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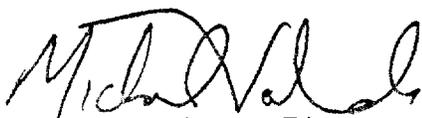
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 machine shop. It seeks to employ the beneficiary permanently in the United States as a lathe machine operator. 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.

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 February 13, 2003. The proffered wage as stated on the Form ETA 750 is \$36,109 annually. On the Form ETA 750B, signed by the beneficiary on January 14, 2003, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on August 5, 2003. On the petition, the petitioner claimed to have been established in 1995, to currently have three employees, to have a gross annual income of \$600,000, but did not indicate the petitioner's net annual income.

In support of the petition, the petitioner submitted:

- An original certified ETA 750 application;
- The petitioner's support letter;
- The petitioner's non-audited and non-reviewed balance sheets.

In a request for evidence (RFE) dated February 27, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, on May 21, 2004, the petitioner submitted:

- Its Form 1120S return for 2003 showing ordinary income of \$23,188, net current assets of minus (-) \$3,945, and zero (0) officers compensation;

- The petitioner's estimate that the value of its company equipment, as of May 20, 2004, is \$391,300; and,
- The May 4 2004 Interoffice Memo of CIS Associate Operations Director William Yates.

In a decision dated June 18, 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.

Counsel states on appeal that it has established its ability to pay the proffered wage. Counsel asserts he can demonstrate this by combining its ordinary income (\$23,188) with its net current assets (\$24,297), which together exceed the proffered wage \$36,109. He further asserts that the petitioner's nearly \$400,000 in company equipment should be viewed as available for liquidation to pay the proffered wage, by analogy to family-based immigration rules under which a sponsor with assets worth five times the excess of its household income over federal poverty guidelines.

At the outset, the AAO notes that combining net income and net current assets will not establish ability to pay. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage.¹ Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is an alternative to other ways of demonstrating the ability to pay the proffered wage, such as with evidence of net income or wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. For example, in certain instances, the amount of cash remaining at the end of a tax year will constitute the petitioner's net income and no longer appears as part of current assets on the return's Schedule L balance sheet. At that point, to continue to treat the cash as part of income would distort a company's financial picture, doubling its true cash and/or income. The Yates memo instructs adjudicators to use each of the three methods separately.

Further, this office is not persuaded by counsel's suggestion that the petitioner will raise funds quickly enough to pay the proffered wage as it comes due, by selling or presumably mortgaging its fixed assets. Counsel has admitted that the equipment is not a liquid asset. Further, to mortgage the petitioner's assets produces a debt, offsetting any gain in the petitioner's effort to improve its ability to pay the proffered wage. We also reject counsel's assertion that assumes the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and would, therefore, not become funds quickly enough to pay the proffered wage on time. Further, the petitioner's total assets do not account for the petitioner's debts and liabilities, which reduce the cash value of petitioner's assets. Otherwise, the petitioner's assets cannot properly be considered in determining the petitioner's ability to pay the proffered wage. However, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A Sub-S corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current

¹ That is not the case here, however, since the petitioner's net current assets for 2003 were a minus (-) \$3,945.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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 petitioner's net current assets during the year in question, 2003, however, were a minus (-) \$3,945, a negative amount and as such, the director properly considered the petitioner's "cash asset loss," or net current assets in denying the petition.

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).

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. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax return for 2003 shows its ordinary income to be \$23,188. Since that amount is less than \$36,108.80, the proffered wage, it fails to establish the ability of the petitioner to pay the proffered wage.

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	Income Increase Needed To Pay Proffered Wage
2003	-\$3,945	\$40,054

Since net current assets for 2003 is a negative figure, it also fails to demonstrate the ability of the petitioner to pay the proffered wage.

After a review of the submitted federal tax return, it is concluded that the petitioner has not have the ability to pay the proffered wage as of the priority date of the petition 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 not met that burden.

ORDER: The appeal is dismissed.