

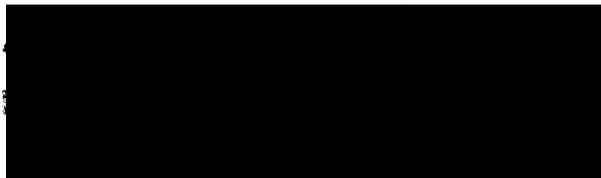
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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BE

FILE: [Redacted]
EAC 03 168 50067

Office: VERMONT SERVICE CENTER

Date: **JUL 19 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

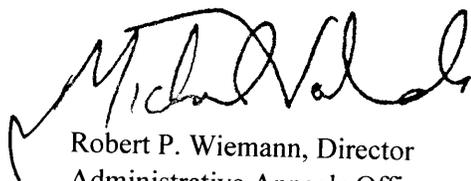
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trucking company. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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 statement 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24.16 per hour, which equals \$50,252.80 per year.

On the petition, the petitioner stated that it was established on July 1, 2000 and that it employs three workers. The petition states that the petitioner's gross annual income is \$1,600,000 and that its net annual income is \$36,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Bloomingdale, New Jersey.

In support of the petition, counsel submitted a partial copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.¹ That return shows that the petitioner reports taxes pursuant to the calendar year. During 2001 the petitioner reported a loss of \$4,551 as its ordinary income. At the end of that year, the

¹ The Schedule A submitted with that form refers to a Statement 3 for an itemization of its Cost of Goods Sold. Statement 3 was not submitted with that form.

petitioner had current assets of \$9,309 and current liabilities of \$7,826, which yields net current assets of \$1,483.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 2, 2003, requested, *inter alia*, additional evidence pertinent to that ability.

The Service Center also specifically requested the petitioner's 2000 tax return. Because the priority date is April 30, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, although the petitioner's 2002 tax return should have been available on the date the Request for Evidence was issued, the Service Center did not request that return.

Further, the Service Center requested that, if the petitioner employed the beneficiary during 2000 or 2001, it submit Form W-2 Wage and Tax Statements showing the wages it paid to the beneficiary during those years. Again, the 2000 W-2 form is not germane to any matter at issue in this case.

Counsel's response is dated September 23, 2003. With his response, counsel submitted the requested 2000 tax return. Counsel did not submit any W-2 forms, apparently indicating that the beneficiary did not work 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 January 29, 2003, denied the petition.

On appeal, counsel submits a letter, dated April 22, 2004, from the petitioner's president. The letter states that the amounts shown as expenses for repairs and maintenance, the amounts shown as payments to subcontractors, and the amounts shown as other auto expenses, \$19,629, \$1,302,117, and \$28,582, respectively, are all funds that would have been obviated by hiring the beneficiary, and should, therefore, be considered amounts available to pay the proffered wage. The letter also states that the petitioner's president anticipates increasing the petitioner's gross sales by hiring the beneficiary, because its trucks would not spend as much time out of service when they required repairs. That letter also states that the petitioner is submitting its amended 2001 tax return.

A 2001 Form 1120S, U.S. Income Tax Return for an S Corporation was submitted with that letter, purporting to be the petitioner's amended return. On that form, the petitioner amended its ordinary income from a loss of \$4,551 to a profit of \$61,697.² In a cover letter, dated April 30, 2004, counsel asserts that the evidence submitted shows the continuing ability to pay the proffered wage beginning on the priority date.

The amended return, however, was not accompanied by any evidence that it was submitted to IRS. Under these circumstances, this office does not find that amended return to be credible evidence of the petitioner's financial condition.

² The change was effected by decreasing the amount of the petitioner's Cost of Goods Sold from \$1,605,599 to \$1,539,351. Because the original return submitted did not contain any itemization of the Cost of Goods Sold, this office is unable to determine the provenance of the \$66,248 difference.

The petitioner's president's assertion that the petitioner's expenses for repairs and maintenance, the amounts shown as payments to subcontractors, and the amounts shown as other auto expenses, amounts which total \$1,350,328, could be obviated by employing the beneficiary is unconvincing. The president provided no evidence that those expenses were composed entirely of labor costs, rather than including the cost of spare parts and consumables, such as grease, oil, and fuel. Further, if the petitioner could save more than \$1 million annually by hiring a mechanic, it would have hired a mechanic, notwithstanding that no U.S. workers were available at the proffered wage of the instant petitioner.

The petitioner has provided no convincing evidence of the amount of those expenses, if any, that could be obviated by hiring the beneficiary, and no amount of those expenses will be included in the determination of the funds available to pay the proffered wage. Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's president has also asserted that he anticipates greater gross receipts if the petitioner is able to hire the beneficiary. The petitioner's president's reasoning is that the petitioner's trucks would spend less time waiting for service and repairs if the petitioner had its own mechanic. The petitioner's president provided no information, however, from which this office can calculate or even estimate the additional revenue one might reasonably project from this change. The record contains no information from which one might calculate or estimate the increased availability of the petitioner's trucks that would result from this arrangement. Further, the record contains no information to show that, but for lack of cargo capacity, the petitioner could have contracted for additional business.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not establish that it employed and paid the beneficiary.

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, 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 \$50,252.80 per year. The priority date is April 30, 2001.

The tax return originally submitted shows that during 2001 the petitioner reported a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits. The petitioner finished the year with net current assets of net current assets of \$1,483. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner responded to the Request for Evidence issued in this matter on September 23, 2003. On that date, the petitioner's 2002 tax return should have been available but, although the petitioner is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, counsel did not submit the 2002 return. Counsel did not submit any evidence of the petitioner's ability to pay the proffered wage during 2002. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

An additional issue exists in this case that was not addressed in the decision of denial.³ Pursuant to 20 C.F.R. §656.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and 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

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship.” See *Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

In this case, the petitioner’s president and half-owner shares the same last name, [REDACTED] with the beneficiary. This indicates that the two may be related. However, because this issue was not raised by the Service Center and the petitioner had no opportunity to address it, it will not be further discussed.⁴

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 not met that burden.

ORDER: The appeal is dismissed.

⁴ If the petitioner were to pursue this petition further, or to file another petition for the same petitioner, then evidence pertinent to this issue might be required.