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20 Mass. Ave. NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
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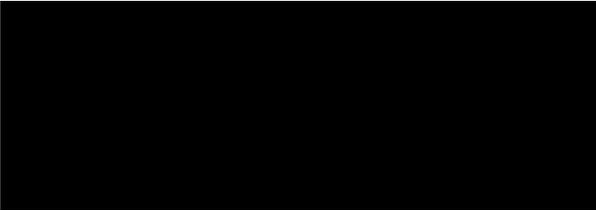
FILE: LIN 03 075 52113 Office: NEBRASKA SERVICE CENTER Date:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a machine shop, which the petition states was established December 30, 1959, with 35 current employees and a gross annual income of \$3.2 million. It seeks to employ the beneficiary permanently in the United States as a machine setup operator. As required, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanies 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 that it had not established the beneficiary had met the job qualification requirements stated on the labor certification application. The director denied the petition accordingly.

Counsel stated he would submit a brief and additional evidence within 30 days of filing the appeal. Counsel has provided no further brief or evidence, however, and therefore, the AAO will decide the appeal based upon the current 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$26,123 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted:

- A Form G-28;
- An approved labor certification application;
- The petitioner's written offer of employment;
- The petitioner's Form 941 quarterly tax report for 2000; and
- The petitioner's unaudited financial statement for 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite two years work experience, the director on July 25, 2003, sent counsel a request for evidence (RFE) pertinent to both requirements.

Consistent with 8 C.F.R. § 204.5(g)(2), the director requested, pertaining to both the petitioner's ability to pay the proffered wage the beneficiary's having met the requirement of two-years experience, that the evidence include:

- Audited profit/loss statements, complete bank account records, and/or personnel records;
- Copies of the petitioner's 2001 corporate income tax return and, if available, the petitioner's 2002 return, along with Form W-2's for 2001 and 2002 issued to the beneficiary; and
- Letters documenting the beneficiary's experience from current or former employers, including specific dates and specific duties¹.

In response, counsel submitted copies of:

- An incomplete² Form 1120, corporate income tax return for 2001;
- Form W-2's issued in the name of [REDACTED]³ for wages paid in 2001 and 2002;

¹ The RFE states, "Evidence of experience must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of employment and specific duties [emphasis already in place]."

² The return lacks a Schedule L, which precludes calculation of the petitioner's net current assets for 2001.

³ The president of the petitioner states that the beneficiary's alias was [REDACTED]

- The petitioner's unaudited balance sheet and profit and loss statement for October 2002; and
- A letter dated October 9, 2003, from the majority shareholder of the petitioner asserting that the beneficiary had met the required two-years experience as of the priority date, and has worked at the proffered position at an annual wage of \$46,000.

Counsel submitted a Form 1120 Corporate tax returns for the petitioner for the year 2001. Counsel had earlier submitted the petitioner's corporate tax return for 2000.

On December 12, 2003, the director denied the petition, finding that the evidence did not establish the continuing ability to pay the proffered wage beginning on the priority date, and further did not demonstrate the beneficiary had met the requisite two years of salient work experience.

On appeal, counsel asserts that the Form W-2s establish the petitioner's ability to pay the proffered wage. Counsel further asserted, as to proving that the beneficiary had the experience specified in the Form ETA 750, promised to "provide the necessary documentation in support thereof." No such documentation has been forthcoming, however, and therefore this office will be based upon the existing record.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence of the ability to pay. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns reflect the following information:

	2000	2001
Net income	-\$834017	-\$960,815
Current Assets	\$1,139,913	unavailable
Current Liabilities	\$1,159,951	unavailable
Net current liabilities	-\$20,038	unavailable

In addition, counsel submitted copies of the petitioner's Forms W-2, Wage and Tax Statements the petitioner issued in the name of [REDACTED] in 2001 and 2002. The Form W-2 Wage and Tax Statements reflect wages paid of \$36,835.10 for 2001, and \$46,109.72 for 2002, both exceeding the \$26,123-per-year proffered wage.

The petitioner's assertion that the beneficiary also goes by the name "[REDACTED]" is not persuasive because the assertion lacks documentary support in the record. Without some independently verifiable evidence, such as affidavits from the beneficiary's colleagues or relatives vouching for the same, the petitioner's claim is only an assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Accordingly, the submitted Form W-2s for 2001 and 2002 fail to establish the petitioner's ability to pay the proffered wage.

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.

Nor does the income analysis derived from the petitioner's tax returns for 2001 and 2002, as stated above, establish the petitioner's ability to pay. For both years, the petitioner reported negative income, and as a consequence the numbers fail to show that the petitioner had sufficient income in either year from which to pay the petitioner's 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 implicit 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(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. The petitioner's net current assets during the years in question, 2001 and 2002, however, were negative or unavailable. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

Accordingly, under either an asset or income analysis, counsel and the petitioner have failed to establish the petitioner's ability to pay the proffered wage continuously from the priority date.

The petitioner and counsel have sought to address whether the beneficiary meets the job qualifications set forth in blocks 14 and 15 of the labor certification application. In response to the RFE, counsel submitted a letter, dated October 9, 2003, from J. [REDACTED], president of [REDACTED] Manufacturing. According to the petitioner's submitted income tax returns, [REDACTED] owned 75.6 percent of voting stock in 2000, which dropped to 10 percent in 2001. The letter states:

Mr. [the beneficiary] is qualified for the position of Machine Set-up/Operator at [REDACTED] Manufacturing based on the result of our recruitment efforts. He has more than two (2) years of experience as a Machine Operator from [REDACTED], located at [REDACTED]. He was employed from September 1997 through April 2001. Prince Industries is also a manufacturer of CNC machinery. His job duties as a Machine Operator were as follows:

Set-up and operated CNC machine. Read and interpreted engineering specifications to determine machine setup, production methods, and sequence of operation. Started machine and observed machine operation to reposition workpiece [sic] or adjusted machine settings for multiple or successive passes. [Italics in place]

[REDACTED] is the lead man in the Citizen department of [REDACTED] Manufacturing managing six machines to allow production to run over a 24 hour period, allowing for lights out manufacturing. [REDACTED] has worked for [REDACTED] Manufacturing (under the names of [REDACTED] and [REDACTED]) since March 2001 through the present time. Our company [REDACTED] Manufacturing is always in need of qualified skill laborers for the position of Machine Set-Up/Operator. [REDACTED] experience with prince Industries will continue to be extremely valuable to our company and he will be performing the same duties as he performed for prince and as outlined above. I believe that [REDACTED] is well qualified for the position and I would like to continue to offer him employment even after his permanent residence is obtained.

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

. *

In fact we are currently paying the beneficiary \$46,000 per year, significantly more than the prevailing wage of \$26,123.10 per year. It is critical for our company to be able to employ someone like [REDACTED] as his talents are invaluable to the continued successful operations of [REDACTED] manufacturing. There, we kindly ask that you approve his labor petition.

8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

This office interprets this regulation to require that the letter of experience come from the employer with whom the beneficiary gained the experience in question. In this case, the only letter of experience in the record is from the petitioning employer who is vouching for experience the beneficiary allegedly gained from a different employer.

Thus, the evidence submitted fails to demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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. The appeal will be dismissed. The petition will be denied

ORDER: The appeal is dismissed.