petition, the petitioner submitted a G-28 notice of entry of appearance as attorney or representative dated April 3, 2001 signed by an immigration consultant who prepared the I-140 petition. The record also contains the following documents, apparently submitted with the I-140 petition, though the order of documents in the file does not clearly indicate when each of the following documents was submitted: a letter dated September 30, 2000 from the service manager of a company in Ecatapec, Mexico stating the beneficiary's former employment with that company as an automotive mechanic from October 4, 1991 to March 25, 1994, with certified English translation; partial copies, each consisting of only the first page, of the petitioner's Form 1120 U.S. Corporation Tax Returns for 1997, 1998, and 1999; four copies of the Form W-2 Wage and Tax Statement of the petitioner's owner for 2000, with attached earnings summary for that year; a copy of the City of Los Angeles Tax Registration Certificate dated January 25, 1992 of the immigration consultant; a copy of the business card of the immigration consultant; a copy of a letter dated March 27, 2001 from the petitioner's owner stating a job offer to the beneficiary; and a copy of a letter dated June 24, 1997 to the California Employment Development Department from the immigration consultant. The record also contains a letter dated March 27, 2002 from the immigration consultant stating that the I-140 petition was being refiled with supporting documents. The record also contains a copy of the I-140 petition.

The petition was approved by the director on August 31, 2001.

On October 26, 2001 the beneficiary filed a Form I-485 Application to Register Permanent Resident or Adjust Status, with supporting documentation. That documentation included copies of the Form W-2 Wage and Tax Statements of [REDACTED] for 1998, 1999 and 2000, with attached earnings summaries for 1998 and 2000.

Notwithstanding the earlier approval of the I-140 petition, the director issued a request for evidence (RFE) dated November 12, 2002 requesting evidence pertaining both to the beneficiary's I-485 application and to the I-140 petition, including, among other requests, a request for a recent letter from the prospective employer confirming a job offer to the beneficiary, a request for complete copies of the beneficiary's tax returns for 1997, 1998, 1999, 2000 and 2001, with W-2 forms for each of those years; and a request for complete copies of the petitioner's tax returns for 1997, 1998, 1999, 2000 and 2001.

In response to the RFE, counsel submitted a letter dated January 31, 2003 and the following documents: a letter dated January 16, 2003 from the petitioner's owner confirming a job offer to the beneficiary; two photographs of the beneficiary; a Form I-863 medical examination of the beneficiary; partial copies, of the first and second pages each, of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 1997, 1998, 1999, 2000 and 2001; copies of pay statements of the beneficiary for pay periods ending December 5, 2002, December 20, 2002, and January 5, 2003; partial copies, of the first and second pages each, of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 1999, 2000 and 2001; and the beneficiary's Form I-485 Supplement A to Form I-485.

In a Notice of Intent to Revoke (ITR) dated March 12, 2003 the director found that the petitioner's evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director

accordingly stated that CIS proposed to revoke the I-140 petition, and afforded the petitioner thirty days to offer evidence in support of the petition and in opposition to the proposed revocation.

In response to the ITR, counsel submitted a letter dated April 9, 2002 and the following documents: partial copies, of the first and second pages each, of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 1999 and 2002; a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002, with attached earnings summary for that year; copies of pay statements of the beneficiary for pay periods ending March 5, 2003, March 20, 2003, and April 5, 2003; an apparently complete copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1998; and a copy of a letter dated April 10, 2003 from a certified public accountant. The foregoing documents were received by CIS on April 14, 2003.

In a Notice of Revocation dated June 2, 2003, the director found that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director found that the beneficiary had been employed by the petitioner since 1994 at wages lower than the proffered wage. The director found that fact to be evidence that the petitioner had violated its agreement with the U.S. Department of Labor, as indicated by the petitioner's statement on the Form ETA 750 that it would pay the beneficiary the prevailing wage when the beneficiary began work with the petitioner. The director accordingly revoked the approval of the petition.

On appeal, counsel submits with the I-290B notice of appeal a document captioned "Motion to Reconsider/Appeal," giving legal arguments in support of the petition. The notice of appeal and supporting document were received by CIS on June 23, 2003. Counsel later submitted another document captioned "Supplementary Brief Based on New Evidence from U.S. CIS Associate Director for Operations," accompanied by a copy of a memorandum dated May 4, 2004 by William R. Yates, Associate Director for Operations, CIS. The supplementary brief and the memorandum by William R. Yates were received by CIS on July 8, 2004.

Counsel states on appeal that the petitioner is obligated to pay the proffered wage to the beneficiary only upon the grant of permanent residence to the beneficiary, and that the petitioner's cash assets as shown on its tax returns are sufficient to establish its ability to pay the proffered wage. In her supplementary brief, counsel states that although the petitioner's net income figures on its tax returns are less than the proffered wage, its net current assets were equal to or greater than the proffered wage on each of the tax returns relevant to the instant petition, a method of analysis which counsel asserts was approved in the memorandum by William R. Yates mentioned above.

The copy of the memorandum from William R. Yates submitted by counsel on appeal is not an evidentiary document, but rather is offered by counsel as legal authority for counsel's position. The issuance of that memorandum on May 4, 2004 is found to be good cause for counsel's submission of a supplemental brief based on that memorandum. Accordingly the matters discussed in that brief will be considered on appeal, along with the matters discussed in counsel's previous submissions.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the

instant case, on the Form ETA 750B, signed by the beneficiary on July 3, 1997, the beneficiary claimed to have worked for the petitioner beginning in May 1994 and continuing through the date of the ETA 750B.

The record contains only one Form W-2 Wage and Tax Statement for the beneficiary, the beneficiary's Form W-2 for 2002. That W-2 form shows compensation paid by the petitioner to the beneficiary in the amount of \$19,000.00 that year. Since that amount is less than the proffered wage of \$38,896.00, the W-2 form fails to establish the petitioner's ability to pay the proffered wage in 2002.

The petitioner also submitted partial copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 1997, 1998, 1999, 2000, 2001 and 2002. The amount of total income shown on those returns is \$18,250.00 for 1997, \$18,750.00 for 1998, \$19,475.00 for 1999, \$19,477.00 for 2000; \$22,750.00 for 2001 and \$19,000.00 for 2002. Even if it were assumed that all the income shown on those returns was received from the petitioner, each of those figures is less than the proffered wage of \$38,896.00, and they therefore would fail to establish the petitioner's ability to pay the proffered wage during those years. As noted above, only for the year 2002 was a copy of the beneficiary's W-2 form submitted for the record. The AAO cannot assume that all of the beneficiary's income for the years 1997 through 2001 was received from the petitioner without copies of W-2 forms, 1099 Miscellaneous Income forms, or other evidence that the petitioner was the sole source of the beneficiary's income for those years. The record also contains copies of pay statements of the beneficiary for pay periods ending December 5, 2002, December 20, 2002, January 5, 2003, March 5, 2003, March 20, 2003, and April 5, 2003. Those pay statements indicate the continued employment of the beneficiary, but they contain no significant information beyond that shown on the beneficiary's tax returns.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The evidence in the record includes partial copies of the petitioner's Form 1120 tax returns for 1997, 1998, 1999, and 2000, and an apparently complete copy of the petitioner's Form 1120 tax return for 2001. No copy of the petitioner's Form 1120 tax return for 2002 was submitted in evidence. According to a letter dated April 10, 2003 from a certified public accountant, the petitioner's 2002 tax return had not yet been prepared and an extension had been obtained from the Internal Revenue Service until September 2003 to file that return. The record before the director closed on April 14, 2003 with the submission of the petitioner's response to the ITR. Therefore as of the date that the record before the director closed, the petitioner's most recent tax return was its Form 1120 return for 2001.

The petitioner's tax returns show the following amounts for taxable income on line 28: -\$68,428.00 for 1997; \$30,128.00 for 1998; \$43,356.00 for 1999; \$31,921.00 for 2000; and -\$29,802.00 for 2001. The petitioner must be credited with amounts paid to the beneficiary during the relevant years, amounts which are discussed above. Assuming that all of the beneficiary's income shown on his tax returns was received from the petitioner, the amounts needed to raise the beneficiary's wage to the proffered wage each year are \$20,646.00 for 1997; \$20,146.00 for 1998; \$19,421.00 for 1999; \$19,419.00 for 2000; and \$16,146.00 for 2001. For the years 1998, 1999, and 2000 the petitioner's net income was greater than the amounts needed to raise the beneficiary's wage to the proffered wage. But for 1997 and for 2001 the petitioner's net income was negative. Therefore the petitioner's net income figures fail to establish the petitioner's ability to pay the proffered wage during 1997 and 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant petition, however, the petitioner failed to submit copies of the Schedule L's for the most of the years in the relevant period, despite the director's specific request for complete copies of the petitioner's tax returns for each of the relevant years. Only for the year 2001 did the petitioner submit an apparently complete tax return. Calculations based on the Schedule L attached to the petitioner's tax return for 2001 yield the amounts for net current assets of \$267,994.00 for the beginning of 2001 and \$222,172.00 for the end of 2001. The figure for the beginning of 2001 is equivalent in accounting terms to that for the end of 2000. Therefore the petitioner's net current assets as calculated from its Schedule L for 2001 would be sufficient to establish the petitioner's ability to pay the proffered wage in 2000 and 2001, since each of those figures is greater than the amounts needed to raise the beneficiary's wage to the proffered wage for 2000 and 2001.

In her supplementary brief, counsel asserts that an analysis of the petitioner's net current assets for each of the years at issue establishes the petitioner's ability to pay the proffered wage. Counsel correctly relies on the memorandum from William F. Yates mentioned above as authority for this approach. Nonetheless, the petitioner's failure to submit copies of Schedule L of its tax returns, except for the year 2001, prevents any analysis of net current assets for the years 1997, 1998 and 1999.

For the foregoing reasons, neither an analysis of the petitioner's net income figures, nor an analysis of its net current assets figures establishes the petitioner's ability to pay the proffered wage during each of the years relevant to the instant petition.

The record also contains a copy of a letter dated April 10, 2003 from a certified public accountant in which the account expresses his opinion that the petitioner has sufficient financial resources to pay the proffered wage. An opinion letter from a certified public accountant is not one of the types of acceptable evidence described in the regulation at 8 C.F.R. § 204.5(g)(2) quoted above. The accountant states that his opinion is based principally on the cash balances indicated on Schedule L of the petitioner's tax returns. Although the accountant's letter might provide some information relevant to the interpretation of the petitioner's tax returns, the petitioner failed to provide copies of Schedule L for its returns for 1997, 1998, 1999, and 2000. For this reason, the accountant's

letter provides no significant additional information relevant to the petitioner's ability to pay the proffered wage during the relevant period.

The record also contains copies of the Form W-2 Wage and Tax Statement of the petitioner's owner for 2000, with attached earnings summary for that year and copies of the Form W-2 Wage and Tax Statements of Ronald Rosinsky for 1998, 1999 and 2000, with attached earnings summaries for 1998 and 2000. Ronald Rosinsky is presumably related to the petitioner's owner, since both persons have the same last name. The W-2 Wage and Tax Statements of the petitioner's owner and of Ronald Rosinsky provide no significant additional evidence of the petitioner's ability to pay the proffered wage. The record does not give details on the relationship of either person to the petitioner. But even if both persons are shareholders and officers in the petitioner, their personal financial resources may not be used to establish the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

In his Notice of Revocation, the director correctly analyzed the petitioner's net income as shown on its tax returns, and also correctly analyzed the beneficiary's income as shown on the beneficiary's tax returns. The director correctly found that those figures failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director's terminology, however, was incorrect, and his grammar was confusing. For example, the director states, "A review of *petitioner's U.S. Corporation Income Tax Return for the 1997* federal tax year shows that when one adds the Ordinary income the result is **NEGATIVE \$68,428.00**, or \$107,324.00 less than the proffered scheduled wage." (Notice of Revocation, page 3, italics and bold in the original). The term "ordinary income" is a term used on the Form 1120S U.S. Income Tax Return for an S Corporation, but that term does not appear on the Form 1120 U.S. Corporation Income Tax Return, which is the form on which the petitioner submitted its tax returns. Moreover, the director's phraseology, "when one adds the Ordinary income," incorrectly suggests that ordinary income should be added to some other unspecified figure. As noted above, however, for a corporation which is not an S corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

In his Notice of Revocation, the director also found that the beneficiary had been employed by the petitioner since 1994 at wages lower than the proffered wage. The director found that fact to be evidence that the petitioner had violated its agreement with the U.S. Department of Labor, as indicated by the petitioner's statement on the Form ETA 750 that it would pay the beneficiary the prevailing wage when the beneficiary began work with the petitioner. The director quoted from the regulation at 20 C.F.R. § 656.20 in support of his analysis.

On appeal, counsel states that the petitioner is obligated to pay the proffered wage to the beneficiary only upon the grant of permanent residence to the beneficiary. Counsel cites the references in the regulation at 8 C.F.R. § 204.5(g)(2) to the "prospective employer" as authority for the view that the obligations of the petitioner under the labor certification commence only after the approval of the I-140 petition. Counsel is correct on this point.

Although a petitioner's past wage payments to a beneficiary may be evidence of the petitioner's ability to pay the proffered wage to the beneficiary and may also be evidence relevant to whether the petitioner intends to pay the beneficiary the full proffered wage upon approval of the petition, the petitioner's obligation to pay the beneficiary the proffered wage begins when the beneficiary commences working pursuant to the approved petition, which in a case of continuing employment of the beneficiary would be when the beneficiary obtains lawful permanent residence based on the approved I-140 petition.

Although the director's analysis was incorrect in several areas for the reasons discussed above, the decision of the director to revoke the petition was correct. As shown above, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The assertions of counsel in her Motion to Reconsider/Appeal and in her Supplementary Brief fail to overcome the decision of the director.

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.