



U.S. Citizenship
and Immigration
Services

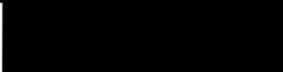
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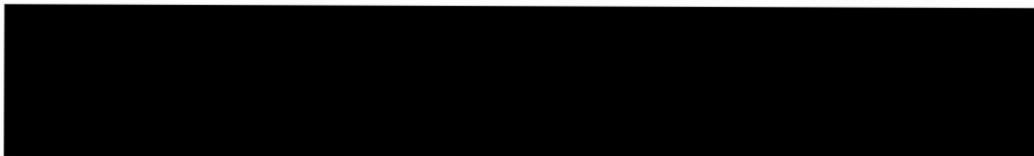
In re:

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 Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The petitioner filed an appeal, which was untimely filed, and the director treated as a motion to reopen. The director determined that the grounds for denial had not been overcome, and affirmed his prior decision. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates an auto repair business, and seeks to employ the beneficiary permanently in the United States as an automobile mechanic. The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s December 9, 2005, and March 9, 2006 decisions, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 is \$18.42 per hour, based on a 40 hour work week, which is equivalent to \$38,313.60 per year. The labor certification was approved on March 21, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on April 30, 2004.² The petitioner represented the following information on the I-140 Petition: date established: 1981; gross annual income: \$300,000; net annual income: not listed; and current number of employees: not listed.

On June 13, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional documentation regarding the petitioner's ability to pay from the time of the priority date, and that such evidence may include audited profit/loss statements, bank account records, and/or personnel records. Further, the RFE requested that the petitioner should provide any W-2 statements for the beneficiary, if the petitioner currently employed the beneficiary. The petitioner responded. Following review, the director denied the petition on March 9, 2006 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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 Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not list that he was employed with the petitioner. However, the petitioner submitted the following W-2 statements, and indicated that the beneficiary began employment with the petitioner after his employment authorization document was issued in late 2004:

<u>Year</u>	<u>W-2 Wages Paid</u>
2004	\$13,300

The petitioner additionally submitted checks written to the beneficiary in the amount of \$548.13 per week for the time period between December 28, 2004 to June 25, 2005. The checks were in the form of personal checks rather than paystubs or paychecks, with evidence that the checks from April 11, 2005 to June 25, 2005 were cashed.³ We note that the proffered wage would be equivalent to \$736.80 per week. The W-2 wages and income in the form of checks paid to the beneficiary would exhibit partial payment of the proffered wage. However, as the payments are less than the proffered wage, the petitioner cannot establish its ability to pay the beneficiary from the priority date of 2001 until the beneficiary obtains permanent residence based on prior

² The petitioner had previously filed an I-140 petition on behalf of the beneficiary based on the same position. That petition was denied on March 20, 2003 as the director determined that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

³ Personal checks issued by the business to the beneficiary would be accepted with evidence that the checks were cashed. The petitioner did not provide this evidence for the checks issued between December 28, 2004 to April 11, 2005, only for the checks of April 11, 2005 and those subsequently issued. Further, whether the petitioner had subtracted taxes from the issued checks is unclear. If the petitioner had, the wages paid may represent higher wages closer to the \$736.80. However, the petitioner did not assert, or provide any evidence that the checks represented wages after taxes were subtracted from the beneficiary's wages.

wage payments alone. The petitioner must show that it can pay the difference between the wages paid and the proffered wage.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). 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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u> ⁴	<u>Net income or (loss)</u>
2004	\$1,135
2003	-\$1,818
2002	\$3,612
2001	\$2,034
2000	\$25
1999 ⁵	\$5,892

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to the petitioner's net income.

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 the difference between the petitioner's current assets and current liabilities.⁶ 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, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's

⁴ The petitioner files its federal tax returns on a tax year, which runs from July 1 to June 30, so that for example, the petitioner's 2004 tax return reflects filing for the time period July 1, 2004 to June 30, 2005.

⁵ The petitioner's 1999 tax return would reflect filing for the time period July 1, 1999 to June 30, 2000, which is before the priority date, and would not establish the petitioner's ability to pay from the time of the priority date. We will, however, consider the petitioner's 1999 federal tax return generally.

⁶According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$5,462
2003	\$4,327
2002	\$6,145
2001	\$2,534
2000	\$500
1999	\$475

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets in any year either.

The petitioner additionally submitted bank statements for time period July 2002 to January 2003, reflecting month end balances. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner’s ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts “in appropriate cases.” We note that the RFE provided that bank statements would be appropriate for the petitioner to submit as additional evidence to its tax returns. However, as the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner’s net current assets, the bank statements would not demonstrate the petitioner’s ability to pay the proffered wage. Further, as a fundamental point, the petitioner’s tax returns are a better reflection of the company’s financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

If we examined the statements, the statements showed significant variation in the petitioner’s account. The statements reflected a low balance of \$7,933 (as of June 30, 2002 reflected on the July 2002 statement), and a high balance of \$34,345 (as of January 31, 2003). The statements for the limited time period provided would not demonstrate the petitioner’s ability to pay from April 2001 to the present, but rather would represent only the amount that the petitioner had in its account as of the statement dates submitted.

On appeal, counsel contends that the petitioner can demonstrate its ability to pay the proffered wage despite the petitioner’s minimal net income, and may do so based on officer compensation. Counsel cites to *Matter of ----*, EAC-01-018-50413 (VSC Jan. 31, 2003) in support. Counsel provides in that case the shareholder of a medical corporation minimized its taxable income by taking the company profits to avoid double taxation. He asserts that the AAO determined net profit alone would not determine the petitioner’s ability to pay, and contends that the present petition presents a similar situation. Counsel provides that the petitioner’s owner and his wife are the company shareholders, and have consistently been paid \$85,000, which is reported on the petitioner’s tax returns.

First, we note that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, the decision that counsel cites in support relates to a personal services corporation, which is different than the structure of the petitioner’s business.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

In the case at hand, however, while the petitioner's federal tax returns do reflect payments to the principal shareholders under officer compensation, the petitioner has not provided any statement from the individual shareholders that one or both are willing and able to in the future, or in the past, waive any or all of their compensation in order to pay the proffered wage. The record only contains counsel's assertion that the petitioner is willing to do so. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further provides that the petitioner's goal in hiring the beneficiary is to increase the petitioner's business and profitability. A petitioner must demonstrate its ability to pay the proffered wage from the time of the priority date. 8 C.F.R. § 204.5(g)(2). Future anticipated profitability would not demonstrate this. The petitioner has provided no estimate or business plan regarding how much additional work his business could perform, and how such work would translate into profitability for his company based on hiring the beneficiary, or another worker. Additionally, we note that the beneficiary is currently employed. The petitioner has provided no evidence of increased profitability since hiring the beneficiary, or that any increase in profitability was the result of hiring the beneficiary and not some other factor. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.