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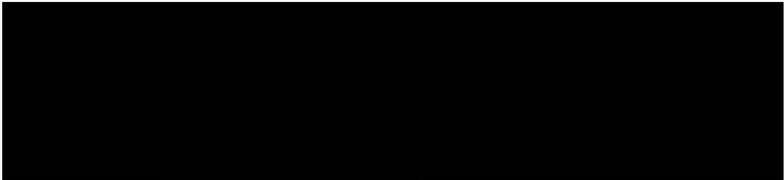
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE: [REDACTED]  
EAC 03 198 52302

Office: VERMONT 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.

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 gas station and automobile repair firm. 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, current counsel submits additional evidence and maintains that the petitioner has the financial ability to pay the proffered wage.

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.

At the outset, it is noted that an employment-based petition (I-140) (EAC 06 135 50997) filed by a different employer on behalf of the same beneficiary was approved on August 2, 2006. This petition is supported by an approved labor certification with a priority date of November 10, 2005. The instant petition's underlying labor certification has an earlier priority date and because third preference visas are not current according to the Department of State's Visa Bulletin, a decision in this matter will be rendered.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.11 per hour, which amounts to \$39,748.80 per annum. On Part B of the ETA 750, signed by the beneficiary on April 29, 2001, the beneficiary claims that he has worked for the petitioner since October 1999.<sup>1</sup>

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<sup>1</sup> In contrast, his undated biographic questionnaire (Form G-325), signed by the beneficiary and submitted with his application for permanent resident status (Form I-485), which was filed June 19, 2003, claims that he has been employed as domestic help since October 1999.

On Part 5 of the preference petition, filed on June 19, 2003,<sup>2</sup> the petitioner claims that it was established in 1998 and currently employs three workers.

In support of its ability to pay the proffered wage of \$39,748.80, the petitioner provided copies of its 2000, 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Return(s). They indicate that the petitioner files its taxes using a standard calendar year. The tax returns for 2001-2003 reflect the following:

	2001	2002	2003
Taxable Income before net operating Loss (NOL) deduction	-\$32,589	-\$16,807	-\$10,261
Current Assets (Sched. L)	\$34,989	\$ 8,429	\$13,488
Current Liabilities (Sched. L)	\$ 491	\$ 249	\$ 292
Net current assets	\$34,498	\$ 8,180	\$13,196

It is noted that the 2000 tax return is less probative in this case as it predates the priority date. The petitioner additionally provided copies of various employees' Wage and Tax Statements (W-2s) for 2001, 2002, and 2003, as well as a W-2 for 2004 issued to the beneficiary. It shows that the petitioner paid \$16,315.10 in wages to him in that year.

As noted above, 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.<sup>3</sup> 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 measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 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.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 7, 2005, denied the petition. The director noted that the salaries paid to other employees do not establish the petitioner's ability to pay the certified wage to the beneficiary and determined that neither the petitioner's net income nor net current assets<sup>4</sup> shown on the 2001, 2002 and 2003 tax returns demonstrated sufficient funds to pay the proposed wage offer.

On appeal, current counsel offers a letter, dated April 27, 2005, from Ismail Ibrahim, the petitioner's president. Counsel reiterates statements in his transmittal letter submitted on appeal. [REDACTED] claims

<sup>2</sup> The petition was denied due to abandonment and subsequently reopened in response to the petitioner's motion.

<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.

<sup>4</sup> The director miscalculated the net current assets for 2001 and 2002.

that the beneficiary will generate an additional revenue of at least \$80,000 and will pay for his salary. Mr. [REDACTED] also states that he will be happy to invest his personal resources to pay the beneficiary's salary.

[REDACTED] claim that the beneficiary's skills will generate additional revenue and thereby automatically provide sufficient funds to pay the proffered wage is not supported by any detail or documentation to explain how the beneficiary's employment as an auto mechanic will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. 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)).

At the I-140 immigrant visa filing state of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not its guarantee to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee or willingness to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, [REDACTED] future intention to supplement payment of the proffered wage does nothing to alter the immediate eligibility of the instant visa 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*, 14 I&N Dec. 45, 49 (Comm. 1971). The regulatory provisions supporting the job offer as described in the underlying approved labor certification requires an employer to demonstrate its continuing ability to pay the proposed wage offer beginning at the priority date. 8 C.F.R. § 204.5(g)(2).

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 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, as noted above, there is conflicting information as to when or whether the petitioner has employed the beneficiary. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In any case, the only evidence of wages paid to the beneficiary is the 2004 W-2 showing \$16,315.10 paid to him during that year, or \$23,433.70 less than the proposed wage offer.

In determining the petitioner's ability to pay the proffered wage, the CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

As set forth above, the petitioner's reported net income for 2001, 2002, and 2003, all reflected losses of \$32,589, \$16,807, and \$10,261, respectively. Similarly, net current assets of \$34,498 in 2001; \$8,180 in 2002; and \$13,196 in 2003 failed to demonstrate that the proffered salary of \$37,748.80 could be paid out of these resources in any of the three years.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the 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.