

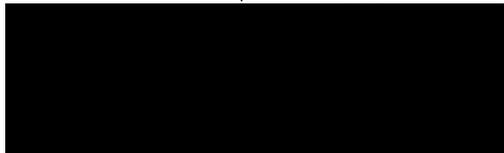


U.S. Citizenship
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Services

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FILE: LIN 03 225 50085 Office: NEBRASKA SERVICE CENTER Date: JAN 20 2006
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant 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:

SELF-REPRESENTED

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 on appeal. The appeal will be sustained.

The petitioner is a property management corporation. It seeks to employ the beneficiary permanently in the United States as a maintenance technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the petitioner submits an explanatory letter and additional evidence.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.76 per hour (\$26,540.80 per year). The Form ETA 750 states that the position requires three years experience.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested additional evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner's latest annual report, U.S. federal tax return, or audited financial statements as well as other documents.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, the petitioner submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax return for 2003; a summary and comparative analysis of petitioner's 2003 and 2002 tax return data as well as other documents.

The director denied the petition on August 24, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that the “previous evidence was incomplete and that our Federal Income Tax Summary was misinterpreted in the [director’s] analysis” On appeal, petitioner submitted a financial statement.

In determining the petitioner’s ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. A statement was found in the record of proceeding that the petitioner employed the beneficiary for three years before he left its employ,¹ but there is no evidence of wage payments.

Alternatively, in determining the petitioner’s ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner’s federal income tax return, 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. Texas 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. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax return submitted demonstrated the following financial information concerning the petitioner’s ability to pay the proffered wage of \$26,540.80 per year from the priority date April 27, 2001.

- In 2001, the Form 1120 stated taxable income² of \$53,202.00.
- In 2002, the Form 1120 stated taxable income of \$51,476.00.
- In 2003, the Form 1120 stated taxable income of \$56,638.00.

The petitioner’s net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did have taxable income sufficient to pay the proffered wage at any time between the years 2002 through 2003 for which the petitioner’s tax returns are offered for evidence.

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.³ A

¹ According to the certified ETA 750B his work dates were December 1996 to September 2001. There is no employment offer letter in the record of proceeding.

² Form 1120, Line 28.

³ 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

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120 U.S. Income Tax Return⁴ submitted by the petitioner, Schedule L found in that returns indicates the following:

- In 2003, petitioner's Form 1120S return stated current assets of \$90,637.00 and \$9,892.00 in current liabilities. Therefore, the petitioner had \$80,745.00 in net current assets. Since the proffered wage was \$26,540.80 per year, this sum is more than the proffered wage.

Therefore, in tax year 2003, the petitioner had established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

The petitioner had submitted internally generated financial statements and tax summaries that have little probative evidence in these proceedings. According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing within the employment system of the Department of Labor.

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 sustained.

expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ The 2001 and 2002 returns were submitted without schedules.

⁵ 8 C.F.R. § 204.5(g)(2).