



U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 02 2006
EAC-04-133-51626

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other Worker 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 pay-phone manufacturer. It seeks to employ the beneficiary permanently in the United States as a production supervisor. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 November 19, 2001. The proffered wage as stated on the Form ETA 750 is \$48,672.00 per year. On the Form ETA 750B, signed by the beneficiary on November 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in September 1999 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on January 5, 2003.

The I-140 petition was submitted on March 31, 2004. On the petition, the petitioner claimed to have been established in 1996, to currently have six employees and to have a gross annual income of \$2,000,000.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a decision dated September 9, 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 a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003 was not readily available when the petition was filed, and that a copy of that Form W-2 submitted on appeal establishes the petitioner's ability to pay the proffered

wage. Counsel also states that the director misinterpreted the petitioner's tax return for 2002 by using the term "net loss" to show the results of an analysis of the balance sheet of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002.

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 November 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in September 1999 and continuing through the date of the ETA 750B.

The record contains a copy of a Form 1099-MISC Miscellaneous Income statement of the beneficiary for 2003 which shows \$17,000.00 in nonemployee compensation received from the petitioner that year. The record also contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2003, which shows \$29,527.50 in employee compensation received from the petitioner that year. The total of the two amounts is \$46,527.50. The relationship of the beneficiary's actual compensation to the proffered wage is shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	no W-2 or 1099 submitted	\$48,672.00	\$48,672.00
2002	no W-2 or 1099 submitted	\$48,672.00	\$48,672.00
2003	\$46,527.50	\$48,672.00	\$2,144.50

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 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 a corporation. The record contains a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002. The record before the director closed on March 31, 2004 with the submission of the I-140 petition. As of that date, the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 was the most recent return available. No copy of the petitioner's federal tax return was submitted for 2001, which is the year of the priority date.

Concerning 2003, the petitioner submitted a copies of the beneficiary's Form W-2 Wage and Tax Statement and Form 1099 Miscellaneous Income statement for 2003. However, the petitioner did not also submit a copy of the petitioner's Form 1120 tax return for 2003.

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 2002 states an amount for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	not submitted	\$48,672.00*	no information
2002	\$21,007.00	\$48,672.00*	-\$27,665.00
2003	not submitted	\$2,144.50**	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 or 2002.

** Crediting the petitioner with the \$46,527.50 actually paid to the beneficiary in 2003.

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 attached to the petitioner's tax return for 2002 yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	not submitted	not submitted	\$48,672.00*
2002	-\$256,384.00	-\$95,165.00	\$48,672.00*
2003	not submitted	not submitted	\$2,144.50**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2002.

** Crediting the petitioner with the \$46,527.50 actually paid to the beneficiary in 2003.

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.

Counsel states that the director incorrectly described the petitioner's excess of year-end current liabilities over year-end current assets as a "net loss." (Motion to Reconsider, October 7, 2004, at 1, quoting Director's decision, September 9, 2004, at 1). Counsel states that the purpose of the balance sheet is not to show the petitioner's income or loss over a period, but to indicate the corporation's net gains, shareholder equities, or retained earnings. Counsel is correct in criticizing the director's use of the term "net loss." That term refers to an excess of expenses over income during the tax year. Counsel states that current assets and liabilities must equal each other on the balance sheet. However, counsel's statements fail to distinguish between current assets and total assets, and between current liabilities and total liabilities. The figures which must equal each other on the balance sheet are total assets and total liabilities. As noted above, CIS considers only current assets and current liabilities when evaluating a petitioner's ability to pay the proffered wage. In order to establish the petitioner's ability to pay the proffered wage in a given year, a petitioner's year-end current assets must exceed its year-end current liabilities by an amount at least equal to the proffered wage, or by the amount of wage increase needed to raise the beneficiary's actual compensation to the proffered wage, if there is evidence that the beneficiary received compensation from the petitioner in the year in question.

In the instant case, for the year 2002, the petitioner's year-end current liabilities exceeded its current assets by \$95,165.00, resulting in a figure for year-end net current assets of -\$95,165.00. Since that figure is negative, it does not establish the petitioner's ability to pay the proffered wage that year.

The record also contains copies of unaudited financial statements. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record also contains copies of two pay statements of the beneficiary, one for the pay period from February 28, 2004 to March 5, 2004 and the other for the pay period from March 6, 2004 to March 12, 2004. Each of those pay statements shows gross pay from the petitioner in the amount of \$1,000.00. Those two pay statements indicate a rate of pay higher than the proffered wage of \$48,672.00. However, the two pay statements for 2004 are insufficient to establish the petitioner's ability to pay the proffered wage for the entire year 2004. The two pay statement also provide no further support to help establish the petitioner's ability to pay the proffered wage in the years prior to 2004.

The record contains no other evidence relevant to the petitioner's financial situation. The evidence therefore 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 2002 as \$21,007.00 and correctly calculated the petitioner's year-end net current assets for that year. The director incorrectly referred to the petitioner's negative net current assets of -\$95,165.00 as a "net loss." (Director's decision, September 9, 2004, at 1). That term is appropriate to an analysis of income, but it is not appropriate to a balance sheet analysis of assets and liabilities. Notwithstanding that error in terminology, the director's conclusion that the foregoing figures failed to establish the petitioner's ability to pay the proffered wage in 2002 was correct.

The director also correctly found that the other evidence in the record failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director made no reference to the absence of any copy of the petitioner's federal tax returns for 2001 and 2003.

The director's decision to deny the petition was correct, based on the evidence then in the record. For the reasons discussed above, the assertions of counsel on appeal and the evidence newly 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.