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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
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FILE:

EAC-05-084-50909

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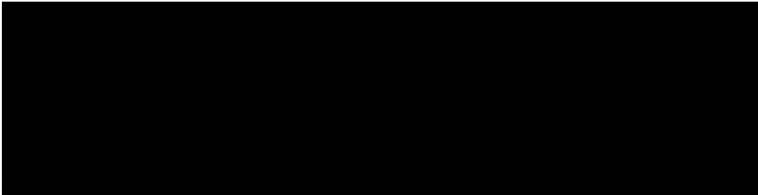
Petitioner:

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, Chief  
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 and the petition will be approved.

The petitioner is a hand bag manufacturer. It seeks to employ the beneficiary permanently in the United States as a shipping and receiving supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification labor certification or the Form ETA 750), 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, counsel submits a brief and additional evidence.<sup>1</sup>

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 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, 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. See 8 CFR § 204.5(d). 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27.09 per hour (\$56,347.20 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered.

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<sup>1</sup> 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 any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of \$13,069,611, to have a net annual income of \$402,543, and to current employ 16 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 12, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents pertinent to its ability to pay the proffered wage: Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2003.

The director denied the petition on February 22, 2005, 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 asserts that the beneficiary will replace a former employee who ceased her employment with the petitioner on January 16, 2005 with a letter from the petitioner and the former employee's W-2 form, and that the replacement establishes the petitioner's ability to pay the beneficiary's 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. In the instant case, the petitioner did not submit the beneficiary's W-2 forms or any other compensation evidence from the petitioner, nor the beneficiary claimed to have worked for the petitioner. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through the present.

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). Reliance on the petitioner's gross receipts, depreciation/amortization deduction or wage expense is misplaced. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632

F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains copies of the petitioner's Form 1120 tax returns for 2001, 2002 and 2003. These tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$56,347.20 per year beginning on the priority date.

In 2001, the Form 1120 stated net income<sup>2</sup> of \$(21,492).

In 2002, the Form 1120 stated net income of \$(86,897).

In 2003, the Form 1120 stated net income of \$(44,697).

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the 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.<sup>3</sup> 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In 2001, the petitioner had current assets of \$273,671 and current liabilities of \$99,152, and thus its net current assets were \$174,519; in 2002, the petitioner had current assets of \$262,951 and current liabilities of \$189,282, and thus its net current assets were \$73,669; in 2003, the petitioner had current assets of \$235,998 and current liabilities of \$114,103, and thus its net current assets were \$121,895. Therefore, the petitioner had sufficient net current assets to pay the beneficiary the proffered wage of \$56,374.20 in 2001, 2002, and 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of or its net current assets.

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28. The director erred in considering the taxable income on Line 30 instead in his decision.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Counsel advised in the initial filing that the beneficiary would replace [REDACTED] in the proffered position and submitted [REDACTED] W-2 forms for 2001 through 2003. Counsel did not, however, verify how many hours per week [REDACTED] spent in the proffered position and how many hours in his president position. On appeal counsel asserts that the beneficiary will replace [REDACTED] who ceased her employment with the petitioner on January 16, 2005 and whose annual salary of \$57,200 would be used to pay the beneficiary the proffered wage. However, in general wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, the petitioner did not submit evidence that [REDACTED] was in the position of shipping and receiving supervisor and performed the same duties as those set forth on the Form ETA 750. If the employee performed other kinds of work, then the beneficiary could not have replaced her. In addition, counsel provides inconsistent information on the person the beneficiary would replace. On appeal counsel asserts that the beneficiary will replace [REDACTED] while with the initial of filing she claimed that the beneficiary would replace [REDACTED] in his duties as a shipping and receiving supervisor. Therefore, the petitioner's request for replacement would be given less weight in these proceedings. Counsel's replacement argument cannot establish the petitioner's ability to pay the proffered wage beginning on the proffered wage in the instant case.

Nonetheless, the petitioner's tax returns for 2001 through 2003 submitted as evidence demonstrate that the petitioner could 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 to the present with its net current assets.

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.

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