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U.S. Citizenship
and Immigration
Services

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FILE: EAC-04-169-51111 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 consulting environmental engineering firm. It seeks to employ the beneficiary permanently in the United States as a Project Engineer. 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 October 18, 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. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$73,100.00 per year.

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 additional evidence. The evidence newly submitted on appeal consists of a letter dated December 3, 2004 from the petitioner's technical director. On appeal the petitioner also submits duplicate copies of numerous documents previously submitted for the record.

Relevant evidence submitted prior to the director's decision includes copies of the petitioner's Form 1120S federal tax returns for 2001 and 2002, copies of contract documents of the petitioner, and copies of documents pertaining to the education and experience of the beneficiary.

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 the document newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the petitioner is a new company with a growing business and states that the petitioner's business decision to add a full-time Project Manager to its staff was fully supported by its business prospects. Counsel states that the petitioner's tax returns should not be considered as the only evidence of its ability to pay the proffered wage and that other documentation in the record establishes that ability. Counsel states that the petitioner's prior counsel gave ineffective assistance to the petitioner. Counsel states that CIS should defer to the New Jersey Department of Labor which conducted the labor certification and that the director must have denied the petition for political reasons.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 27, 2001, 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 Returns for an S Corporation for 2001 and 2002. The I-140 petition was submitted on May 14, 2004. As of that date, the petitioner's federal tax return for 2003 should have been available. However a copy of that return was not submitted for the record.

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. 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 no income from activities other than from a trade or business and no additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns may be considered to be the petitioner's net income. Those figures are shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$(4,322.00)	\$73,100.00*	\$(77,422.00)
2002	\$39,796.00	\$73,100.00*	\$(33,304.00)
2003	\$-	\$73,100.00*	\$(73,100.00)

* 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)
2001	\$(28,190.00)	\$73,100.00*	\$(101,290.00)
2002	\$(20,938.00)	\$73,100.00*	\$(94,038.00)
2003	\$-	\$73,100.00*	\$(73,100.00)

* 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.

Counsel asserts that an analysis of the petitioner's ability to pay the proffered wage should not be limited to the petitioner's tax returns. However, if the petitioner did not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner was free to submit evidence in one of the two other alternative forms as specified in the regulation, namely copies of annual reports or copies of audited financial reports. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not done so.

The record contains copies of several contract documents of the petitioner, dated in 2001, 2002, 2003 and 2004. Those documents indicate that the petitioner was to receive substantial payments under the contracts. However, the record contains no information on the expenses which the petitioner would incur pursuant to those contracts. Therefore the contracts fail to establish that the petitioner's net income in any of those years was greater than that shown on its tax returns.

Counsel asserts that the petitioner's previous counsel gave ineffective assistance to the petitioner, because the absence of any reference in the director's decision to any documentation other than the petitioner's tax returns suggests that the previous counsel failed to submit additional documentation to the director. Present counsel states that such documentation is being submitted on appeal. However, in fact, the record before the director included copies of all of the documentation which is submitted on appeal, except for one letter dated December 3, 2004 from the petitioner's technical director, which was written after the director's October 18, 2004 decision. Therefore it appears that previous counsel submitted all relevant documentation which the petitioner had provided to previous counsel.

Counsel states that the petitioner is a new company with a growing business and states that the petitioner's business decision to add a full-time Project Manager to its staff was fully supported by its business prospects. However, the record lacks details on the petitioner's business prospects and on the petitioner's expenses. Therefore the record lacks sufficient evidence for an analysis of the totality of circumstances affecting the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel states that CIS should defer to the New Jersey Department of Labor which conducted the labor certification and that the director must have denied the petition for political reasons. Counsel's assertions concerning the labor certification do not accurately reflect the nature of that certification. Under the Act, a certification of an ETA 750 by the Department of Labor is a certification that there are not sufficient available workers to perform the labor of the offered position and that the employment of the alien beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Act § 212(a)(5)(B).

Notwithstanding counsel's assertions, the Department of Labor's certification of the Form ETA 750 does not preclude CIS from evaluating the evidence submitted by the petitioner to establish that the petition should be approved. That process includes an evaluation of whether the evidence establishes the petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

The only new evidence submitted on appeal is a letter dated December 3, 2004 from the petitioner's technical director. That letter provides additional details on the petitioner's business operations, including the locations of its two overseas offices and the amount of the petitioner's gross revenues. However, that letter contains no other financial information on the petitioner. Therefore it provides no significant additional information to help to establish the petitioner's ability to pay the proffered wage during the relevant period.

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 correctly stated the petitioner's net income in 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. 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.