

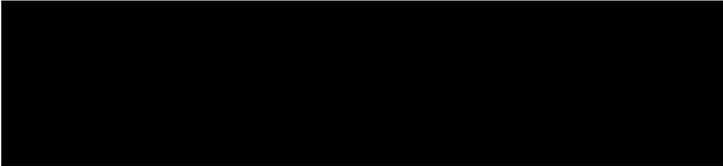
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U.S. Citizenship  
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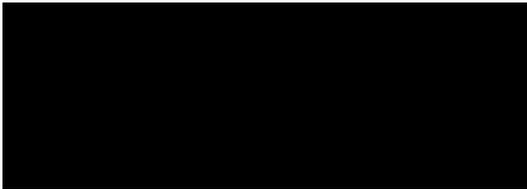
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FILE: EAC 02 228 52264 Office: VERMONT SERVICE CENTER Date: JUL 21 2005

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

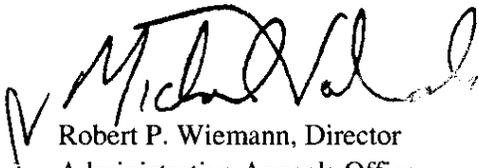
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas and service station. It seeks to employ the beneficiary permanently in the United States as an automobile 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 states that the petitioner does have the ability to pay the proffered wage, if income tax items such as depreciation, cash flow, and good will are considered. Counsel submits no further documentation.

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.

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 March 22, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$18.75, or an annual salary of \$39,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 2000, to have two employees, and to have a gross annual income of \$1,893,995 and a net annual income of \$206,749. In support of the petition, the petitioner submitted a letter of support that stated the beneficiary had ten years of work experience as an auto mechanic, and outlined the beneficiary's prospective job duties. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001. In addition, the petitioner submitted the petitioner's bank statement from Key Bank and Trust, Owings Mills, Maryland for December 2001, and a letter from ██████████ ElkrIDGE, Maryland, dated May 15, 2002. In the letter ██████████ identified as the owner of ██████████ stated that the beneficiary worked at ElkrIDGE Shell as an auto mechanic from December 1998 to March 2001.

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 March 31, 2003, the director requested additional

evidence pertinent to that ability. The director specifically stated that the petitioner's 2001 federal tax return showed a loss of \$15,971, and insufficient net current assets to pay the proffered wage. In addition, the director stated that the petitioner's bank statement for December 2001, which showed an ending balance of \$4,755.52, did not establish that the petitioner maintained a bank balance sufficient to pay the proffered wage.

In response, counsel submitted the first page of IRS Form 1120S, the petitioner's corporate tax return for the year 2002, as well as the petitioner's bank statements from March 2001 to December 2001, from December 2002, and from April 2003. Counsel stated that the bank statements showed a positive cash flow with an average balance in excess of more than \$5,000 a month. Counsel stated that these funds were sufficient to pay the proffered monthly wage of \$3,000. Counsel also stated that, as established by the petitioner's 2002 federal tax return, the petitioner's gross revenue tripled in its second year of operations, and the salaries paid by the petitioner also increased. Based on the bank statements, the increased revenues in the year 2002, and increased salaries, counsel stated that the petitioner had demonstrated that it had and still has the ability to pay the proffered wage of \$750 a week. Counsel also added that with the addition of an additional mechanic, the petitioner would generate additional sufficient income to pay the proffered wage.

In his denial of the petition, the director stated that the petitioner's 2001 tax return showed a negative net income of \$15,971, and Schedule L of the return showed net current assets of \$34,977. The director stated that the petitioner's net income and net current assets were insufficient to pay the proffered wage. The director noted that the petitioner had net income of \$8,930 in 2002, based on the petitioner's 2002 federal income tax return. The director also stated that the petitioner had not submitted a complete 2002 federal income tax with accompanying Schedule L. Therefore the director stated that it could not be determined whether the petitioner had sufficient net current assets to pay the proffered wage in 2002.

With regard to the petitioner's bank statements, the director stated that the 2001 statements showed balances ranging from a high of \$24,547.37 to a low of \$4,755.52, with an average balance of \$12,528.32. The director stated that the statements did not establish that the petitioner maintained a balance in its bank account sufficient to pay the proffered wage, or that the monthly balances increased incrementally over the period of time in question by an amount sufficient to pay the proffered wage on a monthly basis. The director stated that although the petitioner asserted that the monthly bank statement balances were sufficient to pay the beneficiary's monthly salary; the same funds could not be considered as available funds each month to pay the proffered wage, because if the balances were actually being paid to the beneficiary, the available funds would no longer be in the petitioner's bank account. On September 4, 2003, the director denied the petition.

On appeal, counsel states that Citizenship and Immigration Services (CIS) fails to take into account the petitioner's deductions and depreciation figures in the petitioner's federal income tax returns. Counsel states that although the petitioner does not dispute that its 2001 corporate income tax return shows a net loss, such a loss is permissible under the Internal Revenue Code. Counsel also states that a mechanic in a growing business like the petitioner's will be able to make an immediate and substantial impact on the revenues of the business. Counsel asserts that with a mechanic, the petitioner can generate \$1,000 weekly in labor costs that amounts to \$48,000 a year for the petitioner. Counsel also asserts that a good mechanic can generate anywhere between \$1,500 to \$2,000 a week in labor costs alone which would amount to \$60,000 to \$100,000 a year in additional revenues. Counsel states that such profits and revenues are more than sufficient to pay the proffered salary of \$39,000.

Counsel then states that CIS was selective and narrow in reviewing the petitioner's 2001 and 2002 corporate income tax returns, as well as the petitioner's bank statements of April 2001 to December 2001, December 2002, and April 2003. Counsel asserts that CIS failed to recognize that the petitioner's wages paid to employees increased from \$40,000 in 2001 to \$117,000 in 2002. Counsel states that this increase clearly shows that the petitioner's business is growing and that the petitioner is generating sufficient income to pay additional employees. Counsel also states that CIS failed to recognize the deductions and depreciation figures listed on the 2001 corporate income tax return. Counsel states that deductions and depreciation are legitimate deductions for tax purposes, and are income that the petitioner could have used to pay the beneficiary's proffered wage. Counsel also notes that even though the petitioner's business is in the developmental state, the Shell Oil Company is viewed as one of the reputable gas/service stations.

On appeal, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel provides figures as to how much profit will be generated by the beneficiary's work as an automobile mechanic. However, counsel provides no evidentiary documentation to further substantiate this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

In addition, counsel's reliance on the balances in the petitioner's bank account is 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. The director in his decision correctly noted that if the petitioner did use the funds available in the petitioner's bank account to pay the beneficiary's wages, these funds would not longer be available. 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. Finally, with regard to the petitioner's ability to pay the proffered wage as of the priority date, April 30, 2001, the petitioner's ending balance in the Key Bank statement for April 2001 is \$17,968.49, which is considerably less than the proffered annual wage of \$39,000. Therefore, the petitioner's bank statement does not establish that as of the priority date, the petitioner had sufficient bank funds to pay the proffered wage.

On appeal, counsel also asserts that the petitioner's depreciation figures outlined in the petitioner's federal income tax returns could have been used to pay the proffered wage in 2001 and 2002. However, a depreciation deduction does not represent specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 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. 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 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 returns for 2001 and 2002 show the following amounts of ordinary income: -\$15,971 in 2001, and \$8,930 in 2002. As correctly stated by the director, these figures fail to establish the ability of the petitioner to pay the proffered wage of \$39,000.

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. 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.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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. As noted by the director, the petitioner submitted a partial copy of its 2002 federal income tax return. Accordingly, the petitioner's tax returns for 2001 and 2002 provide the following information:

	2001	2002
Ordinary Income	\$ -15,971	\$ 8,930
Current Assets	\$ 38,762	\$ Unknown
Current Liabilities	\$ 3,785	\$ Unknown
Net current assets	\$ 34,997	\$ Unknown

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$15,971, and net current assets of \$34,997, a figure only \$4,003 less than the proffered wage. Nevertheless, the petitioner has not established any additional sources of funds with which to pay the difference between the petitioner's net current assets in 2001 and the proffered wage. As noted previously, the petitioner's bank statements are not viewed as an additional source of funds to pay the proffered wage. Therefore, the petitioner has not established that it has the ability to pay the proffered wage as of the 2001 priority date, through the use of either its net income or net current assets.

With regard to the petitioner's ability to pay the proffered wage in 2002, as previously noted, the petitioner did establish that it had a net income of \$8,930 in 2002. However, this figure is not sufficient to pay the proffered wage of \$39,000. As correctly noted by the director, the petitioner did not submit Schedule L with its 2002 federal income tax return. Therefore the AAO cannot analyze whether the petitioner had sufficient net current assets in 2002 to pay the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and onward. The director's decision shall stand, and the petition will be denied.

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.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

