



U.S. Citizenship
and Immigration
Services

B6

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE:

SRC-04-012-52370

Office: TEXAS SERVICE CENTER

Date: MAR 09 2006

IN RE:

Petitioner:

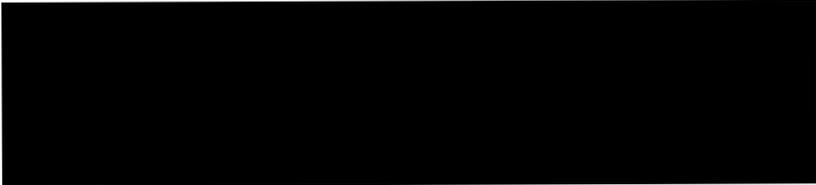
Beneficiary:



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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a shift manager. 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.

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 \$39,000.00 annually. On the Form ETA 750B, signed by the beneficiary on April 28, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on March 21, 2003.

The I-140 petition was submitted on October 16, 2003. On the petition, the petitioner claimed to have been established on November 28, 2000, to currently have 3 employees, to have a gross annual income of \$1,783,084.00, and to have a net annual income of \$13,368.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated November 8, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner can demonstrate the ability to pay the proffered wage in 2003 and it has shown the ability to pay the proffered wage in 2002 by substituting the wage it paid to the beneficiary's wife in 2002. Counsel submits a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003, copies of Form W-2 Wage and Tax Statement for the petitioner's employees in 2002, and a copy of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2002. Counsel also submits a letter from the petitioner stating that the beneficiary's wife will no longer work for the petitioner once the beneficiary is permitted to work, and thus it will substitute the wages paid to the beneficiary's wife for those wages that will be paid to 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 any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 28, 2001, the beneficiary did not claim to have 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 2001, 2002, and 2003. The record before the director

closed on November 8, 2004 with the issuance of the director's decision. 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.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$11,392.00	\$39,000.00*	-\$27,608.00
2002	\$13,368.00	\$39,000.00*	-\$25,632.00
2003	\$38,236.00	\$39,000.00*	-\$764.00

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

The above information is insufficient 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 following amounts for net current assets: \$47,833.00 for the end of 2001; \$16,694.00 for the end of 2002; and \$4,073.00 for the end of 2003.

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
2001	\$47,833.00	\$39,000.00*
2002	\$16,694.00	\$39,000.00*
2003	\$4,073.00	\$39,000.00*

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

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

Counsel states that the petitioner can demonstrate the ability to pay the proffered wage in 2003 because “[the] [p]etitioner’s tax return shows net income of \$38,236.00 and net assets in the amount of \$4,073.00. The net income plus the net assets equal \$42,309.00, which is greater than the proffered wage of \$39,000.00.” Evidence submitted on appeal to support this claim includes the petitioner’s Form 1120S U.S. Income Tax Return for an S Corporation for 2003.

Net current assets are the different between a corporation’s current assets and current liabilities. Net current assets may properly be considered in determining a petitioner’s ability to pay the proffered wage. Because the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. For example, a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out if its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner’s net income is not added to the amount of the petitioner’s net current assets in determining the petitioner’s ability to pay the proffered wage. Moreover, combining 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 the accrual convention, accounts receivable.

Counsel also states that the petitioner can demonstrate the ability to pay the proffered wage in 2002. In addition to adding the petitioner’s net income and net current assets, the beneficiary will also be substituting for his wife, who work for the petitioner in 2002 and earned \$11,996.10. According to counsel, “the Petitioner’s net income and net assets combined total \$30,062.00 -- \$8,938.00 less than the proffered wage. However, substituting Beneficiary for his wife adds an additional \$11,996.00 to the \$30,062.00 available to pay Beneficiary for a total of \$42,058.00, which is well above the proffered wage of \$39,000.00.” Evidence submitted on appeal to support this claim includes copies of Form W-2 Wage and State Statement for the petitioner’s employees in 2002, a copy of the petitioner’s Form W-3 Transmittal of Wage and Tax Statements for 2002, and a letter from the petitioner stating that the beneficiary’s wife will no longer work for the petitioner once the beneficiary is permitted to work, and thus it will substitute the wages paid to the beneficiary’s wife for those wages that will be paid to the beneficiary.

Counsel asserts that the beneficiary will replace one of petitioner’s workers: the beneficiary’s wife. The record does not, however, verify that the beneficiary’s wife was a full-time employee in 2002. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the beneficiary’s wife involved the same duties as those set for in the Form ETA 750. The petitioner has not documented the position and duty of the beneficiary’s wife. If she performed other kinds of work, then the beneficiary could not have replaced her. In addition, as mentioned earlier, the AAO does not agree that the amount of the petitioner’s net income can be added to the amount of the petitioner’s net current assets in determining the petitioner’s ability

to pay the proffered wage. Thus, even if CIS allows the petitioner to substitute the earnings of the beneficiary's wife in 2002 for the beneficiary, the total amount of \$25,364.00 when added to net income or \$28,690.00 when added to net current assets would still be insufficient.

After a review of the federal tax returns, 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.

In her decision, the director incorrectly combined the petitioner's net income and net current assets for 2002. Nevertheless, 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.