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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: SEP 27 2005
EAC 03 205 51233

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 an auto repair shop. It seeks to employ the beneficiary permanently in the United States as an auto 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 states that the petitioner had sufficient funds to pay the proffered wage as of the priority date, and submits further documentation.

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 23, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$24.31, and an annual salary of \$50,564.80. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 2000, to have seven employees, and to have a net annual income of \$10,837. In support of the petition, the petitioner submitted a letter of support from the petitioner dated June 4, 2003, stating that an immediate job was available for the beneficiary as an auto mechanic. The petitioner also submitted the beneficiary's Forms 1040 for 2000 and 2002. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2000, 2001, and 2002. The employer's identification number on these returns is 11-3584727. The Form 1120S for 2001 indicated no gross receipts, or profits, and ordinary income from trade or business activities of -\$50. Schedule L of this return indicated no cash, inventory and/or other assets or liabilities.

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 August 5, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner's 2001 federal income tax indicated a net loss of \$50, while the 2002 return showed a net income of \$4,508 with greater current liabilities than assets.¹ The director requested that the petitioner provide copies of any of the following types of evidence: copies of the beneficiary's Forms W-2, if the beneficiary worked for the petitioner; a statement from a financial officer of the petitioner that establishes the petitioner's ability to pay the proffered wage, or annual reports for 2001 accompanied by audited or reviewed financial statements. The director stated that evidence such as accredited profit/loss statements, bank account records, or personnel records might be considered to establish the petitioner's ability to pay the proffered wage; however they would only be viewed as supplementary evidence. The director finally stated that the record did not include evidence of the beneficiary's requisite two years of job related experience obtained prior to the priority date of April 23, 2001. The director states that evidence as to any qualifying experience or training should be in the form of letters from current or former employers or trainer and should include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary or of the training received. If such evidence was unavailable, the director stated that other documentation relating to the beneficiary's experience would be considered.

In response, counsel submitted copies of the beneficiary's weekly earning statements for the weeks September 27, 2003 to October 17, 2003. These documents indicated that the beneficiary's gross pay for these weeks was \$972.40. With regard to the beneficiary's experience, counsel submitted a letter of employment verification from Irene Leasing, Inc., Scarsdale, New York. Edward Stoppelman, vice president of Irene Leasing, stated that the beneficiary was in his employ as an automobile mechanic from March 12, 1996 to September 30, 2000, and provided a detailed description of the beneficiary's job duties.

The petitioner also submitted bank statements from North Fork Bank from January 2001 to December 2002. Counsel stated that these statements reflect business transactions that included bank deposits of over \$60,000, \$70,000, and \$106,000 every month consistently throughout 2001 and 2002. Counsel also resubmitted the petitioner's Form 1120S income tax return for 2001, and stated that the return reflected gross income of \$856,377, and salaries and wages paid of \$190,437, as well as \$69,520 paid to the petitioner's officers. In addition, counsel submitted the petitioner's 2002 Form 1120 for September 2002 to April 2003 that showed a gross income of \$70,262. Counsel stated this tax return reflected the last two months of 2002 and was a final return for the petitioner filing under the name Autodynamic Repair Shop, Inc. Counsel also submits an IRS Form 1120S for 2002. Counsel explained that the petitioner filed as an S corporation and is doing business under the name Dynamic Repairs, instead of Autodynamic Repairs Shop, Inc. Counsel states that the ownership and the address of the petitioner remain the same.

Counsel then submitted the beneficiary's tax returns for 2001 and 2002. Counsel stated that the beneficiary received \$33,280 in 2001 and 2002, as documented by the Schedules C for the respective tax returns. Counsel further stated that the beneficiary was paid on a cash basis until his labor certification was officially approved

¹ The director stated that the petitioner had current liabilities of \$16,608 over current liabilities, but -\$16,608 is the petitioner's net current assets for 2002, as will be explained further in these proceedings.

by the Department of Labor (DOL), at which time he was placed on the petitioner's payroll at the prevailing wage.

Finally counsel submits a copy of the notice of findings sent to it by DOL in which DOL indicated that the prevailing wage for the proffered position was \$24.31 per hour. Counsel states that the proffered wage of \$24.31 was not established at the time of filing the Form ETA 750 labor certification application, but rather as of April 2003.

The director denied the petition on January 13, 2004. In his denial of the petition, the director stated that the petitioner's 2001 tax returns showed a net loss of \$10,887 and current assets of \$346 over current liabilities. The director also stated that the 2002 tax returns indicates that the petitioner had a net loss of \$1,608 and current liabilities of \$16,609 over current assets. The director noted that the petitioner's tax returns did not establish an ability to pay the proffered wage. The director also stated that the petitioner's 2001 and 2002 monthly bank statements did not establish an ability to pay the proffered wage. The director stated that the petitioner had to show that the bank statement met one of two criteria. One, the petitioner's year-end balances were greater than or equal to the amount of the proffered wage, or two, the petitioner's monthly bank statements increased incrementally with the amount of funds necessary to meet the proffered monthly wage. The director stated that the petitioner's bank statements met neither criterion. The director finally noted that the beneficiary's 2001 and 2002 income tax returns, submitted as evidence, did not establish that the petitioner paid the beneficiary in 2001.

On appeal, counsel submits copies of the monthly balance statements for the petitioner's North Fork bank account for April 2001, June 2001, July 2001, and September through December 2001. Counsel states that the monthly balance statement for April 2001 clearly shows that the petitioner had \$41,241.17 available to pay the proffered wage after all monthly expenses were paid. Counsel states that the bank statements clearly establish that the petitioner had more than sufficient funds available at the end of each month after all expenses were met to pay the proffered wage. Counsel states that DOL did not advise the petitioner of the prevailing wage of \$972.40 until April 2003 and that immediately after that, the employer met the requirement. Counsel states that since business expenses are met by income continuously generated on a daily and weekly basis, the petitioner was able to meet the expense of the beneficiary's salary on a weekly basis, as well as the petitioner's other employees. Counsel asserts that the large amounts left over every month after the expenses are paid clearly show the petitioner's ability to pay the salary prior to and at the time of filing and to the present.

Counsel also submits a copy of the monthly balance statement for January 2004 with three pages of copied paychecks. This documentation indicates the beneficiary was paid \$743.07 on January 13, 2004, \$613.57 on January 27, 2004, and \$743.07 on January 22, 2004. Counsel also submits monthly balance statements for August, September, October, and December 2003. Finally counsel submits the beneficiary's earnings statement for September 12, 2003 to December 26, 2003. These earnings statements indicate that the beneficiary earned a weekly gross pay of \$972.40, and net pay of \$743.07 in this period of time.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's

ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. In addition, with regard to the petitioner's ability to pay the proffered wage as of the priority date, April 23, 2001, the petitioner's ending balance in the North Fork bank statement for April 30, 2001 is \$41,241.17, while substantial, is less than the proffered annual wage of \$50,560.80. Therefore, the petitioner's April 2001 bank statement does not establish that as of the priority date, the petitioner had sufficient bank funds to pay the proffered wage.

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. The Form ETA 750 does not establish that the petitioner employed the beneficiary prior to the priority date. Although the petitioner claimed that it employed the beneficiary in 2002 and 2003, it only submitted weekly pay statements for three weeks in 2003.

On appeal, counsel submits copies of the beneficiary's pay checks and earnings statements for 2003 and 2004. Counsel also submitted copies of the beneficiary's individual federal income tax returns for 2001 and 2002. With regard to the beneficiary's income tax returns, these documents indicate that the beneficiary worked in 2001 and 2002, but they do not establish that the beneficiary worked for the petitioner. Furthermore, even if this fact were established in the record, the beneficiary's wages, or business income, of \$28,200 in 2001 and \$28,745 in 2002 is considerably less than the proffered wage of \$50,564.80. Although the weekly pay statements indicate that the petitioner paid the beneficiary in 2003 and 2004, at the prevailing wage rate, the petitioner has not established that it employed the beneficiary and paid him the prevailing wage as of the April 23, 2001 and onward. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore the petitioner has not established that it has the ability to pay the proffered wage from the April 2001 priority date to the present.

It is noted that counsel asserted in the response of the director's request for further evidence that the petitioner began to pay the beneficiary the prevailing wage as of the date it was notified by the Department of Labor (DOL) of the actual prevailing wage for the proffered position. There is nothing in the law or regulations that requires the beneficiary's employment to conform to the terms of the ETA 750 prior to the alien's adjustment of status. The petitioner is not required to establish that it currently pays the prevailing wage, but rather that it has the ability to pay the proffered wage which is based on the prevailing wage, as of the priority date and onward.

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.

Prior to an examination of the petitioner's net income as of 2001 and onward, the AAO will examine the claimed previous and present business structure of the petitioner. The evidence in the record indicates that the petitioner, under the name [REDACTED] filed Forms 1120S for the years 2000, 2001, and 2002, using the employer identification number of [REDACTED]. These documents indicate that [REDACTED] Inc., was incorporated on December 27, 2000. The record also contains Forms 1120 filed by [REDACTED], for the years 2001 and 2002, using an employer identification number of [REDACTED]. These documents indicate that [REDACTED] was incorporated on September 28, 2000. Since the tax returns are filed under two distinct employer identification numbers and indicate different dates of incorporation, the record is not clear as to whether both businesses are the one and the same entity. It is also not clear that counsel is correct in his assertion that the petitioner changed its name from [REDACTED] since the 2000 tax return submitted to the record is filed under the claimed new name of [REDACTED].

But more importantly, the income tax returns submitted by the petitioner do not reflect any relevant information as to the petitioner's financial resources as of the April 23, 2001 priority date. Counsel in the response to the director's request for further evidence, indicated that the Form 1120 submitted for the tax year 2001 covered the petitioner's business activities from September 2001 to August 31, 2002. This period of time begins six months after the April 2001 priority date. While this return indicates gross receipts of \$856,377, it indicates taxable income on line 28 of -\$10,837. The only other tax return submitted that could presumably include the April 2001 priority date is the Form 1120S income tax form for 2001 submitted with the initial petition.² This return indicates total assets of \$1,950 and an ordinary income from trade or business activities of -\$50. As previously stated, the petitioner did not establish that it employed the beneficiary in 2001. Therefore the petitioner has to establish that it has sufficient net income in 2001 to cover the entire proffered wage of \$50,564.80. The evidence in the record does not establish that the petitioner as of April 2001 had sufficient net income to pay the proffered wage.

With regard to 2002, Form 1120 for 2002 submitted by the petitioner indicated it covers the period of September 1, 2002 to April 30, 2003; however, counsel indicated that this return was a final return for the petitioner as a general corporation and only covers the last two months of 2002. On line 28, the petitioner's

² Although the 2001 1120S return does not indicate the period of time it covers, the filing dates of the other Forms 1120S submitted by the petitioner appear to establish that the petitioner's business cycle reflected in the 1120S returns is January 1 to December 31.

taxable income is -\$6,127. The petitioner, as [REDACTED] then filed an IRS Form 1120S for 2002 on February 11, 2003. The period of time covered by this return is not indicated on the return. This return indicates on line 21 an ordinary income of \$4,508. The combination of the taxable or net income from both of the Form 1120 and Form 1120S is -\$1,619.³ As previously stated, the petitioner did not establish that it employed the beneficiary in 2002. Therefore the petitioner has to establish that it has sufficient net income in 2002 to cover the entire proffered wage of \$50,564.80.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating deduction and special deductions. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income from trade or business activities. As noted previously, the period of time covered by this tax return does not include the priority date, and covers the period of time September 1, 2001 to August 31, 2002. The petitioner's Form 1120 tax return for 2001 shows the following taxable income: -\$10,837. The petitioner's Form 1120S for 2001 indicates ordinary income of -\$50. The combined ordinary or taxable income for 2001 is -\$10,887. Therefore, the petitioner has not established that as of the priority date it had sufficient financial resources to pay the proffered wage of \$50,564.80. As stated previously, the petitioner's tax returns for 2002 show a combined amount of ordinary income of -\$1,619. This figure also fails to establish the ability of the petitioner to pay the proffered wage.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its 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 out of those net current assets. The petitioner submitted the following information for tax years 2001 and 2002 for both its Forms 1120 (general corporation) and Forms 1120S (S corporation):

³ The taxable income identified on the petitioner's 2002 Form 1120S, namely \$4,508, subtracted from -\$6,127, the taxable income noted on the 2002 Form 1120, is -\$1,619.

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2001	2002
Ordinary Income		
1120S Tax Return	\$ -50	\$ 4,508
1120 Tax Return	\$ -10,837	\$ -6,127
Combined Ordinary Income:	\$ -10,887	\$ -1,619
Current Assets		
1120S Tax Return	\$ 0	\$ 46,493
1120 Tax Return	\$ 68,424	\$ 0
Combined Current Assets	\$ 68,424	\$ 46,493
Current Liabilities		
1120S Corporation	\$ 0	\$ 63,101
1120 Corporation	\$ 67,651	\$ 0
Combined Current Liabilities	\$ 67,651	\$ 63,101
Net current assets		
1120S Tax Return	\$ 0	\$ -16,608
1120 Tax Return	773	\$ 0
Combined Net Current Assets:	773 ⁵	\$ -16,608

The federal income tax forms submitted by the petitioner support counsel's assertion that the majority of the petitioner's business operations in 2001 were reported for tax purposes as a general corporation, while the majority of its business operations in 2002 were reported as an S corporation. Nevertheless, the figures listed above for both types of income tax returns fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a net income of -\$10,887, and combined net current assets of \$773, and has not, therefore, demonstrated the ability to pay proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2002. In 2002, the petitioner shows a net income of -\$1,619, and combined net current assets of -\$16,608, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

As noted previously, the bank statements of the petitioner are not viewed as an additional source of funds to pay the proffered wage. Therefore, the petitioner has not demonstrated that any other funds were available to pay the 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.

⁵ The director in her decision stated that the petitioner's current assets in 2001 were \$346 greater than its current liabilities. She provided no further explanation of how this figure of current assets was calculated. The petitioner's correct combined net current assets figure for 2001 is \$773.

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.