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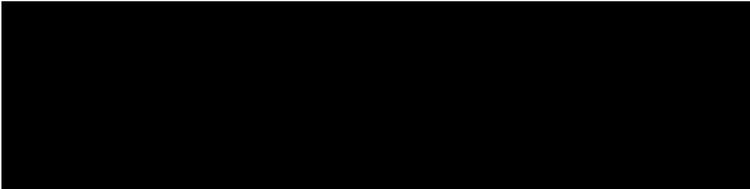
U.S. Department of Homeland Security  
20 Mass, N.W. Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE:



Office: VERMONT SERVICE CENTER

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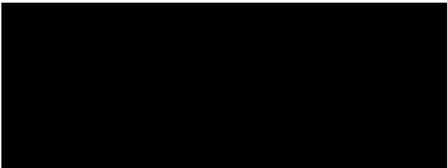
Petitioner:



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 dry cleaning company. It seeks to employ the beneficiary permanently in the United States as a utility pressor supervisor. 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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$14.02 per hour (\$25,516.40 per year). The Form ETA 750 states that the position requires two 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 IRS Form 1120S tax return for 1999,<sup>1</sup> and Form 941 for 2000.

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, consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested Form W-2 for 2001 showing the beneficiary's wages, the 2001 United States corporate income tax return with its schedules and attachments, and an audited annual report for 2001:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$25,516.40 per year as of April 9, 2001, the date of filing and continuing to the present.

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 first page only of the petitioner's Internal Revenue Service (IRS) Form 1120S tax return for years 2001, and a statement by counsel without a Form W-2 Wage and Tax Statement that the beneficiary was an employee of the petitioner in 2001 and earned \$10,920.00 in wages.

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date, April 9, 2001:

- In 2001, the Form 1120S stated taxable income<sup>2</sup> of <\$2,024.90><sup>3</sup>.

The director denied the petition on February 26, 2004, 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.

On appeal counsel submits a brief and additional evidence which is the petitioner's complete 2000 and 2001 tax returns. Counsel also asserts that the petitioner's 2000 tax return demonstrates the ability to pay.<sup>4</sup> Since the priority date from which the petitioner must demonstrate its ability to pay the proffered wage is April 9,

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<sup>1</sup> The tax return for 1999 was submitted incomplete without schedules. Notwithstanding the missing pages, it is two years before the priority date that is April 9, 2001, so it cannot be used to show the ability to pay the proffered wage in 2001.

<sup>2</sup> IRS Form 1120S, Line 21.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>4</sup> Although counsel stated that the beneficiary's 2002 1120S tax return and the beneficiary's W-2 Forms were submitted, there are none in the record, and, Schedule L for years 2000 and 2001 from the returns has no data regarding the petitioner's current assets or liabilities. The returns appear to be filed upon a calendar year basis since the date selection is left blank on both returns.

2001, tax returns offered into evidence prior to the priority date have little probative value to show ability to pay.

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. Counsel asserts that the petitioner employed the beneficiary and paid the beneficiary \$10,920.00 in 2001. 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)).

Counsel asserts that depreciation should be considered as an asset to show the ability to pay the proffered wage. 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 net current assets. In 2001, the Form 1120S stated taxable income<sup>5</sup> was <\$2,024.90>. The wages paid the beneficiary by petitioner were reputedly<sup>6</sup> \$10,920.00. The sum of these two figures is less than the proffered wage of \$25,516.40 per year.

The 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 not state current assets or liabilities in its tax return.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), a case that relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years and he attempts to find commonality between that case and the petitioner's financial circumstances. Since counsel has only submitted the 2001 tax return for review, it is not possible to determine if in succeeding years the petitioner rebounded financially. No unique or unusual circumstances have been shown to exist in

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<sup>5</sup> IRS Form 1120S, Line 21.

<sup>6</sup> There is no documentary evidence to show that payment.

this case to parallel those in the *Sonegawa* case, nor has it been established that year 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the one corporate tax return as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.