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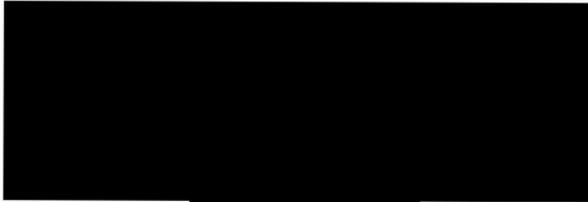
U.S. Department of Homeland Security
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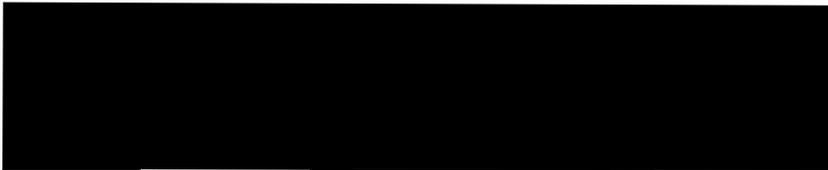
Office: VERMONT SERVICE CENTER

Date: **SEP 06 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker 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 employment based immigrant visa petition was denied by the Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body repair firm. It seeks to employ the beneficiary permanently in the United States as an auto repairer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner has established its 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) also provides in pertinent part:

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 either 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)].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 5, 2001. The beneficiary's salary as stated on the labor certification is \$25.80 per hour or \$53,664 per year. On the ETA 750B, signed by the beneficiary on March 28, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on October 13, 2004, the petitioner claims to have been established in 1996, have a gross annual income of \$351,797, a net annual income of \$158,540, and to employ ten workers.

As evidence of its ability to pay the proffered wage, the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2003. No financial information for 2002 was provided. The tax returns indicate that the petitioner files its returns using a standard calendar year.

In 2001, the return shows that the petitioner reported ordinary income of \$13,791. Schedule L indicates that it had \$10,810 in current assets and \$32,805 in current liabilities, resulting in -\$21,995 in net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of the petitioner's liquidity during a given period. Besides net income, and as an alternative method of determining 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 the proffered salary may be paid. On a corporate tax return, current assets are itemized on line(s) 1(d) through 6(d) of Schedule L and current liabilities are found on lines 16(d) through 18(d).

In 2003, the petitioner declared ordinary income of \$122,115. Schedule L reflects that it had \$23,078 in current assets and \$18,063 in current liabilities, yielding \$5,015 in net current assets.

The director denied the petition, determining that the petitioner had failed to establish its continuing ability to pay the proffered salary beginning on the visa priority date. The director noted that while the petitioner's net income in 2003 was sufficient to pay the proffered wage, in 2001, the petitioner's ability to pay was not demonstrated because both its net income and net current assets were each insufficient to pay the certified wage of \$53,664 per year.

On appeal, counsel resubmits copies of the petitioner's 2001 and 2003 tax returns. He also provides 2002 financial statements consisting of a compilation of the petitioner's financial data as of December 31, 2002.

Counsel asserts that in 2001, the petitioner purchased the building where it operates, as shown by the enclosed closing statements, and that this asset is included on Schedule L, making the total assets \$931,256. Counsel also contends that the petitioner is replacing one of ten employees.

These contentions are not persuasive. 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 a given period. If the petitioner 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 during that period. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period. In this case, the evidence does not indicate that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will next examine the net taxable income as reflected on the petitioner's federal income tax return, audited financial statements or annual reports, 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)). 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.

As mentioned above, CIS will consider a petitioner's net current assets as an alternative way to determine its ability to pay a proposed wage offer. Counsel's suggestion that the petitioner's total assets in 2001, including the value of the building where the petitioner operates, should have been considered in the determination of the ability to pay the proffered wage is rejected. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets, such as the real property purchased for the business operations, 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.

Counsel's assertion as to the beneficiary's replacement of another employee is not supported by anything in the record. There is no direct evidence specifically identifying the position, duties, and termination of the worker who performed the proffered position. Counsel's contentions in this regard do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The 2002 compiled financial statement is not determinative of the petitioner's ability to pay the proffered wage in that year. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 37071 (3rd ed. 2000). This disclaimer is usually found at the beginning of a compilation where the accountant explains that no form of assurance or opinion can be expressed based on the figures presented. As such, the compiled income statement for 2001 cannot be considered as determinative of the petitioner's ability to pay a proffered salary.

While it is noted that the petitioner's net income had increased by 2003 and was sufficient to pay the proffered salary, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing ability to pay the proffered wage beginning at the priority date and continuing until the beneficiary obtains permanent resident status.

Here, the petitioner's tax returns reflected that neither its net income of \$13,791, nor its net current assets of - \$21,995 were sufficient to pay the proffered salary of \$53,664 in 2001. In 2002, it submitted an unaudited financial statement, which does not comply with the regulatory guidelines and cannot be considered as probative of the petitioner's ability to pay the certified salary in 2002.

Based on the evidence contained in the underlying record and after consideration of the information and argument submitted on appeal, the AAO concludes that the petitioner has failed to demonstrate its continuing ability to pay the proffered wage.

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.