



U.S. Citizenship
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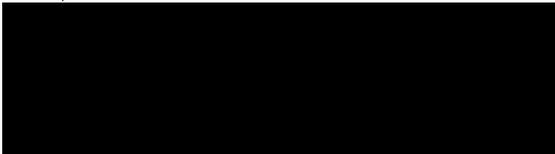
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FILE: WAC-03-178-53857 Office: CALIFORNIA SERVICE CENTER Date: **DEC 21 2005**

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

PETITION: 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an apparel manufacturing company. It seeks to employ the beneficiary permanently in the United States as a quality control manager. 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.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 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)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 30, 1998. The proffered wage as stated on the Form ETA 750 is \$67,935.60 per year. On the Form ETA 750B, signed by the beneficiary on January 23, 1998, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on March 28, 2002.

The I-140 petition was submitted on May 27, 2003. On the petition, the petitioner claimed to have been established on April 1, 1993, to currently have 20 employees, to have a gross annual income of \$1.6 million, and to have a net annual income of \$83,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated March 22, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also requested additional evidence relevant to the beneficiary's experience.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on June 14, 2004.

In a decision dated June 28, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that although the petitioner's tax returns indicate some negative balances, the director failed to request additional evidence in other forms to establish the petitioner's ability to pay the proffered wage. Counsel also states that the petitioner has a line of credit which would be available if needed to pay the proffered wage, and that the petitioner believes that hiring the beneficiary will result in increased sales for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 23, 1998, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1998, 2000, 2001, 2002 and 2003. The record before the director closed on June 14, 2004 with the receipt by the director of the petitioner's submissions in response to

the RFE. As of that date the petitioner's federal tax return for 2004 was not yet available. Therefore the petitioner's tax return for 2003 is the most recent return available.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income. The petitioner's tax returns show the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	\$60,136.00	\$67,935.60*	-\$7,799.60
1999	not submitted	\$67,935.60*	no information
2000	\$48,477.00	\$67,935.60*	-\$19,458.60
2001	\$34,927.00	\$67,935.60*	-\$33,008.60
2002	\$71,761.00	\$67,935.60*	\$3,825.40
2003	\$56,225.00	\$67,935.60*	-\$11,710.60

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage only in the year 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1998	-\$42,211.00	-\$53,058.00	\$67,935.60*
1999	not submitted	not submitted	\$67,935.60*
2000	-\$300,054.00	-\$155,328.00	\$67,935.60*
2001	-\$155,328.00	-\$51,638.00	\$67,935.60*
2002	-\$51,638.00	\$15,611.00	\$67,935.60*
2003	\$15,611.00	-\$16,628.00	\$67,935.60*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel asserts that the petitioner has access to a line of credit which could be drawn upon if necessary to pay the proffered wage to the beneficiary. However, no evidence in the record pertains to a line of credit of the petitioner. The assertions of counsel 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). Moreover, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

In his brief, counsel also asserts that the petitioner hopes that hiring the beneficiary will result in an increase in production and in improved quality of the petitioner's products, and that those factors will in turn lead to increased sales and growth for the petitioner's business. However, the petitioner has provided no information on which to base any projected increase in sales and growth of the petitioner's business. Counsel states that the petitioner has always produced a small profit. That assertion is consistent with the tax returns in the record, which are for the years 1998, 2000, 2001, 2002 and 2003. But the petitioner's tax return for 1999 has not been submitted, nor has any explanation been offered for the absence of that tax return. Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. But the absence of the petitioner's tax return for 1999 and the absence of any further evidence pertaining to the petitioner's business beyond the information shown on the tax returns in the record prevents any further analysis of the petitioner's financial situation under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his brief, counsel states that the director failed to request additional evidence in forms other than tax returns to establish the petitioner's ability to pay the proffered wage. However, in the RFE the director not only made requests for specific tax documents, but also made a general request for evidence of the petitioner's ability to pay the proffered wage. The director stated, "Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns **(with appropriate signature(s) and dates)**, or audited financial statements." (RFE, March 22, 2004, at 2 (bolded text in the original)). Moreover, the petitioner has failed to submit additional evidence on appeal. 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). An evidentiary document would be precluded from consideration on appeal only if the director had specifically requested that document and if the petitioner had failed to submit the requested document prior to the director's decision. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the RFE in the instant case, the director mentioned various documents and types of documents which the petitioner might submit to establish its ability to pay the proffered wage. But nearly all of those documents were listed as alternative examples of acceptable evidence. The only documents specifically requested by the director were signed tax returns, which the petitioner then submitted in response to the RFE. The petitioner was therefore free to submit additional documentation on appeal, but the petitioner has not done so.

For the foregoing reasons, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director incorrectly described the net income as shown on the petitioner's tax returns as "taxable income before net operating loss deduction and special deductions." (Director's Decision, June 28, 2004, at 2). That term refers to the item on line 28 of the Form 1120 U.S. Corporation Income Tax Return. However, the petitioner is an S corporation, and no such item appears on the Form 1120S U.S. Income Tax Return for an S Corporation. In the instant petition, the petitioner's net income may be considered to be the amount shown on line 21, for ordinary income, of the Form 1120S, as discussed above.

Although the director used the wrong term in referring to the petitioner's net income, the director correctly stated the amounts of net income for the petitioner for 1998, 2000, 2001, 2002 and 2003 and correctly calculated the petitioner's year-end current assets and current liabilities for each of those years. The director correctly noted the absence of a federal tax return of the petitioner for 1999. The director found that the petitioner's tax returns failed to establish the petitioner's ability to pay the proffered wage in any of the years at issue. However, the director failed to note that in the year 2002, the petitioner's net income was higher than the proffered wage.

Despite the errors in analysis mentioned above, the director's decision to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.