



U.S. Citizenship  
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FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 16 2005

IN RE:

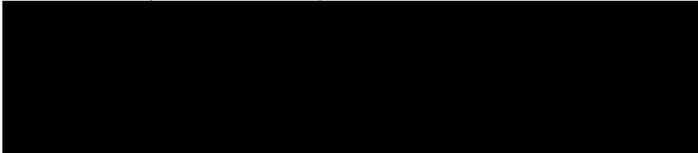
Petitioner:

Beneficiary:



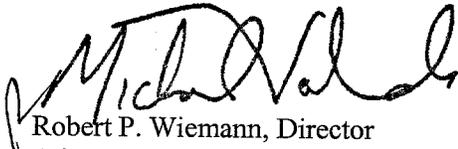
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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 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 U.S. 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 March 13, 2000. The proffered wage as stated on the Form ETA 750 is \$25.38 per hour (\$52,790.00 per year). The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1040 U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined 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 June 23, 2003 requested evidence pertinent to that issue.

"Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$52,790 as of March 13, 2000, of filing and continuing to the present.

Submit the 2000 and 2002 federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

"If the beneficiary was employed by you in 2000, 2001 and 2002, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business."

The United states federal tax return that you submitted is unclear as this being a business that would be able to use this beneficiary in the profession until the person becomes a permanent resident."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the beneficiary's Internal Revenue Service (IRS) Form 1040A tax returns for years 2000, 2001, and 2002, copies of the beneficiary's 2000 – 2002 W-2s, and other information.

The one personal tax return from the petitioner's owner demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,790.00 per year from the priority date.

- In 2001, the Form 1040 stated taxable income<sup>1</sup> of \$182,316.00.

The director denied the petition on December 29, 2003, restating the above requests and indicating that the tax returns were not received, and, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In her decision, the director stated:

"On September 18, 2003, the service received a copy of the beneficiary's 2000 – 2002 W-2s and the beneficiary's 2001 individual tax returns. In 2000, the W-2 states \$496 in wages paid, falling short by \$52,294 of the proffered wage. In 2001, the W-2 states income from ... [another employer] but none from the petitioner, falling short by \$52,790. In 2002, the W-2 states income from ... [another employer] but nothing from the petitioner. Therefore, you failed to show that you were able to pay the beneficiary the proffered wage as of the date of filing and continuing to present."

The director also referred to the failure to submit the petitioner's corporate tax returns. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

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<sup>1</sup> IRS Form 1040, Line 22.

On appeal, counsel asserts:

“-Company has the ability to pay the proffered salary or wage to ... the beneficiary.”

With the appeal, counsel, for the first time, introduces the petitioner's Form 1120S tax returns for 2000, 2001, and 2003.

We will examine the tax returns for what evidence they may provide, but their evidentiary value is lessened by their late submission. The tax returns demonstrated the following financial information concerning the petitioner's inability to pay the proffered wage of \$52,790.00 per year per year from the priority date.

- In 2003, the Form 1120S stated taxable income<sup>2</sup> of \$22,275.00.
- In 2001, the Form 1120S stated taxable income of \$70,699.00.
- In 2000, the Form 1120S stated taxable income of \$71,613.00.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. As mentioned above, the petitioner did employ the petitioner but at no time paid the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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.

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. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did have taxable income to pay the proffered wage of \$52,790.00 per year for the years 2000 and 2002 for which petitioner's tax returns are offered for evidence. The petitioner did not have enough taxable income to pay the proffered wage in 2003 and has not submitted any tax returns for 2002.

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<sup>2</sup> IRS Form 1120, Line 28.

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>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1040 federal tax return. The petitioner's 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.

Examining the three Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2000, petitioner's Form 1120S return stated current assets of \$23,663.00 and \$44,501.00 in current liabilities. Therefore, the petitioner had <\$20,838.00><sup>4</sup> in current net assets for 2000. Since the proffered wage was \$52,790.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$85,972.00 and \$33,305.00 in current liabilities. Therefore, the petitioner had a \$52,464.00 in current net assets for 2001. Since the proffered wage was \$52,790.00 per year, this sum is slightly less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$853.00 and \$45,928.00 in current liabilities. Therefore, the petitioner had a <\$45,075.00> in current net assets for 2003. Since the proffered wage was \$52,790.00 per year, this sum is less than the proffered wage.

Therefore, for the periods 2000, 2001, 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets. Moreover, the petitioner has not submitted any return for 2002.

While the petitioner employed the beneficiary, it did not pay him the proffered wage. Petitioner has not provided information concerning the continuing viability of the company, the beneficiary's role in it, or reasons why there are fluctuations in both taxable income and current net income. Similarly, there is no reason for the absence of the 2002 tax return. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

<sup>3</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.

<sup>4</sup> The symbols <a number> equal a negative number, on financial instruments less than zero.