

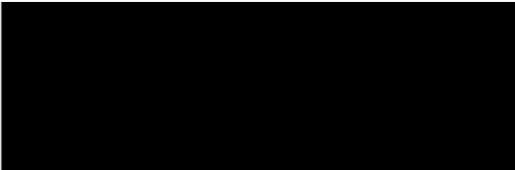


U.S. Citizenship  
and Immigration  
Services

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File: EAC-04-025-51144 Office: VERMONT SERVICE CENTER Date: JUN 13 2006

In re:

Petitioner:  
Beneficiary:



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)

IN 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 Acting Director (Director), Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner failed to establish its ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel indicated that he would submit a brief and/or evidence to the AAO within 30 days and stated only the following: "USCIS erred as a matter of fact and law."

The appeal was received on November 10, 2004. As of this date, more than 17 months later, the AAO has received nothing further. The AAO sent a fax to counsel on May 11, 2006 informing counsel that no separate brief and/or evidence was received to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five (5) days to respond. To date, more than three weeks later, no reply has been received.

The petitioner is a carpentry company. The petitioner seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's October 13, 2004, denial, the denial was based on whether or not the petitioner has the ability to pay the proffered wage. The director found that the petitioner did not demonstrate the continuing ability to pay the required wage, and the director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 18, 2002. The proffered wage as stated on Form ETA 750 for the position of a carpenter is \$21.53 per hour, 40 hours per week, which is equivalent to \$44,782.40 per year.

The labor certification was approved on September 24, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on November 5, 2003. A request for additional evidence ("RFE") was sent to the petitioner on June 21, 2004, asking the petitioner to submit additional evidence to establish that the petitioner had the ability to pay the proffered wage including: petitioner's 2002 and 2003 federal tax returns, or alternatively, requested that the petitioner should submit annual reports accompanied by an audited or reviewed financial statement.

The petitioner submitted its 2002 and 2003 federal tax returns. The director denied the petition on October 13, 2004, based on the petitioner's lack of ability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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 appeal<sup>1</sup>.

The evidence in the record of proceeding shows that the petitioner is structured as a S corporation. On the I-140 petition filed on November 5, 2003, the petitioner listed the following information related to the petitioning entity: established 1975; gross annual income: \$800,000.00; net annual income: "n/a"; and that the petitioner has four employees. The I-140 Petition additionally listed the beneficiary's salary at \$21.53 per hour. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage other than the 2002 and 2003 federal tax returns submitted.

The petitioner must establish that its job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 30, 2001, 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).

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. In the instant case, the petitioner has not claimed that it employed and paid the beneficiary the full proffered wage from the priority date of March 18, 2002. On Form ETA 750B, signed by the beneficiary (no signature date listed), the beneficiary did not claim to have worked for the petitioner.

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<sup>1</sup> 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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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).

The record contains copies of the petitioner's Form 1120S U.S. Corporation Income Tax Returns for the years 2002, and 2003.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$44,782.40 per year from the priority date. 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. Line 21 indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	\$38,044
2003	\$10,575

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are shown on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. Here, petitioner's tax returns do not indicate income from other activities. Therefore, the ordinary income figures for the petitioner's Form 1120S tax returns for 2002 and 2003, line 21 accurately reflect the petitioner's income. Based on the 2002 and 2003 tax returns submitted, the petitioner did not have sufficient net income to pay the proffered wage in the years 2002, and 2003. The petitioner did not demonstrate its ability, or continuing ability, to pay the proffered wage.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets are as follows:

<u>Tax year</u>	<u>Net current assets</u>
2002	-\$584
2003	\$11,887

<sup>2</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

While petitioner's counsel asserts on the I-290B appeal form that the USCIS "has erred as a matter of fact and law," the petitioner has not asserted what was the director's error in law or fact, or what evidence the director failed to consider. The petitioner has not submitted any additional documentation to demonstrate its ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, March 18, 2002, to the present, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The petitioner fails this test under an examination of wages paid to the beneficiary (no evidence), its net income (insufficient for 2002 and 2003), or net current assets (insufficient for 2002 and 2003).

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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 denied.