



U.S. Citizenship
and Immigration
Services

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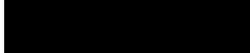


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FILE: 
EAC-03-264-52375

Office: VERMONT SERVICE CENTER

Date: NOV 03 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a textile manufacturing company. It seeks to employ the beneficiary permanently in the United States as a machine 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.

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.

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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour, which amounts to \$38,188.80 annually. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 2001 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on September 22, 2003. On the petition, the petitioner claimed to have been established in 1994, to currently have twelve employees and to have a gross annual income of \$1,374,387.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated December 8, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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 February 9, 2004.

In a decision dated April 19, 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 no brief and submits additional evidence. Counsel states on appeal that the petitioner's tax returns in the record show substantial gross income and substantial payroll expenses. Counsel also states that the petitioner's net loss shown on its tax return for 2001 was the result of accounting practices and mortgage refinancing purposes and that the petitioner has always had the ability to pay the proffered wage.

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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 April 12, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 2001 and continuing through the date of the ETA 750B. However, the record contains no evidence to substantiate the beneficiary's claim to have been employed by the petitioner, nor any evidence indicating the amounts of any compensation paid by the petitioner to the beneficiary. The record contains copies of Form W-2 Wage and Tax Statements, but those Form W-2's are for a person who is not the beneficiary.

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 2001 and 2002. The record before the director closed on February 9, 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 2003 was not yet due. Therefore the petitioner’s tax return for 2002 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
2001	-\$32,741.00	\$38,188.80*	-\$70,929.80
2002	\$110,948.00	\$38,188.80*	\$72,759.20

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2001, which is the year of the priority date.

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	
2001	-\$832,601.00	-\$862,676.00	\$38,188.80*
2002	-\$862,676.00	\$80,445.00	\$38,188.80*

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2001.

The record also contains a letter dated January 27, 2004 from one of the two owners of the petitioner. In the letter, the owner states that the position offered to the beneficiary is not a newly created position, but that it is a position held until recently by another employee, who has been promoted to plant manager. With that letter the petitioner also submits copies of Form W-2 Wage and Tax Statements of that employee for 2001, 2002 and 2003. The letter and the Form W-2's are submitted for the first time on appeal.

The Form W-2's state compensation received by that employee from the petitioner of \$37,849.50 in 2001, \$44,670.46 in 2002, and \$49,280.00 in 2003. The figure for 2001 is \$239.30 less than the proffered wage, and the figures for 2002 and for 2003 are greater than the proffered wage.

The information in the January 27, 2004 letter lacks sufficient detail to establish that the petitioner intended to hire the beneficiary as a replacement for another employee. The evidence indicates that the other employee was on the petitioner's payroll in 2001, 2002 and 2003 and that her position became open only upon her promotion. The date of her promotion is not stated in the January 27, 2004 letter. The evidence fails to establish that the petitioner intended to hire the beneficiary as a replacement for the other employee as of the priority date of April 23, 2001.

The record also contains other evidence relevant to the petitioner's ability to pay the proffered wage.

The record contains a letter dated January 27, 2004 from a person who identifies herself as the accountant for the petitioner. In that letter, the accountant states that in February 2002 the petitioner refinanced its commercial mortgage from a short-term promissory note to a long term loan of \$1,000,000.00. The statement of the accountant is consistent with the information on the Schedule L's attached to the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002. On the Schedule L for 2001, the petitioner states a short-term liability figure on line 17 for mortgages, notes, and bonds payable in less than one year in the amount of \$949,473.00 at the beginning of the year and the same figure at the end of the year. On the Schedule L for 2002, the petitioner states that same figure on line 17 for the beginning of the year, but for the end of the year on that line states zero liabilities. On line 20 of the Schedule L for 2002 the petitioner states long-term liability figures for mortgages, notes, and bonds payable in one year or more of zero at the beginning of the year and \$1,002,750.00 at the end of the year.

The information on the Schedule L's is therefore consistent with the accountant's statement that a short-term mortgage liability of the petitioner which existed during 2001 was refinanced as a long-term mortgage liability in February 2002.

The foregoing evidence provides some support for counsel's assertion in the notice of appeal that the petitioner's line 21 loss in 2001 was due in part to mortgage refinancing actions of the petitioner. Moreover, if the short-term mortgage liability shown on the petitioner's Schedule L for 2001 were not considered as a claim against current assets, the petitioner's year-end net current assets for 2001 would be a positive \$116,872.00, a figure significantly greater than the proffered wage of \$38,188.60.

The petitioner's tax returns in the record show two individuals as the owners of the shares of the petitioner, each person owning 50% of the shares. One of those individuals is the person who signed the I-140 petition and who signed the letter dated January 27, 2004 referred to above. His title is not given in the documents in the record. The other individual shareowner is identified as the petitioner's president.

The petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation show the amounts for compensation of officers of \$458,124.00 for 2001 and \$475,000.00 for 2002. Counsel and the accountant refer to those amounts as "wages." (I-290B, Part 3, attached sheet; Letter from accountant, January 27, 2004, at 1). The tax returns do not identify the recipients of that compensation, but since the petitioner's shares were owned by only two individuals during those years it is a reasonable inference to conclude that the amounts for compensation of officers were paid to the two individuals who are the petitioner's shareowners.

Under the principles of *Matter of Sonegawa*, 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. The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return.

In the instant case, the petitioner has not claimed that the amounts for compensation of officers were discretionary expenses. Nonetheless, the amounts spent on officer compensation in 2001 and 2002 were more than ten times the amount of the proffered wage. Moreover, that fact that the petitioner was able to refinance its short-term mortgage liability of approximately \$950,000.00 in February 2002, less than two months after the end of the year 2001, indicates that the petitioner was in a strong financial position during 2001, notwithstanding its negative net current assets at the beginning and at the end of 2001.

CIS electronic records show no pending I-140 petitions submitted by the petitioner on behalf of other beneficiaries. CIS electronic records show that the petitioner filed a second I-140 petition on July 28, 2005 on behalf of the same beneficiary. The receipt number in that petition is EAC-05-221-52036. CIS electronic records do not show any decision on that new I-140 petition. The electronic records do not indicate whether the position offered the beneficiary in the new I-140 petition is the same as in the instant petition or whether the proffered wage in the two petitions is the same. Nonetheless, since the beneficiary of both petitions is the same person, it appears that the existence of a second I-140 petition does not indicate an additional salary commitment of the petitioner which should be included in an analysis of the petitioner's ability to pay the proffered wage in the instant petition. If the proffered wage in the new I-140 petition is higher than the proffered wage in the instant petition, that fact would have to be considered by the director when adjudicating the new I-140 petition.

The only other I-140 petition submitted by the petitioner, according to CIS electronic records, is a petition for another beneficiary which was submitted on August 12, 1998, EAC- 98-232-51435, and which was approved on September 15, 1998. Since that petition was approved approximately two and one half years before the instant petition was filed, it is not relevant to the instant petition.

For the foregoing reasons, in considering the totality of the circumstances, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage in the instant petition as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income in 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The director's analysis based on the petitioner's net income and net current assets was correct. Nonetheless, in some petitions the evidence in the record supports a further analysis based on the totality of the petitioner's circumstances, under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The evidence in the instant petition supports such an analysis. For the reasons discussed above, the assertions of counsel on appeal are sufficient to overcome the decision of the director.

In summary, although the petitioner's figures for net income and net current assets in 2001 are not alone sufficient to establish the petitioner's ability to pay the proffered wage during that year, the evidence on the totality of the circumstances affecting the petitioner, including its substantial expenses for compensation of officers and its ability to refinance a substantial short-term mortgage liability in early 2002, is sufficient 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.