

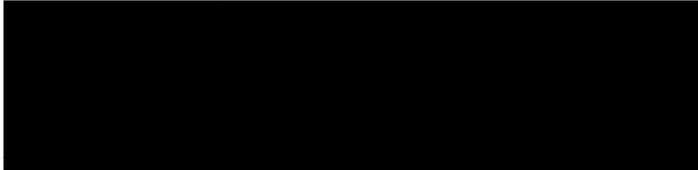
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U.S. Citizenship
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FILE: EAC-03-238-53653 Office: VERMONT SERVICE CENTER Date: JUL 25 2006

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.

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 residential and commercial plumbing company. It seeks to employ the beneficiary permanently in the United States as a Plumber, Assistant. 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 and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 16, 2004 decision denying the petition, the issues in this case are whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the evidence establishes that the beneficiary had the required work experience as of the priority date.

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 November 9, 1998. The proffered wage as stated on the Form ETA 750 is \$39.16 per hour, which amounts to \$81,452.80 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and no additional evidence.

Relevant evidence in the record includes copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1998, 2001, 2002 and 2003.

On appeal, counsel states that the director's decision failed to take into consideration the petitioner's gross profit, which has steadily increased since 1998. Counsel also states that salaries paid for 2001, 2002 and 2003 show amounts greatly in excess of the salary offered.

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 October 1, 1998, 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 copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1998, 2001, 2002 and 2003. In a request for evidence (RFE) dated May 13, 2004, the director had requested the last three years of the petitioner's federal income tax returns. The petitioner's submissions in response to the RFE were received by the director on August 4, 2004. As of that date the petitioner's federal tax return for 2003 was the most recent return available. The record does not indicate why the director failed to request copies of the petitioner's federal income tax returns for 1999 and 2000, since those years are also at issue in the instant petition.

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, that income is reported on Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

Similarly, some deductions appear only on the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax returns indicate additional relevant deductions. Therefore, the petitioner's net income each year must be considered to be the amounts shown each year on Line 23 of the Schedule K, for income. Those amounts are shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1998	\$17,165.00	\$81,452.80*	\$(64,287.80)
1999	not submitted	\$81,452.80*	no information
2000	not submitted	\$81,452.80*	no information
2001	\$14,846.00	\$81,452.80*	\$(66,606.80)
2002	\$17,945.00	\$81,452.80*	\$(63,507.80)
2003	\$8,498.00	\$81,452.80*	\$(72,954.80)

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

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1998	\$(2,280.00)	\$81,452.80*	\$(83,732.80)
1999	not submitted	\$81,452.80*	no information
2000	not submitted	\$81,452.80*	no information
2001	\$(7,218.00)	\$81,452.80*	\$(88,670.80)
2002	\$(9,381.00)	\$81,452.80*	\$(90,833.80)
2003	\$(9,077.00)	\$81,452.80*	\$(90,529.80)

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

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

On the I-290B notice of appeal, received by CIS on October 1, 2004, counsel had requested 60 days to submit a brief and/or evidence to the AAO. However, when this appeal was reached for adjudication by the AAO in June 2006, no further documentation was found in the file. The AAO sent an inquiry to counsel on June 7, 2006. Counsel responded that same day by transmitting a facsimile copy of a letter dated October 27, 2004 from counsel addressed to the Vermont Service Center. Since the appeal was already pending as of October 27, 2004, any further documentation should have been addressed to the AAO, as stated on the I-290B form, not to the Vermont Service Center.

In the October 27, 2004 letter, counsel states that he is enclosing documentation showing the petitioner's ability to pay the proffered wage. Neither the original of that letter nor any supporting documentation is found in the file, and counsel's facsimile transmission of a copy of that letter on June 7, 2006 did not include copies of any supporting documentation.

In his letter dated October 27, 2004, counsel states that the director's decision failed to take into consideration the petitioner's gross profit, which has steadily increased since 1998, according to counsel. Counsel states that the gross profit of the petitioner was \$317,407.00 in 1998, \$343,505.00 in 1999, \$330,439.00 in 2000, \$402,070.00 in 2001, \$427,691.00 in 2002 and \$445,709.00 in 2003. Counsel asserts that those figures show that the petitioner's financial situation has been steadily improving since 1998. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertions about the petitioner's gross profits are supported by the copies of the petitioner's federal tax returns in the record for 1998, 2001, 2002 and 2003. However, as noted above, the record lacks any copies of the petitioner's federal tax returns for 1999 and 2000.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. However, the absence of any financial evidence for 1999 and 2000 prevents any analysis of the petitioner's financial condition during those years. Moreover, *Matter of Sonogawa* relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that the years 1998 through 2003 were uncharacteristically unprofitable years for the petitioner.

Counsel also states that salaries paid for 2001, 2002 and 2003 show amounts greatly in excess of the salary offered. However, the petitioner's salary expenses during those years are among the factors resulting in the

petitioner's net income for each of those years, and therefore those expenses are fully considered in the above analysis of the petitioner's net income. Moreover, the petitioner must establish its ability to pay the proffered wage not only in the years 2001 through 2003 but in each of the years at issue in the instant petition, which are the years 1998 through 2003.

The record contains no other evidence relevant to the petitioner's financial situation. Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director combined figures for ordinary income, current assets and current liabilities to arrive at figures labeled by the director as "Net Income (Loss)." That label is incorrect when referring to calculations based on balance sheet figures. Moreover, figures for ordinary income, assets and liabilities cannot be combined by addition or subtraction, since to do so could result in double counting of some funds. Income is among the factors affecting the petitioner's year-end assets and liabilities, including but separate from current assets and current liabilities.

In her decision, the director also failed to note the presence of additional relevant deductions on the Schedule K's attached to the petitioner's Form 1120S tax returns. Therefore, the proper measure of the petitioner's net income is not its ordinary income, but rather the figure for income on each of the Schedule K's attached to the Form 1120S tax returns.

Despite the above errors in analysis, 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 fail to overcome the decision of the director.

In her decision, the director stated that in the RFE, the director had requested evidence relevant to the beneficiary's qualifications, but that the petitioner had failed to submit evidence relevant to that issue. The director stated that if any appeal was filed, the petitioner should submit evidence on appeal relevant to the beneficiary's qualifications. As noted by the director, the RFE did request evidence relevant to the beneficiary's qualifications.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the

minimum education, training and experience that an applicant must have for the position of Plumber, Assistant. On the ETA 750A submitted with the instant petition, block 14 requires eight years of grade school education, and three years of experience in the offered position. No other requirements are stated in either block 14 or block 15.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience, the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Petri Mechanical Co. [street address] Brooklyn, NY 11219	Plumber	March 1994	April 1997	All kinds of plumbing [with further details given]
Kis sp Z O O Zakland ZAKLAD Przetworstwa Owcowo Warzywego w Bochni Poland	Hydraulics Mechanica	May 1997	present	Hydraulics Equipment Installations/repair/ maint.

The record contains no documentation of any work experience of the beneficiary, apart from the above information on the ETA 750 Part B. The evidence therefore fails to satisfy the requirements of the regulation at 8 C.F.R. § 204.5(g)(1). Accordingly, the evidence fails to establish that the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and fails to establish that the beneficiary had the required work experience as of the priority date.

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.