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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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FILE: EAC 02 183 52202 Office: VERMONT SERVICE CENTER

Date: **APR 01 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a woodworker. 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 contends that the petitioner's financial information demonstrated its continuing ability to pay the proffered salary.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$23.94 per hour, which amounts to \$49,795.20 annually. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary did not claim to have worked for the petitioner.

In support of its ability to pay the proffered salary, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 1998. It reflects that the petitioner files its taxes using a standard calendar year. In 1998, the petitioner reported net taxable income of -\$2,704. Schedule L of the tax return shows that the petitioner had \$3,288 in current assets and no current liabilities, resulting in \$3,288 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as an alternative method of determining its ability to pay a certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-

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

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.

On September 30, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. The director specifically requested that the petitioner provide copies of its 1997, 1999, 2000 and 2001 federal tax returns, as well as copies of the beneficiary's Wage and Tax Statement(s) (W-2) if it employed the beneficiary between 1997 and 2001.

In response, the petitioner submitted its corporate tax returns for 1999, 2000 and 2001. The tax returns reflect the following information for the following years:

	1999	2000	2001
Net taxable income	\$9,022	-\$ 6,614	\$ 189
Current Assets	\$5,520	\$12,483	\$16,226
Current Liabilities	\$ n/a	\$ n/a	\$ n/a
Net current assets	\$5,520	\$12,483	\$16,226

Counsel's transmittal letter, dated December 16, 2002, also indicated that no W-2s were available as the beneficiary was not yet working for the petitioner.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 9, 2003 denied the petition. The director concluded that that petitioner's net income was not sufficient to cover the proffered salary in any of the relevant years beginning on the priority date in January 1998.

On appeal, counsel resubmits a copy of the petitioner's 2000 federal tax return. Counsel also offers a copy of the petitioner's 2002 corporate tax return. It reflects that the petitioner reported net taxable income of \$160,029. Counsel contends that the income and cash flow reported on the petitioner's 2002 tax return was more than sufficient to pay the proffered salary. While the AAO concurs that the 2002 tax return shows sufficient net income to cover the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a *continuing* ability to pay the certified salary be established as of the priority date. In this case, the petitioner's federal tax returns for 1998 through 2001 do not demonstrate the petitioner's ability to pay the beneficiary's wage offer.

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 may have 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 record does not show that the petitioner has employed the beneficiary.

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.

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 taxable 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.

As noted above, neither the petitioner's net taxable income of -\$2,704, nor its net current assets of \$3,288 was sufficient to pay the proffered salary of \$49,795.20 in 1998.

In 1999, the certified wage could not be met by either the petitioner's net taxable income of \$9,022 or its net current assets of \$5,520.

Similarly, in 2000, the proffered salary of \$49,795.20 could not be covered by either the petitioner's net taxable income of -\$6,614 or its net current assets of \$12,483.

Finally, in 2001, neither the petitioner's net taxable income of \$189, nor its net current assets of \$16,226 was sufficient to meet the proffered wage.

Except for 2002, the financial documentation submitted to the record failed to convincingly demonstrate that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date of January 13, 1998.

Beyond the decision of the director, it is noted that the beneficiary bears the same last name as that contained in the name of the petitioning corporation and its principal shareholder. It is unclear if this is merely a coincidence, but it is noted that under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification.

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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.

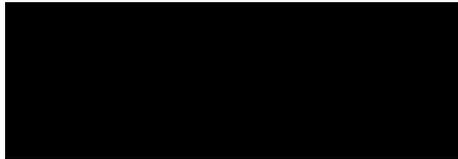
ORDER: The appeal is dismissed.

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FILE: [REDACTED]
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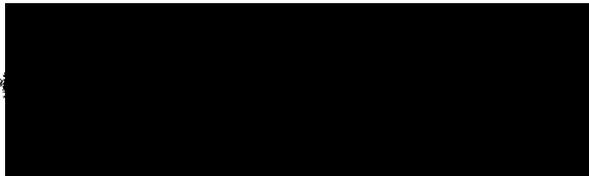
Office: CALIFORNIA SERVICE CENTER

Date: APR 01 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

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