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U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

SEP 07 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foods store. It seeks to employ the beneficiary permanently in the United States as a manager, retail. 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 February 28, 2002. The proffered wage as stated on the Form ETA 750 is \$21.71 per hour, which amounts to \$45,156.80 annually. On the Form ETA 750B, signed by the beneficiary on February 25, 2002, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 13, 2004. On the petition, the petitioner left blank the items for the date on which it was established, its current number of employees, its gross annual income and its net annual income.

In a request for evidence (RFE) dated December 18, 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 specifically requested a copy of the petitioner's 2002 corporate tax return, a copy of a W-2 for each of the petitioner's employees in 2002, and copies of Form 941 quarterly tax reports for each quarter in 2002.

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 March 11, 2005.

In a decision dated March 29, 2005, 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 also submits duplicate copies of some of the documents which had been submitted previously for the record.

Counsel states on appeal that the petitioner had revenues exceeding \$288,000.00 in 2002 and that in February 2002 the petitioner underwent a major capitalization program to have a larger facility. Counsel also states that bank statements of the petitioner submitted in evidence from November 2001 to the present show an initial balance of \$47,119.38. Counsel also states that the petitioner is an S corporation and that its net income in the year of filing was equal to or greater than the proffered wage.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted for the record prior to the director's decision.

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 February 25, 2002, 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 a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002. The record before the director closed on March 11, 2005 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 due. The petitioner's tax return for 2003 should have been available, but no copy of that return was submitted in evidence.

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 (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

In the instant petition, the petitioner's tax return for 2002 indicates income from a source other than from a trade or business. Therefore the figure for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns does not include a portion of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income. In the instant case, the petitioner's tax return for 2002 states the amount for income on line 23, Schedule K as shown in the table below:

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2002	\$47,112.00	\$45,156.80*	\$1,995.20
2003	not submitted	\$45,156.80*	no information

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

The foregoing figures establish the petitioner's ability to pay the proffered wage in 2002. However, since no copy of the petitioner's tax return for 2003 was submitted in evidence, the above information fails to establish the petitioner's ability to pay the proffered wage in 2003, which is the most recent year for which a tax return of the petitioner should have been available when the record closed.

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 attached to the petitioner's tax return for 2002 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	
2002	\$41,724.00	\$0	\$45,156.80*
2003	not submitted	not submitted	\$45,156.80*

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

The petitioner's net current assets at the beginning of 2002 were less than the proffered wage, and the petitioner's net current assets at the end of 2002 were zero.

The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 is marked as a final return by a check mark in Item F, box 2. Instructions to the Form 1120S state that an S corporation should check this box if it has ceased to exist during the period covered by the return. See Internal Revenue Service, Instructions for Form 1120S (2002), at 11, available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>. The marking of the petitioner's 2002 return as a final return presumably explains the failure of the petitioner to submit a copy of its federal tax return for 2003 in evidence. It should be noted that the petitioner's end-of-year figures on Schedule L show zero assets of any type and zero liabilities of any type. That fact is further evidence that the petitioner may have ceased operations during 2002.

Although the director had not specifically requested a copy of the petitioner's tax return for 2003, the RFE dated December 18, 2004 had stated, "Please submit evidence to establish the petitioner's ability to pay the proffered wage from February 28, 2002 to the present." (RFE, December 18, 2004). In his decision, the director noted the absence from the record of any copy of a federal tax return for 2003.

The record contains no evidence indicating any activities of the petitioner during the year 2003. Nor does the record contain any evidence indicating that a different entity has taken over the petitioner's business as a successor in interest. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The record also contains copies of unaudited financial statements for 2002. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Moreover, no financial statements for 2003 were submitted.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

The bank statements in the record are for the months of November and December 2001 and January through October 2002. On the petitioner's bank statements the ending balances are as follows:

2001: \$18,327.01 for November; and \$8,653.81 for December.

2002: \$2,672.00 for January; \$10,126.83 for February; \$8,717.89 for March; \$6,951.88 for April; \$4,632.11 for May; \$3,601.02 for June; \$4,734.76 for July; \$4,843.69 for August; \$7,105.71 for September; and \$5,097.70 for October.

The ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, in the instant petition, the record contains no bank statements after October 2002 and no explanation for the absence of any bank statements for later months. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2003.

Counsel states that the petitioner underwent a capital expansion in February 2002. 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). No evidence in the record supports counsel's assertions on that point.

Counsel asserts that the petitioner's status as an S corporation artificially deflates the petitioner's net income. The Schedule K attached to the Form 1120S U.S. Income Tax Return for an S Corporation shows a single individual as the owner of 100% of the petitioner's shares. Nonetheless, the petitioner's Form 1120S for 2002 contains no information indicating that the petitioner's net income figure on Schedule K as discussed above fails to reflect the full net income available to the petitioner. For example, line 7 of the Form 1120S shows zero expenses for compensation of officers and line 8 shows only \$3,000.00 in expenses for salaries and wages. Line 3 of Schedule A shows zero expenses for cost of labor. Therefore the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 contains no indications of large discretionary expenses under the control of the petitioner's owner which might be reallocated to pay the proffered wage.

In any event, however, as noted above, the petitioner's net income as shown on its Schedule K for 2002 was slightly more than the proffered wage. The petitioner's net income for 2002 is therefore sufficient to establish the petitioner's ability to pay the proffered wage in the year 2002, which is the year of the priority date. But nothing in counsel's assertions on appeal addresses the failure of the evidence to establish the petitioner's ability to pay the proffered wage in the year 2003.

In his decision, the director considered the petitioner's figure for ordinary income on its Form 1120S U.S. Income Tax Return for an S Corporation for 2002 to be the petitioner's net income for that year. As discussed above, however, the petitioner's Form 1120S shows additional income on Schedule K from a source other than from a trade or business. Therefore the income figure on Schedule K is the proper measure of the petitioner's net income for 2002. The director was therefore incorrect in finding that the evidence failed to establish the petitioner's ability to pay the proffered wage in 2002. However, the director correctly noted the absence of any tax return information for the petitioner for 2003. As discussed above, the evidence fails to establish the petitioner's ability to pay the proffered wage in 2003. Therefore the decision of the director 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.