

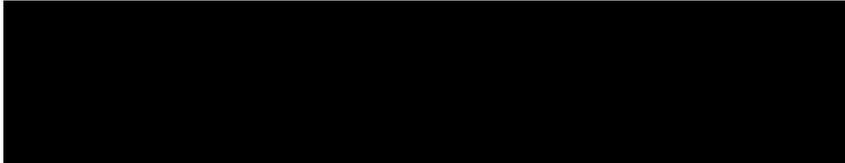
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U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 03 102 50460

Date: NOV 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 HVAC installation and service company. It seeks to employ the beneficiary permanently in the United States as a HVAC installer and repairman. 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 employs the beneficiary and the beneficiary's wages are reflected in the petitioner's tax return. Counsel submits additional documentation to the record.

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 25, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$19.03, or an annual salary of \$39,582.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1997.

On the petition, the petitioner claimed to have been established in 1979 and to have five employees. In support of the petition, the petitioner submitted a letter of employment verification signed by Ms. Zoraida Gabin, President, HVAC/Dynamic, Inc, Wheaton, Maryland. In this letter, Ms. Gabin stated that the beneficiary was an employee from March 1995 to September 1997. The petitioner also submitted copies of two employment authorization documents (EADs) issued in February 2000, and April 2002.

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 26, 2003, the director requested

additional evidence pertinent to that ability. The director specifically requested that the petitioner submit its 2001 Federal income tax return with all schedules and attachments. The director also stated that if the petitioner employed the beneficiary in 2001, to provide the beneficiary's W-2 form to establish the beneficiary's actual wages.

In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns for the years 2001 and 2002. These two documents indicated that the petitioner had ordinary income of \$877 in 2001, and ordinary income of \$33,232 in 2002.

The director denied the petition on August 19, 2003. In his denial of the petition the director stated that the petitioner's 2001 tax return showed taxable income of \$877, and that this income showed that the petitioner did not have the ability to pay the proffered wage.

On Form I-290B filed with Citizenship and Immigration Services (CIS) on August 29, 2003, counsel states that the petitioner employed the beneficiary in the past and has paid wages to the beneficiary. Counsel also states that the 2001 federal income tax return shows that the petitioner's income reflects payments made to the beneficiary. Counsel also states that the petitioner was requesting documentation such as bank statements, checks and other evidence from its accountant with regard to the petition. On July 22, 2005, counsel submits to the record the petitioner's bank statements from Southern Financial Bank, Warrenton, Virginia, for the months April to December 2001. Counsel also submits copies of the checks written by the petitioner during these months, including checks to the petitioner's employees. The checks that the petitioner issued to the beneficiary from April to December 2001 total \$16,623. Finally counsel submits Forms 1099-MISC for three employees for the tax year 2001. According to the beneficiary's Form 1099-MISC, the petitioner paid the beneficiary \$34,785 in 2001. Counsel provides no further explanation or commentary on the petitioner's 2001 bank statements, or on the variance in salary levels as documented by the petitioner's checks and the beneficiary's Form 1099-MISC.

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. On the ETA 750, the beneficiary, under oath, indicated that he had worked for the petitioner since September 1997. On appeal, counsel submits a Form 1099-MISC, the petitioner's bank statements for April through December 2001, and copies of checks paid to the beneficiary from April 2001 to December 2001.¹ As previously stated, the bank checks indicate the beneficiary earned \$16,632 for nine months of work in 2001, while the Form 1099-MISC indicates that the beneficiary earned \$34,785 for the entire twelve months. There is no explanation provided for the difference between these two figures. *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,

¹ Although the petitioner submitted its 2002 federal income tax return, it did not submit any evidence as to the beneficiary's actual wages in 2002.

will not suffice.” Without an explanation with regard to the beneficiary’s wages during the first three months of 2001, the Form 1099-MISC submitted by the petitioner on appeal is not viewed as persuasive evidence as to the beneficiary’s wages in 2001. Moreover, even if it were viewed as persuasive evidence, the amount falls short of the proffered wage. Furthermore, the record reflects no further information on any wages received by the beneficiary after 2001. As such, the petitioner did not pay the beneficiary a salary equal to or greater than the proffered wage in 2001 and onward. Therefore the petitioner has not established its ability to pay the proffered wage in 2001 and onward based on the actual wages paid to 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, 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: \$877 and \$33,232. These figures fail to establish the ability of the petitioner to pay the difference between the beneficiary’s actual wage and the proffered wage in 2001, and the entire proffered wage in 2002.

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.² A corporation’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current

² 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

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 submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ 877	\$ 33,232
Current Assets	\$ 18,019	\$ 26,284
Current Liabilities	\$ 55,812	\$ 24,221
Net current assets	\$ -37,793	\$ 2,063

These figures fail to establish the ability of the petitioner to pay the proffered wage. In 2001, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary based on ordinary income of \$877, and net current assets of -\$37,793. The petitioner established that it paid the beneficiary at least \$16,632 in 2001. However, the petitioner would still have to establish that it has the ability to the difference between the beneficiary's actual wages and the proffered wage of \$39,582.40, which is \$22,950.³ Given the petitioner's ordinary income of \$877 and its net current assets of -\$37,793, in 2001 the petitioner has not demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

For tax year 2002, the petitioner submitted no evidence to the record as to any wages earned by the beneficiary during that year. Without more persuasive evidence, the petitioner has to establish that in 2002 it has the ability to pay the entire proffered wage of \$39,582.40. As illustrated above, the petitioner has \$33,232 in ordinary income. Therefore, although the petitioner has substantially more ordinary income in 2002, it has not established that it has sufficient ordinary income (or net current assets) to pay the proffered wage. In addition, the petitioner has provided no further documentation as to other sources of funds that are liquefiable enough to pay the beneficiary's proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it 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.

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.

³ Even if the Form 1099-MISC submitted by the petitioner is accurate, the difference between the beneficiary's 2001 wages as established by the Form 1099-MISC and the proffered wage is \$4,797.