

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

BE



FILE: [REDACTED]
EAC-03-266-51451

Office: VERMONT SERVICE CENTER

Date: **NOV 03 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 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 sustained. The petition will be approved.

The petitioner is an auto repair business. It seeks to employ the beneficiary permanently in the United States as an auto technician/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 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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$850.40 per week, which amounts to \$44,220.80 annually. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner¹.

On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of \$1,046,899, and to currently employ two workers. In support of the petition, the petitioner submitted the first page of its 2000² and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.

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 December 1, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to

¹ On Form G-325, Biographic Information sheet, signed by the beneficiary on August 15, 2003 and submitted with his application to adjust status to lawful permanent resident, the beneficiary also indicated that he has not worked for and is not presently working for the petitioner.

² Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director stated that the petitioner's net income on its 2000 and 2001 tax returns did not reflect an ability to pay the proffered wage and requested additional evidence, such as the petitioners complete 2001 and 2002 corporate tax returns with all schedules and attachments, any evidence of wage payments made by the petitioner to the beneficiary, bank account records, personnel records, or regulatory-prescribed evidence.

In response, the petitioner submitted its Form 1120S corporate tax returns for the years 2001 and 2002, along with a letter signed by Zenop Tuncer (Mr. Tuncer), President of the petitioner, who states the following, in pertinent part:

As shown by the company tax returns, more than \$41,000.00 was paid as compensation to officers. This money was and is available for [the beneficiary] as he was to replace this individual who is myself and who is performing this job. This amount as well as the company profit and assets more than covers his offered salary.

The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ³	\$5,694	\$5,767
Gross receipts or sales	\$1,046,899	\$1,058,126
Compensation of officers	\$41,600	\$41,600
Current Assets	\$8,013	\$9,134
Current Liabilities	\$13,368	\$14,562
Net current assets	-\$5,355	-\$5,428

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 April 12, 2004, denied the petition, stating that the petitioner's net income and net current assets were insufficient to pay the proffered wage, and that the compensation already paid to officers cannot be considered because it "represents monies already expended by the corporation."

On appeal, counsel asserts that [redacted] is a working officer and intended to replace himself and the salary paid to himself with the beneficiary in addition to a part-time employee "by the name of [redacted] [redacted] who is no longer employed by [the petitioner] and whose duties, [the beneficiary] was also to assume." The petitioner submits another letter by [redacted] who states the following in pertinent part:

Please be advised that [the beneficiary] is not currently employed by this company. [The beneficiary] will be employed by this company in the future when he has his employment authorization. At present, I am performing his job duties which I will stop doing when he starts to work for this company. The income that I receive from the company in the form of officer compensation is set aside to pay the salary to [the beneficiary].

In addition, counsel submitted copies of Forms W-2, Wage and Tax Statements the petitioner issued to [redacted] in 2000, 2001, 2002, and 2003, and to [redacted] in 2000 and 2001. The Forms W-2 issued to [redacted]

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

reflects his \$41,600 in officer compensation in each year. [REDACTED] forms reflect wages received in the amounts of \$13,000 in 2000 and \$9,250 in 2001.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002, or 2003.

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 expenses⁴. 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.

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

⁴ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). In the instant case, the petitioner does not show that it receives income from sources other than from a trade or business.

are the difference between the petitioner's current assets and current liabilities.⁵ 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.

The proffered wage is \$44,220.80. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, 2002, or 2003. In 2001, the petitioner shows a net income of only \$5,694 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. Likewise, in 2002, the petitioner shows a net income of only \$5,767 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. Presumably the petitioner's 2003 corporate tax return was unavailable when it filed its appeal in May 2004.

The sole shareholder of an S corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. In addition, both counsel and [REDACTED] advised that the beneficiary would replace [REDACTED] and receive the wages that have been paid to him for work performed in the capacity of auto technician/mechanic, which he will stop performing when the beneficiary has employment authorization and can be hired. There is no adverse information or evidence concerning this proposition and [REDACTED] provided two signed letters testifying to his intent. Thus, contrary to the director's decision, the AAO will consider the officer's compensation, since the petitioner is structured as an S corporation, as well as wages paid to [REDACTED] for his capacity performing the duties of auto technician/mechanic as available to pay the proffered wage of the proffered position since that position has been performed by [REDACTED] who will cease that role upon hiring the beneficiary⁶.

The combination of compensation received by [REDACTED] in the amount of \$41,600 added to the petitioner's net income of approximately \$5,000 in 2001 and 2002 demonstrates sufficient funds to pay the proffered wage. The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage. Therefore, the petitioner has established that it has 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 met that burden.

⁵ 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.

⁶ The AAO will not consider the wages paid to [REDACTED] since only counsel asserted that the beneficiary would replace [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).



Page 6

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