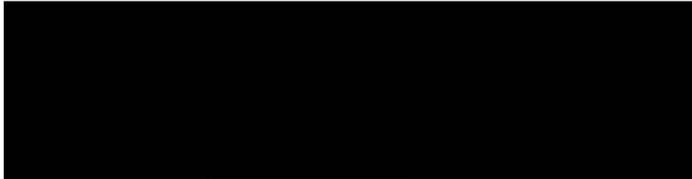




U.S. Citizenship
and Immigration
Services

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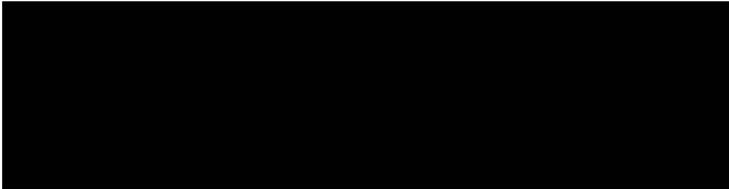


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **MAR 24 2006**
EAC-04-150-52778

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, Director
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 an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$32.75 per hour, which amounts to \$68,120.00 annually. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on December 22, 2003.

The I-140 petition was submitted on April 21, 2004. On the petition, the petitioner claimed to have been established in February 1985, to have a gross annual income of \$531,000.00, and to have a net annual income of \$7,000.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated September 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. According to the Form I-290B, “[a]dditional evidence is being submitted in the form of available credit throughout the relevant period.” However, no additional evidence appear in the record.

Counsel states on appeal that the examiner did not request additional evidence, the petitioner’s bank statements establish its ability to pay the proffered wage in 2001 and 2002, and the period in question is April 2001 through December 2002.

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 19, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary. The beneficiary’s Form W-2’s for 2001, 2002, and 2003 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary’s actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2001	\$22,480.00	\$68,120.00	\$45,640.00
2002	\$27,044.00	\$68,120.00	\$41,076.00
2003	\$31,271.00	\$68,120.00	\$36,849.00

The above information is insufficient to establish the petitioner’s ability to pay the proffered wage in 2001, 2002, and 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 (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 and 2002. The record before the director closed on April 21, 2004 with the receipt by the director of the petitioner's submission of the I-140 petition. As of that date the petitioner's federal tax return for 2004 was not yet due. However, the petitioner's federal tax return for 2003 would have been due before April 21, 2004. Therefore the petitioner's tax return for 2003 is the most recent return available. The petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2003 does not appear in the record.

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	\$3,331.00	\$45,640.00*	-\$42,309.00
2002	-\$14,454.00	\$41,076.00*	-\$55,530.00
2003	No Information	\$36,849.00*	No Information

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

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

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 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	\$4,047.00	\$45,640.00*
2002	\$2,262.00	\$41,076.00*
2003	No Information	\$36,849.00*

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

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

Counsel states that “the examiner did not find it appropriate to request additional evidence, as permitted by 8 C.F.R. §204.5(g)(2). Rather, the examiner relied on the information provided with the original filing of the I-140 petition.” The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal. The petitioner had the opportunity to submit additional evidence on appeal, and the record indicates that no evidence was submitted on appeal.

Counsel also states that based on the petitioner’s monthly bank statements from 2001 to 2002, “[t]he month-end balances for petitioner exceeded the monthly [wage] shortfall in each and every month.” The record contains copies of the petitioner’s bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner’s ability to pay a proffered wage. While that regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner’s net current assets.

In addition, counsel asserts that according to a memo by William R. Yates dated May 4, 2004, “the evidence must clearly establish the petitioner’s financial ability . . . [and] each piece of evidence must conclusively show financial ability.” He states that in this case, “[e]ach piece of evidence (in the form of each month-end balance in petitioner’s bank account for the entire period in question, namely April of 2001 through December of 2002) conclusively shows the petitioner’s financial ability to pay the [proffered] wage.” As mentioned above, bank statements cannot show the petitioner’s financial ability to pay the proffered wage. Moreover, counsel incorrectly states that the period in question is from April 2001 through December 2002.¹ According to 8 C.F.R. § 204.5(g)(2), the period in question begins with the priority date, which is April 7, 2001, and continues until the

¹ Counsel states that the period in question begins with April 2001, “which is the date of filing of the Application for Alien Labor Certification.” Counsel, however, does not explain why the period in question ends at the end of December 2002.

beneficiary obtains lawful permanent residence. Therefore, the date the record before the director closed, September 8, 2004, is the end date for the period in question, and the petitioner has to establish its ability to pay the proffered wage in 2003. Aside from the beneficiary's Form W-2 Wage and Tax Statement for 2003, which shows that the petitioner was paid less than the proffered wage, no other evidence was submitted to show the petitioner's ability to pay the proffered wage in 2003.

After a review of the record, 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 correctly stated the petitioner's net income in 2001 and 2002, correctly calculated the petitioner's year-end net current assets for each of those years, and correctly noted that the petitioner's income tax return for 2003 was not submitted. The director found that the available information 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 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.