



U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 19 2005
WAC-03-089-51298

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

PETITION: 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:
[Redacted]

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

The petitioner is a body shop and car repair company. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is February 6, 2001. The proffered wage as stated on the Form ETA 750 is \$16.62 per hour, which amounts to \$34,569.60 annually. On the Form ETA 750B, signed by the beneficiary on January 30, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on January 27, 2003. On the petition, the petitioner claimed to have been established in 1999, to currently have five employees, and to have a gross annual income of \$418,000.00. In the item for net annual income the petitioner wrote "See Tx Returns." (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated September 23, 2003, the director requested an employer's job offer on behalf of the beneficiary and additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on October 14, 2003.

In a second RFE, dated October 30, 2003, the director requested copies of the employer's monthly bank statements for the years 2001 and 2002 and for the last nine months of 2003. In response to the RFE, the petitioner submitted copies of bank statements of the petitioner. The petitioner's submissions in response to the RFE were received by the director on November 26, 2003.

In a Notice of Intent to Deny (ITD) dated December 13, 2003, the director informed the petitioner of his intention to deny the petition because the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director afforded the petitioner thirty days to submit additional information, evidence or arguments to support the petition.

In response to the ITD the petitioner submitted additional evidence. The petitioner's submissions in response to the ITD were received by the director on January 16, 2004.

In a decision dated February 3, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the petitioner intends to hire the beneficiary to perform services which have previously been performed by outside contractors. Counsel states that the evidence of payments to outside automobiler repair contractors shows funds spent for those payments which have been greater than the proffered wage in each year at issue in the instant petition.

The only evidence newly submitted on appeal is a copy of a letter dated February 11, 2004 from the petitioner's president. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of the document newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 30, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999, 2000, 2001 and 2002. The petitioner's tax year runs from August 1 each year to July 31 of the following year. The return for 2000 covers the period from August 1, 2000 to July 31, 2001 and includes the priority date of February 6, 2001.

The record before the director closed on January 16, 2004 with the receipt by the director of the petitioner's submissions in response to the ITD. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available. The 2002 return covers the period from August 1, 2002 until July 31, 2003.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	-\$2,438.00	not applicable	not applicable
2000	-\$4,049.00	\$34,569.60*	-\$38,618.60
2001	-\$2,510.00	\$34,569.60*	-\$37,079.60
2002	-\$1,478.00	\$34,569.60*	-\$36,047.60

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1999	\$3,035.00	\$597.00	not applicable
2000	\$597.00	-\$3,092.00	\$34,569.60*
2001	-\$3,092.00	-\$5,602.00	\$34,569.60*
2002	-\$5,602.00	-\$7,080.00	\$34,569.60*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the monthly ending balances are as follows:

	2001	2002	2003
January	\$9,287.18	\$1,519.19*	\$21.32
February	-\$2,574.83	\$2,293.58	-\$624.36
March	-\$7,372.67	\$1,698.83	-\$1,588.14
April	-\$9,530.14	\$3,871.36	-\$5,049.12
May	-\$2,142.60	-\$913.43	-\$867.78
June	-\$1,720.19	-\$1,396.65*	\$572.21
July	-\$3,275.53	\$159.03	-\$4,905.41
August	-\$1,125.52	-\$4,102.25*	-\$1,777.35
September	-\$424.44	-\$2,535.64	-\$5,092.08
October	\$2,265.62	-\$4,779.21	\$94.57
November	-\$456.46	\$2,723.20	
December	-\$2,589.79	\$1,596.13	

*No statements submitted for this account for those months, therefore the figures shown are the beginning balances of the following months.

For the month of June 2002 the petitioner submitted a statement for another account of the petitioner, which shows an ending balance of \$756.78. No other statements for that account were submitted in evidence.

The above ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. For more than half of the months the ending balances are in fact negative. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

For the above reasons, the petitioner's bank statements fail to provide additional support to establish the petitioner's ability to pay the proffered wage during the years at issue.

The record also contains copies of Form 1040 U.S. Individual Income Tax Returns of the beneficiary for 2000 and 2001. Schedule C's attached to those returns show that the beneficiary owned a sole proprietorship business by the name of [REDACTED] with the principal business stated as used care dealer. The record also contains copies of checks from the petitioner to [REDACTED] dated in 2001, 2002 and 2003. Five checks are dated in 2001, with a total amount of \$25,000.00 and an average amount of \$5,000.00 per check. Three checks are dated in 2002, with a total amount of \$11,000.00 and an average amount of \$3,666.67 per check. Three checks are dated in 2003, with a total amount of \$19,700.00 and an average amount of \$6,566.67 per check.

The record also contains copies of checks from the petitioner to individuals dated in 2001, 2002 and 2003. On some checks to individuals the date of the check is not visible on the copy in the record. For any such check it is assumed for the purpose of analysis that its date is the same as that on the check which precedes it in the record.

For 2001, the record contains 45 checks to individuals with a total amount of \$8,826.00 and an average amount per check of \$196.13. For 2002, the record contains 78 such checks with a total amount of \$23,576.75 and an average amount per check of \$302.27. For 2003, the record contains 47 such checks with a total amount of \$16,570.00 and an average amount per check of \$352.55.

The total of the checks to [REDACTED] and to individuals are \$33,826.00 in 2001, \$34,576.75 in 2002, and \$36,270.00 in 2003.

The record also contains a letter dated February 11, 2004 to the director from the petitioner's president, which was submitted for the first time on appeal. In the letter, the president states the following:

Pursuant to your request, we gathered and submitted every check that was used to pay contractors for auto-body repairs services. And as those records indicate, in 2001 and 2002 we have paid \$34,954 and \$34,576 per year for contractors, like [the beneficiary], to work as auto-body repairers. In 2003, we paid more than \$46,000.000 to these contractors. By hiring [the beneficiary] as a full-time employee, we will completely eliminate the need to hire contractors. [The petitioners] not only has the ability to pay [the beneficiary] the prevailing wage of \$34,569, we have already been paying more than that sum-total in payments to a number of different auto-body repair contractors for three years.

(Letter from the petitioner's president, February 11, 2004, at 1).

The figure stated in the president's letter for 2001 is \$1,128.00 more than the total of the checks for 2001. The president's figure for 2002 is equal to the total of the checks for that year, and the president's figure for 2003 is \$9,730.00 more than the total of the checks for that year. Aside from the above discrepancies, the checks other than those payable to [REDACTED] bear no clear indications that they were payments for auto body work.

Only three of the checks to individuals bear notations indicating that they represent payment for work on motor vehicles. One check dated March 3, 2001 to an individual named [REDACTED] bears the words "98 Honda Civic" in the memo section of the check. Another check dated March 6, 2001 to the same individual bears the words "95 GMC P/U" in the memo section. A check dated January 9, 2003 to an individual named [REDACTED] bears the words "1995 Nissan P/U" in the memo section. No other checks reference any vehicles.

Four checks dated in 2003 to an individual named [REDACTED] bear the word "commission" in the memo section of the check, and five checks dated in 2003 to an individual [REDACTED] bear the word "maintenance" in the memo section of the check.

Some of the checks in fact appear to be paychecks, since some checks are in approximately the same amounts to the same individuals, dated one week apart.

For example, the record contains copies of checks dated in 2002 to an individual named [REDACTED]. The dates and amounts of those checks are shown in the table below.

January 2, 2002	\$291.00	May 1, 2002	\$309.00
January 16, 2002	\$606.00	undated	\$303.00
January 23, 2002	\$300.00	May 22, 2002	\$321.00
February 1, 2002	\$252.00	May 29, 2002	\$249.00
undated	\$307.50	June 5, 2002	\$222.00
undated	\$318.00	June 12, 2002	\$301.50
March 12, 2002	\$300.00	June 19, 2002	\$297.00
March 20, 2002	\$246.00	June 26, 2002	\$300.00
March 27, 2002	\$300.00	July 3, 2002	\$309.00
undated	\$321.00	July 10, 2002	\$243.00
undated	\$303.00		

In addition, eight checks dated in 2002 to an individual named [REDACTED] show a similar pattern, with payments averaging about \$300.00 per check. Eleven checks dated in 2002 to an individual named [REDACTED] also appear to be periodic payments, with amounts ranging from \$161.25 to \$618.75.

No invoices or other documentation is submitted to corroborate the petitioner's claim that all of the checks in the record are for auto body work done for the petitioner by independent contractors.

For the foregoing reasons, the evidence fails to support the president's assertions that all of the checks in the record payable to individuals represent payments made by the petitioner to independent contractors for auto body work.

The president's letter states that all of the checks to [REDACTED] were for auto body repair work, an assertion which does appear to be supported by the evidence discussed above. Nonetheless, the amounts of the payments

to Caltex Motors, totalling \$25,000 in 2001, \$11,000.00 in 2002 and \$19,700.00 in 2003, were less in each year than the proffered wage of \$34,569.60. Therefore the payments to [REDACTED] alone are insufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary.

As noted above, the combined totals of the checks to Caltex Motors and to individuals were \$33,826.00 in 2001, \$34,576.75 in 2002, and \$36,270.00 in 2003. Those amounts are approximately equal to the proffered wage. However, the evidence in the record is insufficient to establish that all of the payments to other persons were for auto body repair work contracted out by the petitioner. 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 his brief, counsel states that the petitioner's adjusted gross income for 2001 and 2002 was more than double the proffered wage. In the letter dated February 11, 2004 which is mentioned above the petitioner's president states, the following

I would like to point out that the business grossed more than \$310,000 in 2002 and \$330,000 in 2001. Our adjusted gross income for those years, after deducting costs of goods, was more than \$71,000 in 2002 and \$93,000 in 2001.

(Letter from petitioner's president, February 11, 2004, at 2).

The references of counsel and of the petitioner's president to the petitioner's "adjusted gross income" employ incorrect terminology. The petitioner is a corporation, and its tax returns contain no figures for "adjusted gross income." The figures referred to by counsel and by the petitioner's president are those for total income, on line 11 of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's Form 1120 for 2001 shows total income on line 11 of \$93,696.00, and the petitioner's Form 1120 for 2002 shows the figure of \$71,772.00 on that line. For the reasons discussed above, CIS does not base its analysis on a petitioner's gross receipts or sale nor on a petitioner's total income. Rather, CIS bases its analysis on the petitioner's net income, after allowable deductions. For corporations, the figure for net income is that shown Form 1120, Line 28, taxable income before net operating loss deduction and special deductions. In the instant petition, those figures are discussed above in the analysis of the petitioner's net income. See *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, at 1084 (S.D.N.Y. 1985).

For the foregoing reasons, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income in 2001 and 2002. The director found that the petitioner's net income figures failed to establish the petitioner's ability to pay the proffered wage in those years. The director failed to note that the petitioner's tax year runs from August 1 each year to July 31 of the following year, and the director accordingly failed to consider the petitioner's tax return for its 2000 tax year, which includes the February 6, 2001 priority date. The director also failed to calculate the petitioner's net current assets for any of the years at issue.

The director considered the petitioner's assertions that funds used to pay contractors for auto body repair work could have been used to pay the beneficiary. The director failed to give sufficient attention to the petitioner's claim that those funds would have been spent for the beneficiary's wage in the years at issue, rather than on outside contractors. Nonetheless, for the reasons discussed above, the evidence in the record is

insufficient to establish that all of the checks submitted in evidence were for payments to outside contractors for auto body repair work.

Although the analysis of the director was incomplete with regard to the above issues, the decision of the director to deny the petition was correct, based on the evidence in the record before the director. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are insufficient to overcome the decision of the director.

In summary, the information in the petitioner's tax returns and bank statements is insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. In addition, the evidence in the record is insufficient to establish that the petitioner made payments to outside contractors during the relevant period in amounts equal to or greater than the proffered wage. Therefore the evidence fails to establish that hiring the beneficiary would have saved the petitioner sufficient funds to pay the proffered wage during each of the years at issue in the instant petition.

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.