

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



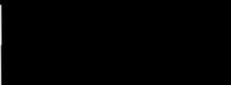
U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 02 2006

LIN-04-086-50253

IN RE:

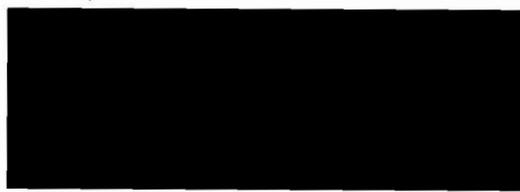
Petitioner:

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)

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 Acting Center Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a plumbing service. It seeks to employ the beneficiary permanently in the United States as a plumber. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750), approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.¹

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$16.32 per hour (\$33,945.60 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered.

¹ 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 AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$206,000, to have a net annual income of \$21,000, and to currently employ four (4) workers. According to the tax returns in the record, the petitioner's fiscal year is based a calendar year. On the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary claimed to have worked for the petitioner since April 1999.

With the petition, the petitioner submitted the following documents pertinent to its ability to pay the proffered wage from the priority date: Form 1120S, U.S. Income Tax Return for an S Corporation for 2000² through 2002.

The director denied the petition on February 28, 2005, determining that the evidence submitted did not establish that the petitioner has the ability to pay the full proffered wage of \$33,945 in 2002 with its net income of \$20,985 or net current assets of \$12,026 that year.

On appeal, counsel asserts that the director erred in assuming the beneficiary has not been employed and paid by the petitioner, and with wages actually paid to the beneficiary the petitioner established its ability to pay the proffered wage.

Agreeing with counsel's assertion on appeal, Citizenship and Immigration Services (CIS) should first examine whether the petitioner employed and paid the beneficiary during a given period in determining the petitioner's ability to pay the proffered wage 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. On appeal counsel submits the beneficiary's Form W-2 Wage and Tax Statement for 2002, 2003 and 2004. These W-2 forms establish that the petitioner paid the beneficiary \$25,360 in 2002, \$33,684.63 in 2003 and \$41,046 in 2004. The petitioner did not submit any documentary evidence of the beneficiary's compensation from the petitioner in 2001, the year of the priority date. The petitioner paid \$8,585.60 less than the proffered wage in 2002 and \$260.97 less than the proffered wage in 2003. However, the petitioner established that it paid the beneficiary the full proffered wage in 2004. Therefore, the petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001, the difference of \$8,585.60 in 2002 and \$260.97 in 2003 between the wages actually paid to the beneficiary and the proffered wage.

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, 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

² The priority date in the instant case is April 16, 2001, therefore, the petitioner's tax return for 2000 is not necessarily dispositive in determining its ability to pay the proffered wage.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner's tax returns for 2001, 2002 and 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage or difference between the wage already paid to the beneficiary and the proffered wage from the priority date.

Tax year	Net income	Wage difference Need to pay	Surplus or deficit
2001	\$29,399 ³	\$33,945.60 ⁴	\$(4,546.60)
2002	\$20,985	\$8,585.60	\$12,399.40
2003	\$54,447	\$260.97	\$54,186.03

Therefore, for the years 2002 through 2003, the petitioner did have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage while the petitioner had a deficit of \$4,546.60 to pay the proffered wage with its net income in 2001.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

³ Ordinary income (loss) from trade or business activities as reported on Line 21 of Form 1120S.

⁴ The director erred in prorating the proffered wage for the portion of the year that occurred after the priority date for 2001. We do not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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. Schedule L attached to the petitioner's tax return for 2001 yields that the net current assets were \$6,518. Therefore, the petitioner did not have sufficient net current assets to cover the proffered wage in 2001.

Counsel's argument concerning the overall financial condition of the petitioner, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, the petitioner's net income was short \$4,546.60 for the proffered wage in 2001 without considering the possible wages already paid to the beneficiary in that year. The petitioner was established in 1996 and had been in business for 5 years at the time the Form ETA 750 was filed. The petitioner's gross income has always been above \$200,000 and has a steady increase. The petitioner pays more than \$75,000 in officer's compensation and wages every year in the relevant years. The petitioner has established its ability to pay the proffered wage for all other years with wages actually paid to the beneficiary and net income. The petitioner and the beneficiary claimed that the beneficiary has been working for the petitioner and been paid since April 1999. It is most likely that the beneficiary was paid more than \$4,546.60 in 2001 if the petitioner had submitted evidence for it. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the 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, the petitioner has established that it had the continuing ability to pay the beneficiary the difference between the wage paid and the proffered wage as of the priority date through an examination of its totality of circumstances.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted establishes 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.