

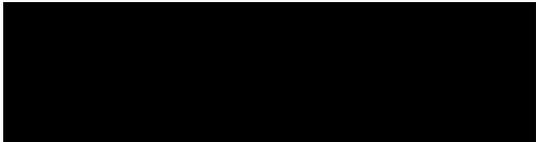
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE: LIN-03-130-50814 Office: NEBRASKA SERVICE CENTER Date: **JUL 26 2005**

IN RE: Petitioner: 
Beneficiary: 

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a Plumber (Construction). 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 the beneficiary had the education required on the Form ETA 750 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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date 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 March 7, 2001.

The Form ETA 750 states that the position of Plumber (Construction) requires eight years of grade school education and four years of high school education and two years of experience in the job offered.

On the Form ETA 750B, signed by the beneficiary on February 8, 2001, the beneficiary claimed to have been employed by the petitioner from March 2000 until March 2001.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The I-140 petition was submitted on March 17, 2003. On the petition, the petitioner left blank the items for the date it was established, its current number of employees, its gross annual income and its net annual income. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 23, 2003, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage and additional evidence relevant to the beneficiary's education. The director stated:

The educational requirements for the offered position is [sic] eight years of grade school and four years of high school. No evidence was submitted to show that the alien meets this requirement. Submit evidence to show that the alien met the educational, training, experience, and any other requirement of the labor certification by March 7, 2001. Evidence of education must be in the form of an official record showing the dates of attendance, area of concentration of study, and date of degree award, if any.

(RFE, October 23, 2003, at 2).

The RFE stated that any response must be received by CIS by January 15, 2004. That date was consistent with the twelve-week period for response to an RFE set by the regulation at 8 C.F.R. § 103.2(b)(8).

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on January 15, 2004. The responses did not include copies of any documents pertaining to the beneficiary's education.

In a decision dated March 17, 2004 the director determined that the petitioner had not established that the beneficiary had eight years of grade school education and four years of high school education as required on the Form ETA 750. The director stated that evidence of the beneficiary's education had been requested in the RFE, but had not been submitted. The director therefore denied the petition.

On appeal, counsel submits additional evidence and no brief. Counsel states on appeal that the educational credentials requested by the director were submitted on February 16, 2004, a date which counsel states was after the due date. Counsel further states that the required documents are attached to the notice of appeal, and that since the educational documents have now been submitted, the petitioner urges that the petition be approved.

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). However, where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The documents submitted for the first time on appeal consist of the following documents: a copy of a Certificate of Graduation from Vocational High School of the beneficiary, dated June 24, 1972, issued by the Vocational High School in Dabrowa Tarnowska, Poland, with certified English translation; and a copy of an affidavit dated January 26, 2004 of Jerzy Szewczyk, who identifies himself in the affidavit as a former Consul of Poland in Chicago. On appeal, the petitioner also submits a duplicate copy of a letter dated February 13, 2001 from an official with a company in Dabrowa Tarnowska, Poland, stating the beneficiary's experience as a sanitary equipment installer from February 1, 1997 to April 3, 2000, with certified English translation. Another copy of that letter, with the certified English translation, had been submitted prior to the director's decision, along with other evidence.

Each of the documents submitted for the first time on appeal is directly relevant to the beneficiary's high school education. The Certificate of Graduation shows the beneficiary's graduation from a three-year vocational high school on June 24, 1974. The affidavit of [REDACTED] describes the types of high schools which existed in Poland at the time of the beneficiary's graduation from high school.

Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, where the Board of Immigration Appeals stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

Matter of Soriano, 19 I&N Dec. 764, 766 (BIA 1988).

As noted above, in the RFE the director had specifically requested evidence pertaining to the beneficiary's grade school and high school education. Since the petitioner failed to submit the requested evidence prior to the director's decision, and since the petitioner has offered no explanation for its failure to do so, that evidence is precluded from consideration on appeal.

In his decision, the director correctly found that the petitioner had failed to submit evidence of the beneficiary's education as requested in the RFE. Since the petitioner had submitted other evidence as requested in the RFE, the director treated the submission as a request for a decision based on the record, as authorized by the regulation at 8 C.F.R. § 103.2(b)(12). The director then correctly found that the evidence failed to establish that the beneficiary had eight years of grade school education and four years of high school education as required by the ETA 750. The director therefore denied the petition.

The decision of the director to deny the petition was correct, based on the evidence then in the record. The assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, 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.

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 Sonegawa*, 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 February 8, 2001, the beneficiary claimed to have worked for the petitioner from March 2000 until March 2001.

The record contains copies of a Form W-2 Wage and Tax Statement of the beneficiary for 2000 and copies of Form 1099-MISC Miscellaneous Income statements of the beneficiary for 2001 and 2002. Each of the foregoing statements shows compensation received from the petitioner. The record before the director closed on January 15, 2004 with the petitioner's submissions in response to the RFE. As of that date, a statement of the beneficiary compensation for 2003 was not yet due, so the beneficiary's Form 1099-MISC for 2002 was the most recent statement available. The amounts of compensation on the beneficiary's Form W-2 for 2000 and on his Form 1099-MISC's for 2001 and 2002 are shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2000	\$18,600.00	N/A	N/A (priority date is in 2001)
2001	\$36,000.00	\$62,899.20	\$26,899.20
2002	\$43,280.00	\$62,899.20	\$19,619.20

The above figures fail to establish the petitioner's ability to pay the proffered wage either in 2001 or in 2002.

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. 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. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

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 record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001 and 2002. The record before the director closed on January 15, 2004 with the petitioner's submissions in responses to the RFE. As of that date the petitioner's tax return for 2003 was not yet due.

The petitioner's Form 1120S tax returns in the record state amounts for ordinary income on line 21 as shown in the table below.

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	\$5,944.00	N/A	N/A (priority date is in 2001)
2001	\$5,457.00	\$26,899.20*	-\$21,442.20
2002	-\$11,431.00	\$19,619.20*	-\$31,050.20

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above figures fail to establish the petitioner's ability to pay the proffered wage in either 2001 or 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	
2000	\$15,482.00	\$24,500.00	N/A (priority date is in 2001)
2001	\$24,500.00	\$15,500.00	\$26,899.20*
2002	\$15,500.00	\$6,400.00	\$19,619.20*

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above figures fail to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

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. In the instant petition, the

Schedule K-1's attached to the petitioner's tax returns show a single individual as the owner of 100% of the shares of the petitioner. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income.

The petitioner's tax returns show amounts paid in officer compensation of \$80,000.00 in 2000; \$102,600.00 in 2001; and \$110,000.00 in 2002. Those amounts were presumably paid to the petitioner's owner. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. In certain circumstances, amounts paid in officer compensation to the sole owner of the petitioner may be considered as additional financial resources of the petitioner.

If the amounts paid in officer compensation in 2001 and 2002 are added to the petitioner's net income in each of those years, the total in each year would be an amount sufficient to pay the beneficiary the full proffered wage, while still leaving a substantial amount available for officer compensation. Nonetheless, the record in the instant case contains no evidence that the petitioner's owner would have been willing and able to forego a portion of his officer compensation if that had been necessary in order to pay the beneficiary the full proffered wage. Therefore, based on the evidence in the instant petition, the amounts paid in officer compensation fail to provide additional support to establish the petitioner's ability to pay the proffered wage.

The record contains no other evidence relevant to the petitioner's ability to pay the proffered wage. For the above 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 summary, the evidence in the record fails to establish that the beneficiary had four years of high school education as required by the ETA 750. The director's denial was based on that ground. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage during the years at issue.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.