

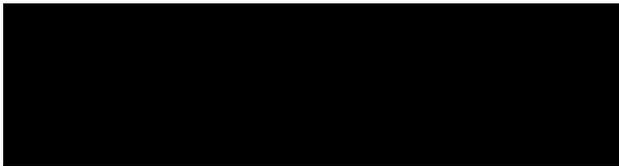
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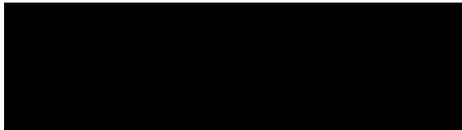


FILE: EAC-04-251-51675 Office: VERMONT SERVICE CENTER Date: JUN 08 2006

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:



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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
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 dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 6, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$25.44 per hour for 35 hours per week, which amounts to \$46,300.80 annually.¹

¹ The director, as counsel correctly notes on appeal, erred in stating that the proffered wage is \$52,936.00. The director's calculation is based on the assumption that the beneficiary is employed for 40 hours per week, and the Form ETA 750 specifically indicates that the beneficiary is employed for 35 hours per week.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Relevant evidence submitted on appeal includes a letter from the petitioner dated October 20, 2004, an income statement for 2001, and a payee report for 2001. Other relevant evidence in the record includes a letter from the petitioner dated July 28, 2004, copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002, and copies of the Form W-2 Wage and Tax Statements for the president of the petitioning corporation and his wife for 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that officer compensation, salaries and wages, labor costs, net current assets at the beginning of the year, and the petitioner's improved situation in 2002 can be considered. Counsel also states that a request for evidence (RFE) should have been issued.

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 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 August 1, 2004, the beneficiary did not claim to have worked for the petitioner.³

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

² 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).

³ On the certified Form ETA 750, the name of the beneficiary [REDACTED]. The record contains a letter from counsel requesting for the substitution of the original beneficiary with the current beneficiary, [REDACTED]. Thus, the current beneficiary signed the form after the priority date and the date of certification.

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 a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. The record before the director closed on September 3, 2004 with the receipt by the director of the petitioner's I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available. A copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2003 does not appear in the record.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$18,061.00	\$46,300.80*	-\$64,361.80
2002	\$38,203.00	\$46,300.80*	-\$8,097.80
2003	No Information	\$46,300.80*	No Information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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 End of year	Wage increase needed to pay the proffered wage
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2001	\$8,681.00	\$46,300.80*
2002	\$77,272.00	\$46,300.80*
2003	No Information	\$46,300.80*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2003.

Counsel states on appeal that “[t]he denial totally ignores that [the beneficiary] will be replacing [REDACTED] who earned \$15,000.00 in 2001 and is [no] longer employed by the firm.” The record includes a letter from the petitioner dated October 20, 2004 stating that “[t]he workers [REDACTED]

[REDACTED] were all carpenters . . . [and] [w]e will use part of the money [paid out to subcontractors] to pay [the beneficiary].” The record also includes a letter from the petitioner dated July 28, 2004 stating that “[the beneficiary] will replace some of the money paid out [to subcontractors,] especially since much of it went [REDACTED] who no longer works for us.” In addition, the record contains an income statement for 2001 and a payee report for 2001.

In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary. Counsel advises that the beneficiary will be replacing another worker, [REDACTED]. However, the letter from the petitioner dated October 20, 2004 names ten different carpenters and does not indicate exactly which carpenter or carpenters the beneficiary will be replacing. Additionally, the letter from the petitioner dated July 28, 2004 seems to indicate that the beneficiary will be replacing [REDACTED]. Thus, counsel’s assertion that the beneficiary will be replacing [REDACTED] is not supported by evidence, and going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the letter dated July 28, 2004 appears to contradict counsel’s assertion that the beneficiary will replace [REDACTED] and *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Furthermore, the letter dated October 20, 2004 names the subcontractors and states that all the subcontractors are carpenters, but does not clearly identify the individual or individuals whom the beneficiary will be replacing. The ten workers named include [REDACTED] the president and sole officer of the petitioning entity. The beneficiary cannot replace [REDACTED] because nothing in the record indicates that the position of the president of the corporation involves the same duties as those set forth in the Form ETA 750.

As shown above, counsel states that [REDACTED] earned \$15,000.00 in 2001. According to the income statement for 2001, [REDACTED] \$19,434.16; according to the payee report for [REDACTED]

was paid \$15,394.16. The income statement for 2001 is inconsistent with counsel's statement and the payee report, and *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Additionally, the income statement for 2001 and the payee report for 2001, both evidence of payments received by the subcontractors, are unaudited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements in the record are not persuasive evidence. The financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel states that "net income can be combined with the labor costs paid out if those labor costs will be transferred to the alien." As indicated above, the AAO will not look at the petitioner's labor costs because the petitioner has not established that the beneficiary will be replacing another worker performing the duties of the proffered position. Thus, net income cannot be combined with the labor costs in this instance.

Counsel states that "[t]he denial completely ignores [the] petitioner's letter of August 25 in which [the president] indicates that he and his wife were responsible for the \$84,000.00 in salaries and wages." The record does not contain a letter dated August 25, 2004. The letter dated July 28, 2004 does state that "if it were necessary, [the president and his wife] would have reduced [their] drawings somewhat to cover [the beneficiary's] salary." The record also contains copies of the Form W-2 Wage and Tax Statements for the president and his wife for 2001 and 2002 showing that the president received the amounts listed for officer compensation and his wife received the amounts listed for salary and wages in 2001 and 2003.

The sole shareholder of a corporation has 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 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for officer compensation may be considered as additional financial resources of the petitioner, in addition to its figures for taxable income. According to the record, no evidence indicates that the beneficiary was paid in 2001, and the petitioner had a negative net income and net current assets of \$8,681.00 in 2001. Thus, the petitioner still needed \$37,619.80 to meet the proffered wage in 2001. The officer was compensated \$53,000.00 in 2001. \$37,619.80 is 71.0% of the total compensation, and even though the letter states that the president would have reduced his drawing "somewhat" to cover the beneficiary's salary, the AAO is not persuaded that reducing his drawing "somewhat" equates to foregoing two-third of his compensation in order to pay the salary of an employee.

Unlike officer compensation, salaries and wages paid to others cannot be considered unless, as stated above, the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position. The salaries and wages were paid to the president's wife, and evidence in the record does not state her duties. She is also not one of the carpenters listed in the letter from the petitioner dated October 20, 2004. Thus, wages paid to the president's wife cannot be considered.

Counsel states that “net current assets exceeded net current liabilities by \$59,565.00 at the beginning of the year [for 2001].” The AAO, as shown above, looks to a corporation’s year-end current assets and year-end current liabilities shown on Schedule L in determining the petitioner’s net current assets.

Counsel states that “for 2002 the situation improved.” The totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonegawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner in a framework of profitable or successful years.

Counsel states that “this case should not have been denied without a request for evidence.” The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal, and the petitioner did submit additional evidence on appeal.

The letter from the petitioner dated July 28, 2004 also states that its “profit plus the cash availability (\$38,203.00 plus \$8,681.00) was enough to guarantee [the beneficiary’s] salary.” The petitioner is essentially stating that its net income from 2002 can be combined with its year-end net current assets from 2001. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner’s ability to pay the wage—one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective “snapshot” of the net total of petitioner’s assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner’s ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. Additionally, the petitioner is combining figures from two different years, and the petitioner must demonstrate that it has the ability to pay the proffered wage in each of the years in question.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The director, in her decision, did not discuss the petitioner's financial information for 2003. Nevertheless, this is immaterial because even if the petitioner can establish its ability to pay the proffered wage in 2003, it still cannot establish its ability to pay the proffered wage in 2001. Thus, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted 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.