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



U.S. Citizenship  
and Immigration  
Services

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PUBLIC COPY

FILE:

LIN 03 214 51537

Office: NEBRASKA SERVICE CENTER

Date: OCT 24 2006

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 grinding company. It seeks to employ the beneficiary permanently in the United States as a grinding operator. 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 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) 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 December 31, 2002. The proffered wage as stated on the Form ETA 750 is \$27,185.60 per year. On the Form ETA 750B, signed by the beneficiary on December 6, 2002, the beneficiary claims to have worked for the petitioner during three periods, the most recent being from April 2000 to the present.

On Part 5 of the visa petition, filed on July 3, 2003, the petitioner claims to have been established in 1978, to currently employ thirty workers and to have a gross annual income of \$742,058.

Because the initial evidence submitted with the petition failed to establish the petitioner's ability to pay the proffered salary, the director issued a request for evidence on December 11, 2003. He advised the petitioner that such evidence must include the petitioner's latest annual report, its 2002 US tax return, or audited financial statements showing that the petitioner has had the continuing ability to pay the proposed wage offer. He further informed the petitioner that additional evidence such as profit/loss and personnel records.

Specifically, the director requested any personnel records, Wage and Tax Statements (W-2s) or Form 1099-Misc showing any compensation paid to the beneficiary since the priority date of December 31, 2002.

The director also requested that the petitioner provide copies of its employer's quarterly federal tax return (Form 941) and copies of state unemployment compensation reports identifying all workers and their earnings. The director did not designate a time period for these submissions.

In response, the petitioner, through counsel, provided a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. As the 2002 return covers the priority date, it is more relevant. It contains the following:

	2002
Ordinary Income	\$ 39,901
Current Assets (Sched. L)	\$271,880
Current Liabilities (Sched. L)	\$196,503
Net Current Assets	\$ 75,377

The petitioner additionally provided copies of data processing records representing quarterly wage information for 2003 for the purpose of generating a Form 941, but such records did not include references to any employee. The petitioner did not supply any wage information relevant to the beneficiary individually as requested.

Copies of the petitioner's bank statements covering the period from December 31, 2002 to May 30, 2003 were provided.

The director denied the petition on July 26, 2004. He noted that two other petitions had been approved with the same priority date and determined that the evidence must show that the petitioner can pay a third beneficiary. focused on the petitioner's financial data contained within its 2002 corporate tax return and concluded that neither the petitioner's net income, nor its net current assets provided sufficient funds to pay the proffered wage.

On appeal, counsel provides wage records for the two other beneficiaries that are employed with the petitioner.<sup>1</sup>

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner

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<sup>1</sup> The AAO will not consider counsel's suggestion that payment of wages to the beneficiary should be attributable to him while using an alias.

establishes by documentary evidence that it 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, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

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 exceeded the proffered wage is misplaced. 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 evidence in the record indicates that the petitioner's net current assets of \$75,377<sup>2</sup> or net income of \$39,901 could reasonably cover the payment of the proffered wage to three beneficiaries as herein indicated. In view of the foregoing, the previous decision of the director will be withdrawn. The appeal will be sustained and the petitioner will be approved.

**ORDER:** The director's decision is withdrawn. The appeal is sustained and the petition is approved.

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<sup>2</sup> Net 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 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 readily available resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of a 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 a corporation'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.