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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

B6

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: SEP 06 2006  
EAC-03-067-52079

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:  
[REDACTED]

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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an upholstery and furniture company. It seeks to employ the beneficiary permanently in the United States as a pattern maker. 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 as of the priority date of the visa petition and denied the petition accordingly.

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

As set forth in the director's November 25, 2003 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 October 12, 1999. The proffered wage as stated on the Form ETA 750 is \$23.51 per hour, which amounts to \$48,900.80 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and no additional evidence. The petitioner also submits a partial copy of its Form 1120 U.S. Corporation Income Tax Return for 1999, a duplicate of a partial copy of that return which was submitted previously. Other relevant evidence in the record includes apparently complete copies of the petitioner's Form 1120 tax returns for 2000 and 2001 and a copy of a letter from a former employer of the beneficiary.

On appeal, counsel states that in 1999 the petitioner had substantial gross receipts and substantial gross profits which were more than sufficient to pay the \$48,900.80 annual proffered wage, since its cash flow was substantially higher than that amount.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 October 1, 1999, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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. With the I-140 petition the petitioner submitted a partial copy of its Form 1120 U.S. Corporation Income Tax Return for 1999. In a request for additional evidence (RFE) issued on August 20, 2003, the director requested complete copies of the petitioner's federal income tax returns for 2000, 2001 and 2002, among other documents. In response to the RFE, the petitioner submitted an additional partial copy of its Form 1120 return for 1999 and apparently complete copies of its Form 1120 tax returns for 2000 and 2001. The petitioner also submitted a copy of a Form 7004 Application for Automatic

Extension of Time to File Corporation Income Tax Return, requesting an extension until December 15, 2003 to file the petitioner's Form 1120 for 2002.

The petitioner's tax documents show that the petitioner's tax year runs from April 1 until March 31 of the following calendar year. The petitioner's tax return for 1999 covers the period from April 1, 1999 until March 31, 2000; its return for 2000 covers from April 1, 2000 until March 31, 2001; and its return for 2001 covers from April 1, 2001 until March 31, 2002.

The petitioner's submissions in response to the RFE were received by the director on November 14, 2003. As of that date, the petitioner's Form 1120 tax return for 2002 was apparently unavailable. According to the Form 7004 mentioned above, the 2002 return covered the period from April 1, 2002 until March 31, 2003. The regular due date for that return would have been two and one half months after March 31, 2003, which was June 15, 2003. However, the Form 7004 requests an automatic six-month extension until December 15, 2003 to file the petitioner's Form 1120 for 2002. Therefore, as of the date when the record closed before the director, the petitioner's Form 1120 for 2002 was not yet due.

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 returns state amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1999	\$(24,606.00)	\$48,900.80*	\$(73,506.80)
2000	\$55,216.00	\$48,900.80*	\$6,315.20
2001	\$16,591.00	\$48,900.80*	\$(32,309.80)

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

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2000 but not in 1999 or 2001.

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.

In the record in the instant petition, the copy of the petitioner's Form 1120 for 1999 is incomplete, lacking a Schedule L. However, the copy of the petitioner's Form 1120 for 2000 does contain a Schedule L. The figures for the petitioner's assets and liabilities for the beginning of its 2000 tax year are equivalent in accounting terms to those for the end of its 1999 tax year. Therefore, the figure shown below for the petitioner's net current assets at the end of its 1999 tax year are based on calculations from its figures for the beginning of the year on its Schedule L for 2000.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1999	\$(104,187.00)	\$48,900.80*	\$(153,087.80)
2000	\$(48,971.00)	\$48,900.80*	\$(97,871.80)
2001	\$(32,374.00)	\$48,900.80*	\$(81,274.80)

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

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel asserts that in 1999 the petitioner had substantial gross receipts and substantial gross profits which were more than sufficient to pay the \$48,900.80 annual proffered wage, since its cash flow was substantially higher than that amount. Under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of circumstances in evaluating a petitioner's ability to pay the proffered wage. However, in the instant petition, the record contains no evidence that the petitioner's figures for its gross receipts and gross profits are better evidence of its ability to pay the proffered wage than its figures for net income, as discussed above. Although the petitioner's tax returns show substantial gross receipts and substantial total income, those returns also show substantial expense deductions each year, resulting in negative net income figures for its 1999 and 2001 tax years. Therefore the evidence fails to establish the petitioner's ability to pay the proffered wage in those years.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record 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 1999, 2000 and 2001. The director failed to calculate the petitioner's year-end net current assets for any of the years at issue. The director's analysis was therefore incomplete. Nonetheless, 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.