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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FEB 25 2005

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER Date:

SRC 02 032 56726

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision is withdrawn and the matter is remanded to the director for further consideration.

The petitioner is a convenience store/gas station. It seeks to employ the beneficiary permanently in the United States as a store manager. 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 states that the petitioner is replacing one employee who earned the proffered wage, and thus, has the ability to pay the proffered wage. Counsel submits no 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 18, 2001. The proffered wage as stated on the Form ETA 750 is an annual salary of \$36,600. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since October 2000.

On the petition, the petitioner claimed to have been established in 1997 and to have a net annual income of \$24,303. The petitioner indicated that it had two employees on the petition. In support of the petition, the petitioner submitted a letter of support that stated it employed two individuals. The petitioner did not indicate that it employed the beneficiary, but it outlined the job duties of the position. The petitioner also submitted

IRS Form 1120S, the petitioner's corporate income tax return for 2000, and Form 600S, the State of Georgia Net Worth Tax Return, for 2001. In addition, the petitioner submitted a letter on blank paper from the administrator of Mini Mart, location not identified, that stated the beneficiary had worked for Mini Mart for two years.

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, on February 8, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide a copy of the petitioner's 2001 federal income tax; a copy of W-2 for each employee in 2001; copies of Form 941 Quarterly Tax Report, for each quarter in 2001; and a copy of the petitioner's bank statements from April 2001 to the present.

In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2001. Counsel noted that this document showed that \$44,100 had been paid in management fees. Counsel stated that it had erroneously indicated on the I-140 petition that the petitioner had two employees, and asserted that Mr. [REDACTED] was the petitioner's only full-time employee. Counsel added that [REDACTED] was vacating the position when the beneficiary was available to start work; and submitted copies of the petitioner's bank statements for the year 2001 for three Peoples' Bank checking accounts (89961, 92569, and 91124). Although counsel stated that a W-2 Form for [REDACTED] was submitted, no such document is found in the record. Counsel submitted a IRS Form 1099, Miscellaneous Income, that indicated \$44,100 was paid to [REDACTED] as nonemployee compensation in 2001. Counsel also submitted a copy of IRS Form 1096, Annual Summary and Transmittal of U.S. Information Returns, that lists the petitioner's federal identification number and address, and the sum of \$44,100.

In his denial of the petition, the director stated that the petitioner's 2001 tax return did not establish that the petitioner had the ability to pay the proffered wage.¹ The director examined the petitioner's ordinary income for 2001, along with the compensation of officers, wages paid, and the petitioner's depreciation deductions. The director also noted that the fulltime employee's salary of \$44,100 was listed as a management fee on the tax return. Based on the ordinary income and deduction figures, the director determined that the petitioner's tax return for 2001 did not establish that the petitioner had the ability to pay the proffered wage. The director also analyzed the petitioner's three banking accounts. The director identified banking account 91124 as a money order account, noted that account 89961 was inactive from December 2000 to November 2001, and noted ending balances for accounts 92569 and 91124. The director determined that the statements of the three bank accounts did not show that the petitioner had adequate funds to pay the beneficiary's salary, especially in August and September of 2001. On July 11, 2002, the director denied the petition.

On appeal, counsel states that the director did not take into account that the beneficiary would be replacing an employee who earned \$44,100 during 2001. Counsel asserts that the IRS Form 1099 shows that, [REDACTED]

¹ The director's decision did not correctly identify the materials submitted by counsel in response to the director's request for further evidence. Counsel submitted no W-2 forms but did submit an IRS Form 1099, Miscellaneous Income, for 2001, the entire IRS Form 1120S for 2001, and bank statements for three checking accounts for the entire year of 2001.

██████████ the present employee, earned \$44,100 in management fees in 2001. Counsel asserts that Form 1099 establishes that the petitioner had the ability to pay the proffered wage in 2001, and noted that the present employee's earnings were slightly more than the proffered wage. Counsel further asserts that, regardless of how the petitioner's accountant characterized the earnings, the director erred by ignoring that the present employee was paid this amount for the beneficiary's proposed position. Counsel further concludes that the petitioner's gross sales in 2001 were over \$1,311,000, and the petitioner earned a profit, even after the payment of the \$44,100 management fee.

The director's remarks with regard to the petitioner's bank accounts are not relevant to this proceeding. 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.

With regard to counsel's assertion on appeal that the petitioner is replacing its sole employee with the beneficiary, the record only presents inconsistent documentation and discrepancies with regard to the petitioner's employees and any claimed replacement. In the original petition, not only did the petitioner indicate that it had two employees, but the petitioner's cover letter also indicated this. Furthermore, Form ETA 750A states that the beneficiary will be supervising two to three employees. In addition, on the Form ETA 750B, the beneficiary indicated that he had worked for the petitioner since November 2000. In response to the director's request for further evidence, counsel then stated that the petitioner only had one employee and submitted a Form 1099, Miscellaneous Income for ██████████ the claimed single employee. The petitioner's IRS Form 1120S identified this sum under "other deductions" as a management fee.² Thus, the record is confused as to how many employees the petitioner has in its employ, and how they are being paid. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Furthermore, although counsel then states that the beneficiary will be replacing ██████████ there is no documentation in the record, such as a letter of resignation from ██████████ to further substantiate this assertion. Neither the petitioner nor counsel provides any explanation for why the petitioner pays its employees utilizing Form 1099, as opposed to W-2 Forms. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the assertions of counsel, do

² It should be noted that the petitioner's 1120S tax form for 2000 indicates that the petitioner paid a management fee of \$21,000 in 2000, less than half of the \$44,100 management fee paid to ██████████ in 2001. Neither the petitioner nor counsel provides any further clarification of the use of a Form 1099 to pay a regular employee, much less an explanation for the doubling of such a payment in one year.

not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Finally, the IRS Form 1099 submitted by the petitioner clearly establishes that the \$44,1000 was provided to Mr. Kherani as nonemployee compensation. Without more persuasive evidence, the petitioner has not established that it has one or more employees, or that the beneficiary will be replacing a single employee.

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. Although the petitioner submitted its federal income tax return for 2000, since the priority date for the petition is April 18, 2001, the petitioner's financial resources in the year 2000 are not dispositive in the present proceedings. Therefore, only the IRS Form 1120S from 2001 is considered in this proceeding. In the instant case, although on Form ETA 750B, the beneficiary claimed that the petitioner employed him in November 2000, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage, or any wage, in 2001 and onward.

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. Nevertheless, 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. The wage and tax documentation submitted by the petitioner for the year 2000 is not relevant to these proceedings. Therefore, only the petitioner's 2001 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: \$9,970. This figure fails to establish the ability of the petitioner to pay the proffered wage of \$36,600 based on the petitioner's net income. As stated previously, counsel's assertion with regard to the beneficiary replacing another employee whose salary is already included in the petitioner's 2001 income tax return figures, is not persuasive.

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. 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. Thus, while the director utilized depreciation deductions in his analysis of the petitioner's net income, the AAO does not view this as an appropriate analysis of current net assets. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-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. The petitioner's federal income tax return for 2001 provides the following figures:

	2001
Ordinary Income	\$ 9,770
Current Assets	\$ 145,626
Current Liabilities	\$ 40,736
Net current assets	\$ 68,290

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. However, in 2001, the petitioner shows a net income of \$9,770, and net current assets of \$68,290, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not established that it is offering the beneficiary a bona fide position. Without any explanation of the use of IRS Form 1099 to pay the petitioner's one claimed employee, it is not clear that the petitioner proposes to establish an employer-employee relationship with the beneficiary. Furthermore, the description of the job in the ETA 750A of store manager with the supervision of two or three subordinates is quite distinct from the petitioner's claimed one-person gas station/convenience store.

In addition, with regard to the beneficiary's requisite experience as a store manager, the letter submitted by Mini Mart in the petition is found insufficient to establish the beneficiary's requisite two years of work experience. The signer of the letter is not identified, the letter itself is not dated or on letterhead, the letter does not specify the years in which the beneficiary worked for Mini Mart, or the number of hours per week. Finally the employer provided no documentation of the beneficiary's work experience, such as pay stubs or employment records. Without such details, the Mini Mart letter is not adequate documentary evidence to

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

establish the beneficiary's previous work experience prior to the priority date. As previously stated, the petitioner did not establish that it has employed the beneficiary since November 2000 as a store manager. Therefore the petitioner did not establish that the beneficiary had the requisite work experience prior to the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Although the petitioner has established that it has the capability to pay the proffered salary as of the priority date and onward, other issues remain unresolved that were never addressed by the director. These issues include the replacement of one employee by the beneficiary, the actual nature of the position, and number of paid employees, any previous employment of the beneficiary by the petitioner in 2001, and the beneficiary's qualifications for the position. In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 only met that burden in part.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.