

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

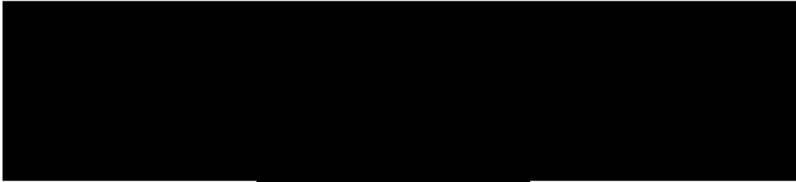
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



File: [Redacted]
EAC-04-133-54126

Office: VERMONT SERVICE CENTER

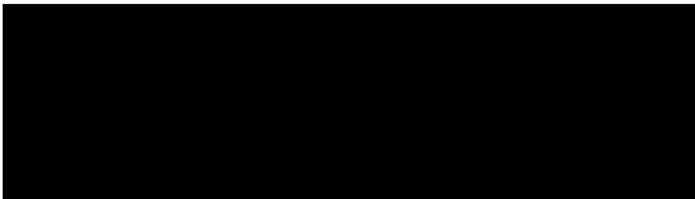
Date: JUN 01 2007

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, Vermont Service Center (“director”) denied the preference visa petition. The petitioner then appealed the denial to the Administrative Appeals Office (“AAO”). The AAO affirmed the director’s decision. The petitioner has now filed a Motion to Reopen the AAO decision. The motion to reopen will be granted. The appeal will be dismissed.

The petitioner operates a commercial construction business and seeks to employ the beneficiary permanently in the United States as a construction specialist. 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 January 10, 2006 decision, the AAO affirmed the director’s decision and dismissed the appeal on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

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 30, 2001. The proffered wage as stated on Form ETA 750 for the position is \$19.77 per hour, equivalent to \$41,121.60 per year based on a 40 hour work week. The labor certification was approved on January 13, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 29, 2004. The petitioner listed the following information on the I-140 Petition related to the petitioning entity: date established: January 1991; gross annual income: \$2,100,000; net annual income: not listed; and current number of employees: 15.

On August 18, 2004, the director denied the petition finding that the petitioner did not demonstrate the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed to the AAO. On January 10, 2006, the AAO affirmed the director's decision and dismissed the appeal on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage. The petitioner then filed a motion to reopen the AAO's decision.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

The petitioner has provided new evidence concerning its ability to pay the proffered wage, including the petitioner's complete federal tax returns for the years 2001, 2002,² 2003, and 2004, business bank account statements, and several recent paystubs for the beneficiary. As the petitioner has submitted new evidence, we will reopen and reconsider the petition.

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 13, 2001, the beneficiary did list that he has been employed with the petitioner since December 2000. The petitioner provided the following evidence of payment:

The petitioner previously submitted its 2001 and 2002 federal tax returns, but only submitted the first few pages, which did not include all the relevant schedules.

<u>Year</u>	<u>Wages Paid³</u>
2002 ⁴	\$13,465 (Form 1099)
2001	\$20,184.50 (Form W-2)
2000	\$2,835 (Form W-2)

The petitioner additionally submitted several paystubs for 2005 in the following amounts: \$782 for the time period ending September 30, 2005; \$680 for the period ending October 7, 2005; and \$765 for the period ending October 21, 2005. The partial wages paid to the beneficiary will be considered in determining the petitioner's ability to pay the proffered wage, but are insufficient alone to show the petitioner's ability to pay. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage for the years 2001, 2002, and 2005, and must demonstrate that it can pay the full proffered wage in 2003, and 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, Citizenship & Immigration Services ("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.

The petitioner is structured as 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

³ The petitioner also submitted additional W-2s for the beneficiary showing wages paid by other employers:

2002	\$20,750	[REDACTED]
2001	\$3,181	[REDACTED]
2000	\$25,434.50	[REDACTED]

Wages paid by other entities are not considered to demonstrate the petitioner's ability to pay the proffered wage.

⁴ The petitioner did not submit the beneficiary's 2003 W-2 Form, if any, or the beneficiary's 2004 W-2 Form, which would have been available at the time that the petitioner filed its Motion to Reopen the AAO determination.

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). Line 21 shows the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$78,996
2003	-\$13,352 ⁵
2002	-\$67,877
2001	\$19,448

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 considered.

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 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>
2004	\$38,507
2003	-\$301,081
2002	-\$187,424
2001	-\$113,645

Following this analysis, the petitioner's federal tax returns show that the petitioner would lack the ability to pay the proffered wage under the net current asset test as well for all of the above years.

The petitioner additionally submitted six bank statements: for the following dates: January 31, 2001; December 31, 2001; December 31, 2002; December 31, 2003; December 31, 2004; and December 31, 2005. 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." 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.

⁵ For the years 2003, and 2003, the petitioner's tax returns reflect that it earned small amounts of income from other sources, so that we will take the net income for these years from the petitioner's Schedule K.

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.

If we examined the statements, the statements showed significant variation in the petitioner's account. The statements reflected a low balance of \$3,459 (as of December 31, 2005), and a high balance of \$421,945 (as of December 31, 2004). The statement reflects that the petitioner received two large payments on December 30, 2005, one in the amount of \$280,000, and the second in the amount of \$106,038. Additionally, five or six statements alone would not demonstrate the petitioner's ability to pay from April 30, 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 provides that "the petitioner has a much more substantial business than you indicated in your denial dated January 10, 2006." Counsel additionally provides that, "we vigorously assert that the beneficiary herein was not working for the petitioner full time . . . which is the core problem. The petitioner remains ready, willing and able to pay the wage offered."

Counsel does not elaborate on how the documents submitted demonstrate that the petitioner's business is more substantial. For instance, if we look at the petitioner's tax returns, the returns demonstrate that the petitioner's gross receipts declined by \$859,740 from 2003 to 2004. While the petitioner's 2004 end of the year bank statement reflects a large amount of cash, the petitioner's 2004 Schedule L shows that the petitioner paid off a liability of \$302,812 by the end of the year, and the Schedule L reflects only \$38,507 in cash.

In contrast to counsel's assertion, the core problem is not whether the beneficiary has been employed full-time or not. The core problem is whether the petitioner can pay the beneficiary the proffered wage from the priority date of April 30, 2001 continuing until the beneficiary obtains permanent residence. Based on the foregoing, and all the documents submitted, the petitioner cannot demonstrate this.

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 Motion to Reopen is granted. The prior decision of the AAO will be sustained and the petition is dismissed.