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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:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

AUG 23 2005

WAC 02 199 50848

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a construction contractor. It seeks to employ the beneficiary permanently in the United States as a heavy equipment operator. 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 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 granting 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 14, 1998. The proffered wage as stated on the Form ETA 750 is \$27 per hour, which equals \$56,160 per year.

On the petition, the petitioner stated that it was established during 1992 and that it employs 45 workers. The petition states that the petitioner's gross annual income is \$11 million.<sup>1</sup> The space reserved for reporting net annual income was left blank. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since 1992. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Garden Grove, California.

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<sup>1</sup> The evidence subsequently submitted does not appear to support this optimistic estimate of the petitioner's gross annual income.

In support of the petition, counsel submitted the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner is a corporation and reports taxes pursuant to a fiscal year running from July 1 of the nominal year to June 30 of the following year.

The 1998 return, which covers the fiscal year from July 1, 1998 to June 30, 1999, shows that during that fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$32,822. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of \$2,475,547 and current liabilities of \$2,238,448, which yields net current assets of \$237,099.

The 1998 return also shows that at the beginning of its 1998 fiscal year, which was also the end of its 1997 fiscal year, the petitioner had current assets of \$5,052,625 and current liabilities of \$4,852,727, which yields net current assets of \$199,898.

The 1999 return, which covers the fiscal year from July 1, 1999 to June 30, 2000, shows that during that fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$60,931. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of \$2,154,890 and current liabilities of \$2,110,740, which yields net current assets of \$44,150.

The 2000 return, which covers the fiscal year from July 1, 2000 to June 30, 2001, shows that during that fiscal year the petitioner declared a loss of \$379 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of \$3,285,478 and current liabilities of \$3,023,932, which yields net current assets of \$261,546.

On September 10, 2002 the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted additional copies of the petitioner's fiscal year 1998, 1999, and 2000 tax returns. Counsel stated that the petitioner's fiscal year 2001 tax return was not yet completed.

On November 20, 2002 the California Service Center issued another Request for Evidence in this matter. The Service Center requested copies of the W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary since 1998.

In response counsel submitted copies of 1998, 1999, 2000, and 2001 W-2 forms showing amounts that Adir International, not the petitioner, paid to Byron E. Lopez, not the beneficiary, during those years.

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 May 29, 2003, denied the petition.<sup>2</sup>

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<sup>2</sup> The petitioner's year-end net current assets were incorrectly computed in that decision.

On appeal, counsel states that W-2 forms showing wages the petitioner paid to the beneficiary were previously submitted and submits copies of those W-2 forms. The record does not support counsel's assertion that those forms were previously provided. Further, where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). The W-2 forms submitted on appeal will not be further considered.

Counsel also provides (1) two 2003 pay stubs, (2) the beneficiary's April 13, 2003 social security statement, (3) the beneficiary's 1999 and 2000 Form 1040A and (4) the beneficiary's 2001, 2002 Form 1040 U.S. Individual Income Tax Returns.

The pay stubs are for the period ending May 18 and May 25, 2003. The May 25 pay stub shows that the petitioner paid a year-to-date total of \$25,733.12 to the beneficiary.

The beneficiary's April 13, 2003 social security statement shows taxed social security and Medicare earnings of \$33,145, \$41,223, \$41,659, \$56,625, and \$59,606 during 1998, 1999, 2000, 2001, and 2002, respectively, but does not show the employer or employers by whom he was paid those amounts.

The beneficiary's personal tax returns show Line 7, Wages, Salaries, Tips, etc. of \$41,223, \$41,659, \$56,626, and \$59,807, during 1999, 2000, 2001, and 2002 respectively, but not the employer or employer's who paid the beneficiary those amounts.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary during 2003 and paid him \$25,733.12 during that year. The petitioner has not established that it paid wage to the beneficiary during any other year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 total 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$56,160 per year. The priority date is January 14, 1998.

The petitioner submitted its 1998, 1999, and 2000 tax returns. The earliest of those returns, the 1998 return, covers the 1998 fiscal year running from July 1, 1998 to June 30, 1999. The petitioner did not submit the return covering the period from January 14, 1998, the priority date, to July 1, 1999.

However, the petitioner's Schedule L assets and liabilities for the beginning of its 1998 fiscal year are identical to its end-of-year Schedule L assets and liabilities for 1997. The petitioner's fiscal year 1998 tax return shows that at the end of its 1997 fiscal year the petitioner had net current assets of \$199,898. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during the period from January 14, 1998, the priority date, to July 1, 1999.

During its 1998 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$32,822. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$237,099. That amount is sufficient to pay the proffered wage. The petitioner's net current assets at the end of fiscal year 1998 were sufficient to demonstrate its ability to pay the proffered wage during that fiscal year.

During its 1999 fiscal year, which ran from July 1, 1999 to June 30, 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of \$60,931. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 1999 fiscal year out of its profits.

During its 2000 fiscal year the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$261,546. That amount is sufficient to pay the proffered wage. The petitioner's net current assets at the end of fiscal year 2000 were sufficient to demonstrate its ability to pay the proffered wage during that fiscal year.

Counsel stated in his response to the September 10, 2002 Request for Evidence that the petitioner's fiscal year 2001 tax returns were not yet complete. Because the petitioner's 2001 fiscal year would have ended on June 30, 2002, its tax returns would not then have been due. Counsel's assertion is credible even absent evidence in its support and the petitioner is excused from providing its tax returns for its fiscal year 2001 or any subsequent fiscal years.

The petitioner submitted evidence sufficient to show that it was able to pay the proffered wage during all salient periods. The petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.