

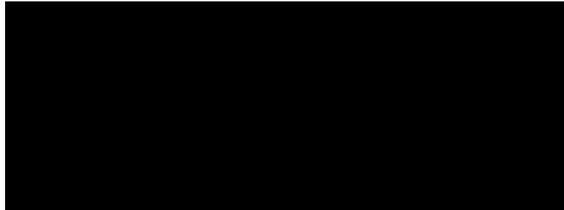
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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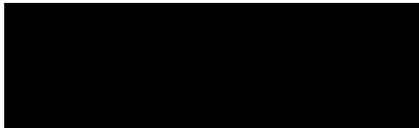


B6

FILE: EAC 02 225 51243 Office: VERMONT SERVICE CENTER

Date: APR 05 2005

IN RE: Petitioner:
Beneficiary:



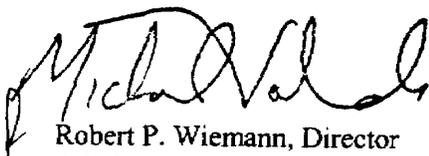
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 subcontracting construction company. It seeks to employ the beneficiary permanently in the United States as a drywall installer. 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 submits a brief and some additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 \$13.60 per hour, which amounts to \$28,288 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 1992.

On the petition, the petitioner claimed to have been established on June 9, 1976, to have a gross annual income of \$952,426, but did not state how many workers it currently employs. In support of the petition, the petitioner submitted a Form G-28; a certified ETA 750, application for labor certification; a February 7, 2002 letter from the petitioner's accountant vouching for the petitioner's financial ability to pay the proffered wage accompanied by a Form 1099 income reporting wages of \$171,829.08¹ [sic] paid in 2001 to [REDACTED];" and a March 12, 2001 letter from another Delaware employer attesting to the work experience of the beneficiary's work experience.

¹ \$171,829.08 is probably an error. This office is disregarding the figure, for as counsel has explained, she submitted the Form 1099, which reports wages paid to [REDACTED] the beneficiary's brother.

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, the director on February 19, 2003, sent a request for evidence (RFE) seeking additional evidence pertinent to that ability to pay. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, its federal tax return for 2001 or alternatively an audited or reviewed financial statement for that year to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted a corporate Form 1120 tax return for the fiscal year 2001 ending June 30, 2002, along with a Delaware state corporate tax return for the same fiscal year.

On April 15, 2003, 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 accordingly, denied the petition.

On August 11, 2003, after counsel had appealed and submitted additional evidence, the director rejected the appeal for the petitioner's failure to file the Notice of Appeal within the 33 days allowed. 8 C.F.R. § 103.3(a)(2)(i), 8 C.F.R. § 103.5a(b). The director treated the appeal as if a motion to reopen or reconsider and affirmed the April 15, 2003 decision because the petitioner had not overcome the grounds for denying the petition.

On September 15, 2003, counsel appealed the director's August 11, 2003 decision that affirmed his prior decision. Counsel asserts, based upon postal receipts submitted on appeal, that the director did receive the notice of appeal within the allowed time of 32 days, on the May 18, 2003, which is a Saturday. Moreover, if the last day of the 33-day period falls on a Saturday, Sunday, or legal holiday, the period will run until the end of the next day that is not a Saturday, Sunday or legal holiday. 8 C.F.R. § 1.1(h). This office agrees with counsel and notes that the filing would be timely even if counsel had filed the notice of appeal as late as Monday, May 20, 2003.

In his review, the director affirmed the April 15, 2003 decision that found the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel asserts the director erred when he decided:

- Not to consider – in determining its ability to pay – such non-cash items as a \$16,780 depreciation deduction (from income), a \$90,400 deduction for officer's salaries reported in the petitioner's corporate tax return for July 1, 2000 – June 30, 2001²;
- To disregard the petitioner's Form 1120 tax return for the 2001 fiscal year (ending June 30, 2002), because the priority date of April 30, 2001 preceded the fiscal year;

² Counsel refers to a decision issued by the AAO concerning non-cash items to establish ability to pay. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel further asserts that had the evidence been submitted earlier, the director could have considered the petitioner's March 2001–April 2002, beginning-and-ending bank balances that each exceed the proffered wage of \$2,357.33 per month, establishing ability to pay.

This office will now take up counsel's assertions.

A depreciation deduction, while not an expense in the year claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages. In determining the petitioner's ability to pay the proffered wage, the Service will 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Service 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 also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In his February 19, 2003 RFE, the only income tax return the director asked for was the petitioner's 2001 return. The petitioner's tax year is not the calendar year but July 1–June 30, the April 30, 2001 priority date preceded the return counsel sent. Counsel asserts that the director failed to give due consideration to the return. However, as will be seen, the tax returns for either portion of 2001 fail to establish the petitioner's ability to pay.

Counsel concedes that the name [REDACTED] refers to the beneficiary's brother. Thus, the submitted Form W-2 in the name of [REDACTED] in these proceedings, lacks any evidentiary weight.

Counsel's reliance on the petitioner's bank account balances is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

On appeal, counsel has also submitted the petitioner's fiscal 2000 Form 1120 tax return. The two federal tax returns submitted, therefore reflect the following information for fiscal years ending June 30, 2001 and June 30, 2002 respectively:

	<u>2000</u>	<u>2001</u>
<u>Net income</u>	(\$2,787)	\$4,582
Current Assets	\$7,707	\$32,418
Current Liabilities	\$39,907	\$74,746
<u>Net current liabilities</u>	(\$32,200)	(\$42,328)

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000 or 2001.

The record includes the petitioner's Form 1099 purporting to report wages paid to [REDACTED] during its fiscal year ending June 30, 2002. Given that the report is for the beneficiary's brother, this office will not consider the Form 1099.

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.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.