



U.S. Citizenship
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Services

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FILE: LIN 03 265 53542 Office: NEBRASKA SERVICE CENTER Date: NOV 10 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:
[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 sustained. The petition will be approved.

The petitioner is a retail convenience store. It seeks to employ the beneficiary permanently in the United States as a 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.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$20,800 annually. On the Form ETA 750B, signed by the beneficiary on September 4, 2003,¹ the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on September 11, 2003. On the petition, the petitioner claimed to have been established on December 19, 1996, to currently have three employees, to have a gross annual income of more than \$675,000, but did not specify the petitioner's net annual income.

In support of the petition, the petitioner submitted:

- The certified ETA 750 with an additional Part B;
- An employer's support from the petitioner;
- Letters to establish the beneficiary's job experience
- The petitioner's Form 1120S return for 2001 and 2002; and,
- A copy of a February 13, 2003 notice in deportation proceedings (██████████) directing the beneficiary to appear before an Immigration Judge.

In a request for evidence (RFE) dated March 1, 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

¹ Another alien had signed the ETA 750 on April 25, 2001. CIS records do not indicate the petitioner used the ETA 750 for any other petitions.

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, the petitioner submitted the personal income tax returns (Form 1040) of the petitioner's owner for 2002 and 2003, meant to show another source of funds. Counsel asserts that for 2002, the petitioner paid the corporation's owner, [REDACTED], who was also an owner of the property by virtue of its transfer to an LLC, \$25,500 more in rent than for 2001, and \$13,500 more in 2003 than in 2001.

In a decision dated May 14, 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.²

On appeal, counsel submits a brief but no additional evidence.

Counsel states on appeal that the petitioner's deductions from income as shown on its 2001-2003 income tax returns each exceed the \$20,000 in proffered wage, establishing the ability to pay the proffered wage. Further, counsel asserts the amount the petitioner paid in increased rents in 2002 and 2003 make up any deficit that exists in the amount of its ordinary income below the proffered wage.³

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, the beneficiary did not claim to have worked for the petitioner, eliminating this as a means of proving its ability to pay the proffered wage.

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

² The decision incorrectly attributed to the petitioner a second I-140 petition, which CIS records indicate another entity had submitted.

³ The record of proceeding is inadequate for this office to address the rent issue counsel raises.

(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.

Counsel's assertion, that the petitioner should be able to add back the depreciation deductions deducted from its income for 2001–2003, is not persuasive. The court in *K.C.P. Food Co., Inc.*, specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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.”

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 returns show the following amounts for ordinary income: \$22,482 for 2001, \$12,244 for 2002, and \$12,912 for 2003.

The figure for 2001 is more than the proffered wage and accordingly demonstrates the petitioner's ability to pay the proffered wage for that year. The figures for the two succeeding years, however, are less than the proffered wage, and accordingly fail to establish the ability of the petitioner to pay the proffered wage in those two years.

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 those the corporation's managers can expect to convert 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	Income Increase Needed To Pay The Proffered Wage
2001	\$50,133	None
2002	\$28,934	None
2003	\$31,841	None

Since each of those figures is more than the proffered wage, they establish the ability of the petitioner to pay the proffered wage for each of the three years.

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After a review of the federal tax returns, it is concluded that the petitioner has established that it had 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 met that burden.

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