

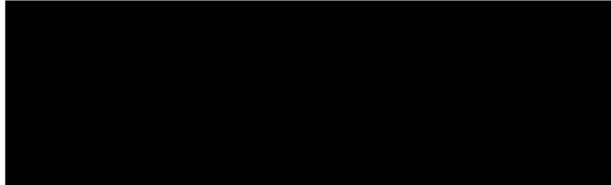
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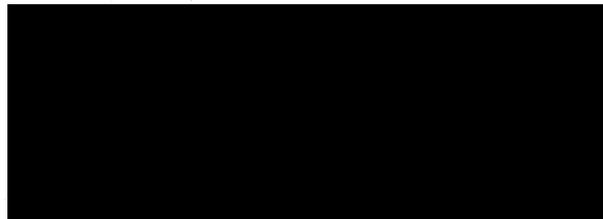
FILE: EAC-03-255-51720 Office: VERMONT SERVICE CENTER Date: **JUL 25 2006**

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, 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 company. It seeks to employ the beneficiary permanently in the United States as a welder. 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 22, 2004 decision denying the petition, the single issue in this case is 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.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$17.15 per hour, which amounts to \$35,672.00 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 no brief and no additional evidence.

Relevant evidence in the record includes a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for its 2001 tax year; copies of Form W-2 Wage and Tax Statement of the beneficiary for 1998, 1999, 2000 and 2001; a copy of the petitioner's Articles of Organization; a letter from a certified public accountant; and two letters from a former employer of the beneficiary in Mexico.

On appeal, counsel states that the evidence establishes to establish the petitioner's ability to pay the proffered wage and that CIS must consider the petitioner's normal accounting practices, even if that ability is not reflected in the petitioner's tax returns.

An initial issue concerns the petitioner's legal organizational status. In a request for evidence (RFE) dated June 3, 2004, the director stated that CIS requires documentation on the date of birth of the petitioner when the petitioner is a private individual or a sole proprietorship. The RFE then requested documentation on the date of birth of [REDACTED] who is identified on the I-140 petition as the petitioner's president. Notwithstanding the director's statements pertaining to the petitioner, the evidence in the record clearly identifies the petitioner as a corporation, not as a private individual or sole proprietorship. The petitioner's name on the I-140 petition includes the abbreviation "Inc.," for "Incorporated." Moreover, the federal tax return in the record is a Form 1120 U.S. Corporation Income Tax Return, in the same name as the petitioner's name on the I-140, and the employer identification number on the Form 1120 matches the petitioner's IRS tax number as shown on the I-140 petition.

The record contains a copy of the petitioner's Articles of Organization, which show that the petitioner was incorporated in the Commonwealth of Massachusetts on February 14, 1996. That date is consistent with the information on the petitioner's Form 1120 tax return for 2001, which gives that same date as the petitioner's date of incorporation.

The evidence therefore establishes that the petitioner is a corporation.

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 April 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1998 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 1998, 1999, 2000 and 2001. No Form W-2's were submitted with the I-140 petition. In the RFE, the director requested, among other documents, copies of Form W-2's of the beneficiary for 1998, 1999, 2000 and 2001. The priority date in the instant petition is April 26, 2001. Therefore the years 1998, 1999 and 2000 are not at issue in the instant

petition, but the year 2001 is the year of the priority date. The I-140 petition was submitted on September 12, 2003. As of that date, the beneficiary's Form W-2 for 2002 should have been available. Moreover, as of the June 3, 2004 date of the RFE, the beneficiary's Form W-2 for 2003 should have been available. But the RFE did not request copies of Form W-2's for 2002 and 2003, and no copies of those W-2's were submitted by the petitioner.

The beneficiary's Form W-2's state compensation received from the petitioner, as shown in the table below.

Calendar Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1998	\$1,848.00	not applicable	not applicable
1999	\$12,335.00	not applicable	not applicable
2000	\$13,399.00	not applicable	not applicable
2001	\$23,658.00	\$35,672.00	\$12,014.00
2002	not submitted	\$35,672.00	no information
2003	not submitted	\$35,672.00	no information

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

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 record contains a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001. The return is for a tax year for the period from July 1, 2001 to June 30, 2002. As noted above, the priority date in the instant petition is April 26, 2001. The petitioner's Form 1120 tax return for 2001 therefore does not include the priority date. The petitioner's tax return for 2000 presumably covers the period from July 1, 2000 until June 30, 2001, a period which would include the priority date.

The I-140 petition was submitted on September 12, 2003. As of that date, the petitioner's Form 1120 tax return for 2002 was not yet due, since tax year returns are due three and one half months after the close of the tax year. The petitioner's tax return for 2002 presumably covered the period from July 1, 2002 until June 30, 2003, with a resulting due date of October 15, 2003, more than a month after the I-140 petition was submitted.

The petitioner's Form 1120 tax return for 2002 should have been available as of the June 3, 2004 date of the RFE, but the RFE made no reference to that tax return. Since the director did not request a copy of the

petitioner's 2002 tax return, the period covered by that return will not be considered to be at issue in the instant petition.

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. The petitioner's tax return for 2001 states an amount for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	not submitted	\$12,014.00*	no information
2001	\$51,181.00	\$35,672.00**	\$15,509.00

\* Crediting the petitioner with the \$23,658.00 actually paid to the beneficiary in calendar year 2001, the calendar year which begins during the petitioner's tax year 2000 (7/1/00 to 6/30/01).

\*\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in calendar year 2002, which begins during the petitioner's tax year 2001 (7/1/01 to 6/30/02).

The foregoing information establishes the petitioner's ability to pay the proffered wage during the period covered by its 2001 tax year. But the foregoing information fails to establish the petitioner's ability to pay the proffered wage as of the priority date, since no tax return was submitted for the 2000 tax year, which includes the priority date.

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 2001 yield the amount 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)
2000	not submitted	\$12,014.00*	no information
2001	\$(72,540.00)	\$35,672.00**	\$(108,212.00)

\* Crediting the petitioner with the \$23,658.00 actually paid to the beneficiary in calendar year 2001, the calendar year which begins during the petitioner's tax year 2000 (7/1/00 to 6/30/01).

\*\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in calendar year 2002, which begins during the petitioner's tax year 2001 (7/1/01 to 6/30/02).

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the petitioner's tax years 2000 or 2001.

The record also contains a letter dated March 14, 2003 from a certified public accountant. In that letter, the accounts states the following:

We have prepared the Corporate tax returns for [the petitioner] since inception. For the period ended June 30, 2002 the Corporation had gross income of \$1,183,615, and total expenses of \$1,133,351, which includes salary and wages paid to the subject alien workers. The net profit of the Corporation for the year was \$51,181. The Corporation did not pay any Corporate Income Taxes for the year as it had losses from a prior year to offset the income. It is anticipated that the Company will continue to be profitable in the future and will continue to pay the alien workers.

(Letter from Certified Public Accountant, March 14, 2003).

Letters from accountants are not among the forms of required evidence specified by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements. Nothing in the account's letter indicates that the figures presented in that letter are based on audited financial statements. Therefore, the accountant's letter provides no significant additional support to establish the petitioner's ability to pay the proffered wage during the relevant period.

It is noted that the accountant's letter refers to "subject alien workers" in the plural, but without giving any further information about the number of such workers or about the wages offered to them.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

CIS electronic records indicate that in 2003, the year in which the instant petition was filed, the petitioner also filed eight other I-140 petitions, all of which were approved. The record in the instant case contains no information about the proffered wages for the beneficiaries of the other eight petitions submitted by the petitioner in 2003, nor any other information about those beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner while also paying the proffered wage to the beneficiary of the instant petition.

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 incorrectly based her analysis of net income on the petitioner's figure for taxable income on line 30 of the Form 1120 tax return, which is the line for taxable income after net operating loss deduction and special deductions. The director also incorrectly referred to the figure on that line as "ordinary income," a term which does not appear on the Form 1120. As discussed above, the proper figure for the petitioner's net income is that on line 28 of the Form 1120, for taxable income before net operating loss deduction and special deductions. The director correctly summarized the petitioner's figures for current assets and current liabilities.

The director failed to note that the petitioner's tax return for 2001 is not a calendar year return, but a tax year return. As discussed above, the petitioner's 2001 tax year does not include the priority date of April 26, 2001, and no return covering that date was submitted for the record.

Despite the errors in the director's analysis, the director's decision 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 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.