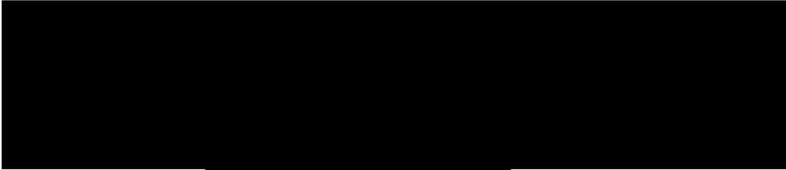




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

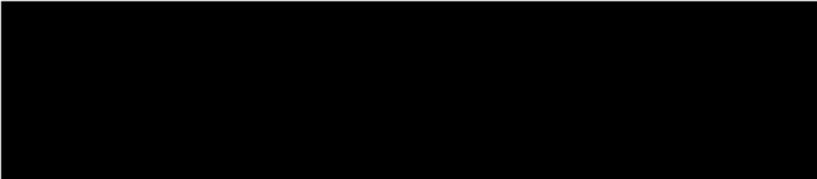
FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **OCT 20 2006**
EAC 03 220 50661

IN RE: 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 dismissed.

The petitioner is a tire and auto service firm. It seeks to employ the beneficiary permanently in the United States as a tire service supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 10, 2001. The proffered wage as stated on the Form ETA 750 is \$17.44 per hour, which amounts to \$36,275.20 per annum. On the Form ETA 750B, signed by the beneficiary on February 10, 2001, the beneficiary claims to be working for the petitioner, but does not state the commencement date. A subsequent letter from the petitioner pegs the beneficiary's employment as beginning in May 1999.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on July 3, 2003, the petitioner claims to have been originally established in 1915, and to currently employ sixty workers. In support of its ability to pay the beneficiary's proposed wage offer of \$36,275.20 per year, the petitioner initially submitted a letter, dated May 28,

2003, from [REDACTED]” the petitioner’s president, who states that the petitioner has been in business since 1915 and has a very healthy balance sheet.

On August 21, 2003, the director requested additional financial documentation from the petitioner in support of its continuing ability to pay the proffered wage beginning as of the date of filing. The director specifically requested copies of the petitioner’s 2000, 2001, and 2002 federal tax returns, as well as copies of the beneficiary’s Wage and Tax Statements (W-2s) for 2000, 2001, and 2002, if the petitioner employed him during that period.

In response, the petitioner, through counsel, provided a duplicate copy of the M [REDACTED] May 28, 2003, letter, and copies of the beneficiary’s 1999-2002 W-2s. They W-2s reflect that the petitioner paid the following wages to the beneficiary in 2000-2002:

2000	\$25,476.88
2001	\$26,900.38
2002	\$27,206.46

The petitioner did not provide the federal tax returns as requested and did not provide an explanation as to their omission.

The director denied the petition on March 24, 2005. He noted that wages paid to the beneficiary in 2001 and 2002 were \$9,374.82 less than the proffered wage in 2001 and \$9,068.74 less than the proffered wage in 2002. The director concluded that the 2001 and 2002 W-2s did not establish the petitioner’s ability to pay the proffered wage of \$36,275.20 as the beneficiary was compensated less than the certified salary.

On appeal, counsel provides a copy of the petitioner’s 2001 federal tax return, a copy of an Internal Revenue Service (IRS) application of extension of time, dated September 9, 2002, to file the 2002 tax return, and a copy of the petitioner’s 2003 tax return. The 2003 tax return shows that the petitioner reported \$75,635 in net income, which exceeds the proffered salary and establishes the petitioner’s ability to pay for that year.

In his brief, counsel claims that even by the principles outlined in a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, “Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2),” HQOPRD 90/16.45 (May 4, 2004), (hereinafter “Yates Memorandum”), the petitioner has met its burden to demonstrate its ability to pay the proffered wage as shown by the beneficiary’s W-2s and the submission of the 2001 and 2003 tax returns on appeal.

Counsel’s assertion is partially correct relevant to the 2003 tax return. It is noted that CIS authority includes a review as whether the petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary’s wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983).

With regard to the 2004 Yates Memorandum, it is noted that by its own terms it is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.¹

That said, the review process employed in this case is consistent with the guidance offered in the Yates Memorandum. 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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, as in this case, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the proffered wage and the actual wages paid to the beneficiary during a given period can be covered by the petitioner's net income or net current assets², the petitioner will be deemed to have demonstrated its ability to pay for the designated period. As determined by the director, however, the wages paid to the beneficiary in 2001 and 2002 fell short of the proffered wage by \$9,374.82 and \$9,068.74, respectively.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts or the level of payroll is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held

¹See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

²Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period. Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown Schedule L of the corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If the petitioner's year-end 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.

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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as mentioned above.

As noted above, the 2003 federal tax return submitted on appeal supports the petitioner's ability to pay the proposed wage offer in that year. In this case, however, relevant to the 2001 and 2002 tax returns,³ the AAO finds the petitioner's failure to submit these federal income tax returns as specifically requested by the director cannot be excused. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the document(s) in response to the director's request for evidence on August 21, 2003. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence relating to the 2001 tax return provided for the first time on appeal. The 2002 tax return or other regulatory evidence relating to that year has never been provided. The regulation at 8 C.F.R. § 204.5(g)(2) provides that the petitioner's evidence of its continuing ability to pay the proffered wage as of the priority date must include either federal tax returns, audited financial statements, or annual reports. As no documentation was submitted to the director that established the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2), other than the beneficiary's 2001 and 2002 W-2s, the director did not err in denying the petition.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, *supra*. As the evidence fails to establish that the petitioning company had the continuing ability to pay the proffered wage beginning on the visa priority date of April 10, 2001, the petition may not be approved.

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. It may be noted that this denial is without prejudice to the petitioner filing a new I-140 (with applicable fee) supported by the required evidence establishing eligibility for the benefit sought.

ORDER: The appeal is dismissed.

³ This also applies to the 2000 tax return if it covers the priority date of April 10, 2001.