

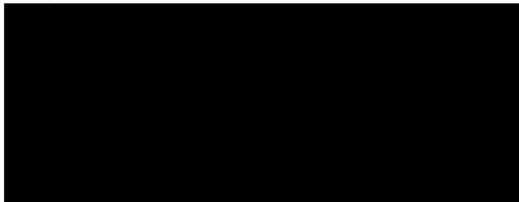


U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

B6



File: [Redacted]  
EAC-05-173-51351

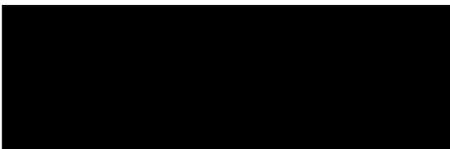
Office: VERMONT SERVICE CENTER

Date: DEC 17 2007

In re: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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, Vermont Service Center (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is in the business of construction, and seeks to employ the beneficiary permanently in the United States as a carpenter (“Dovetail Machine Operator”). As required by statute, 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 August 21, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

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. 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 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 C.F.R. § 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

---

<sup>1</sup> 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 19, 2001. The proffered wage as stated on Form ETA 750 is \$31.92 per hour,<sup>2</sup> which is equivalent to an annual salary of \$66,393.60 per year, based on 40 hour work week. The labor certification was approved on March 18, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on May 23, 2005. On the I-140, the petitioner listed the following information: date established: August 19, 1992; gross annual income: \$269,396; net annual income: \$196,633; current number of employees: six.

On October 18, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit further evidence to support its claim that it could pay the beneficiary the proffered wage from April 19, 2001 onward, as the petitioner submitted its federal tax returns for two years, and those two years did not demonstrate the petitioner's ability to pay. The petitioner responded. Following consideration of the petitioner's response, on August 21, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will examine whether the petitioner employed and paid the beneficiary 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. In the case at hand, the beneficiary did not list on Form ETA 750B, signed on April 10, 2001, that the petitioner employed him. The petitioner provided the beneficiary's 2004 Form W-2, which exhibited payment to the beneficiary in the amount of \$12,250. The petitioner did not provide evidence of payment to the beneficiary in any other year, or indicate on what date that it hired the beneficiary. Therefore, the petitioner is unable to establish its ability to pay the proffered wage from the time of the priority date onward through prior wage payment to the beneficiary alone. The petitioner must demonstrate that it can pay the full proffered wage for the years 2001, 2002, and 2003, and that it can pay the difference between the wages paid and the proffered wage for 2004.

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. 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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

---

<sup>2</sup> The petitioner initially listed an hourly salary of \$11.00 per hour, but DOL required that the salary be increased to \$31.92 prior to certification based on the level of experience required.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005 <sup>3</sup>	\$1,211
2004	-\$185
2003	not submitted
2002	not submitted
2001	-\$8,407

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

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. 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 on the Forms 1120S. 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 evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2005	-\$4,725
2004	\$1,233
2003	not provided
2002	not provided
2001	-\$8,998

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well.

The petitioner also submitted Form 941, Quarterly Federal Tax Returns for the fourth quarter of 2004, as well as the petitioner's Forms W-3 for 2004. We have noted the beneficiary's individual Form W-2 above. While

---

<sup>3</sup> The petitioner provided its 2005 tax return on appeal, which would not have been available at the time of filing the I-140 petition, or at the time of the petitioner's response to the RFE.

the Form 941 and Forms W-3 exhibit wages paid to other workers, wages paid to others would not demonstrate the petitioner's ability to pay the proffered wage.<sup>4</sup>

The petitioner additionally submitted reviewed profit and loss statements for the years ending December 31, 2001, 2002, 2003, and 2004.<sup>5</sup> The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The "reviewed" statements are unaudited, and, therefore, are not persuasive or reliable evidence, and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel provided a letter from the petitioner's accountant to address the petitioner's ability to pay the proffered wage.<sup>6</sup>

The accountant addresses the petitioner's ability to pay the proffered wage for each year. For 2001, the accountant provides that the petitioner's wages paid amounted to \$29,473, and that those wages would be paid to the beneficiary as those employees had been laid off.

The petitioner has not provided the names of these workers, stated their wages, or verified their full-time employment, or provided evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the laid off workers would involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker or workers who performed the duties of the proffered position. If that employee or employees performed other kinds of work, then the beneficiary could not have replaced him or her.

Further, for 2001, the accountant provides that rent income is paid to the petitioner's president, and "would also be stopped as to pay [the beneficiary's] salary. This total would add up to an additional income in the amount of \$49,083 along with the net profit of \$12,746 for a total income to paid [sic] to [the beneficiary] in the amount of \$61,829."<sup>7</sup>

As the rents have already been paid to the petitioner's president, the petitioner cannot look back and assert that these amounts paid would be available to pay the beneficiary's wage. A petitioner must establish the

---

<sup>4</sup> Additionally, the petitioner's federal tax returns note that the petitioner has paid the following amounts in salaries: 2001: \$25,179; 2004: \$37,195; 2005: \$66,500. The petitioner listed on Form I-140 that it employed six workers. The salaries paid to all workers accounts for less than the proffered wage in 2001, and 2002.

<sup>5</sup> A petitioner must demonstrate its ability to pay the proffered wage from the priority date onward for each year thereafter until the beneficiary obtains permanent residence. Therefore, in this matter, the petitioner would need to demonstrate its ability to pay from 2001 onward and continuing until the beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). The petitioner only submitted its reviewed statements for the years 2001, and 2003 on appeal. Additionally, as noted above, the petitioner failed to provide its 2002, and 2003 federal tax returns, or any other regulatory prescribed evidence for those years.

<sup>6</sup> The petitioner also provided copies of the reviewed financial statements and the petitioner's 2005 federal tax return, which have all been addressed above.

<sup>7</sup> Additionally, we note that the total of \$61,829 for all items added, even if we were to accept those figures, is still below the proffered wage.

beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts, or on speculation of future eligibility. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The accountant provides the same analysis for the year 2002, where the addition of wages paid to laid-off workers, rent income to the president, and net profit would total \$67,552. For 2003, the accountant concludes that the calculation of the foregoing items would amount to \$71,783, and \$70,027 for 2004.

Similarly, we note the same objections to the accountant's analysis for these years: the petitioner has failed to provide any documentation or information related to the "laid off" workers that the beneficiary would hypothetically replace. Further, the petitioner cannot look back and determine that it retroactively will not pay the petitioner's president rent. The amount has already been paid out, and cannot be added back to determine the proffered wage. *See Matter of Katigbak*, 14 I&N Dec. at 49.

For the year 2005, the accountant asserts that the petitioner's Form 1120S wages paid on line 8 shows \$66,500 in wages paid to the beneficiary, and therefore, the petitioner can pay the proffered wage.

The petitioner has not provided the beneficiary's Form W-2 to document that the wages listed on Form 1120S were all paid to the beneficiary, and that those wages instead did not reflect payment to multiple workers. 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 petitioner did not provide any additional evidence to document that the petitioner can pay the beneficiary the proffered wage. Accordingly, based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.