

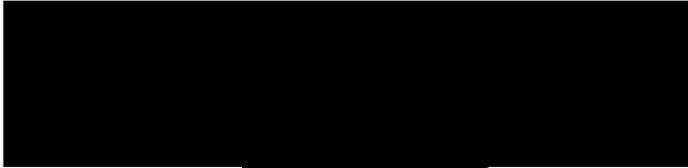
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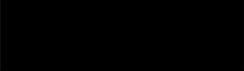
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

WAC 06 078 50375

JAN 02 2008

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: SELF-REPRESENTED

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a machine shop. It seeks to employ the beneficiary permanently in the United States as a numerical control tool programmer/operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 beginning on the priority date of the visa petition. The director also determined that, because the proffered position requires only one year of experience or training, the instant petition cannot be approved as a petition for a skilled worker, the category pursuant to which it was filed. The director denied the petition.

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

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 granting 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 at 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 either 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, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 9, 1998. The proffered wage as stated on the Form ETA 750 is \$23.59 per hour, which equals \$49,067.20 per year.

The Form I-140 petition in this matter was submitted on January 11, 2005. The petition indicates, at Part 2, that it is a petition for a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Act. On the petition, the petitioner stated that it was established during 1979 and that it employs six workers. The petition states that the petitioner's gross annual income is \$855,325 and that its net annual income is \$7,955. On the Form ETA 750, Part B, signed by the beneficiary on October 27, 1998, the beneficiary claimed to have worked for the

petitioner from June 1995 to September 1998.<sup>1</sup> The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Torrance, California. The petitioner indicated on the Form ETA 750, at Item 14 that the proffered position requires one year of experience, but no additional training or education.

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).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup> In the instant case the record contains (1) the petitioner's 1998, 1999, 2000, 2001, 2002, 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) a statement earnings paid to the beneficiary's by the petitioner for work the beneficiary performed between July 27, 1997 and August 2, 1997, (3) copies of monthly statements pertinent to the petitioner's bank account, and (4) the petitioner's quarterly wage statements for the last quarter of 2001 and the first, second, and third quarters of 2002. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on October 1, 1998, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The petitioner left Line 23, Income,<sup>3</sup> on its 1998 Schedule K blank. Computation based on the other figures on that schedule, however, shows that the petitioner had Line 23 Income of \$9,738. At the end of that year the petitioner declared no current assets and no current liabilities. The petitioner's 1998 end-of-year net current assets cannot, therefore, be calculated. The Schedule A appended to that form shows Line 3, Cost of Labor of \$158,775.

During 1999 the petitioner declared Schedule K, Line 23 Income of \$97,306. At the end of that year the petitioner did not declare its current assets and current liabilities on Schedule L. The beginning-of-year figures on the petitioner's 2000 Schedule L, however, correspond to the 1999 end-of-year figures. The 2000

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<sup>1</sup> A G-325 Biographic Information form in the record, signed by the beneficiary on October 7, 2002, states that the beneficiary continued working for the petitioner at least through that date. When, if ever, the beneficiary left the petitioner's employ is therefore unclear.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> Schedule K Line 23 Income is the sum of the various types of income and gain (Ordinary income, Long-term Capital Gain, Short-term Capital Gain, *et cetera*) minus the various types of loss. (Ordinary loss, Long-term Capital Loss, Short-term Capital Loss, *et cetera*) and is considered to be net income for the purpose of assessing the petitioner's ability to pay the proffered wage.

Schedule L shows that at the end of 1999 the petitioner's current liabilities exceeded its current assets. The Schedule A appended to the 1999 tax return shows Line 3, Cost of Labor of \$120,716.

During 2000 the petitioner declared Schedule K, Line 23 Income of \$19,072. At the end of that year the petitioner's current liabilities exceeded its current assets. The Schedule A appended to that form shows Line 3, Cost of Labor of \$168,685.

During 2001 the petitioner declared Schedule K, Line 23 Income of \$37,994. At the end of that year the petitioner's current liabilities exceeded its current assets. The Schedule A appended to that form shows Line 3, Cost of Labor of \$172,990.

During 2002 the petitioner declared Schedule K, Line 23 Income of \$2,280. At the end of that year the petitioner's current liabilities exceeded its current assets. The Schedule A appended to that form shows Line 3, Cost of Labor of \$144,511.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$5,364. At the end of that year the petitioner's current liabilities exceeded its current assets. The Schedule A appended to that form shows Line 3, Cost of Labor of \$138,685.

During 2004 the petitioner declared a loss of \$11,214 as its Schedule K, Line 17e Income/loss reconciliation.<sup>4</sup> At the end of that year the petitioner's current liabilities exceeded its current assets. The Schedule A appended to that form shows Line 3, Cost of Labor of \$149,530.

During 2005 the petitioner declared Schedule K, Line 17e Income/loss reconciliation of \$4,613. At the end of that year the petitioner's current liabilities exceeded its current assets. The Schedule A appended to that form shows Line 3, Cost of Labor of \$151,268.

The director denied the petition on August 23, 2006. On appeal, the petitioner asserted,

My appeal is based on the facts that my employee has shown to have acquired more than the two years experience required to be considered a still worker. ( See ETA 750, Part B, # 15B). Secondly my cost of labor as shown on my 1120S U.S. Income Taxes exceed the required amount of my employee wages (See Form 1120S Schedule A#03) Total Cost of Labor \$ 151,268.00 for the year 2005. Year 2004 was \$149,530.00, and the remaining years as proven my ability to pay. I am therefore requesting that the line "Cost of Labor" on all tax year be reevaluated.

[Errors in the original.]

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<sup>4</sup> The Schedule K was amended such that what had been designated Line 23 Income is now called Line 17e Income/loss reconciliation. For the years after that amendment, Line 17e Income/loss reconciliation is considered net income.

This office understands the petitioner's statement to assert that the Cost of Labor shown on the tax returns for the various salient years should be considered a fund available to pay additional wages during those years, and to assert that the instant petition may be approved as a petition for a skilled worker position because the beneficiary has two years of qualifying experience.

Initially, this office notes that the petition was not denied based on any lack of experience on the part of the beneficiary. Section 203(b)(3)(A)(i) of the Act requires that, for a position to qualify for a petition as a skilled worker under that section, the position pursuant to which the petitioner specified that the instant petition was filed, the position must require two years of training or experience. According to the approved labor certification supporting the instant petition, the proffered position requires one year of experience and no additional training. The petition may not be approved under the visa category pursuant to which it was filed. The petition was correctly denied on this basis, which has not been overcome on appeal.

The remaining issue is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date as required pursuant to 8 C.F.R. § 204.5(g)(2).

Because the priority date of the instant petition is November 9, 1998, the beneficiary's wage statement for work performed from July 27, 1997 to August 2, 1997 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, on the Form ETA 750B the beneficiary indicated that he ceased working for the petitioner before the priority date. In that case, of course, the petitioner would have paid no wages to the beneficiary during the salient years since the priority date. In any event, the petitioner has submitted no evidence of any wages it paid to the beneficiary during the salient years.

Showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>5</sup> or otherwise increased its net income,<sup>6</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate

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<sup>5</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>6</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

cases,” the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and generally cannot show the sustainable ability to pay a proffered wage.<sup>7</sup> Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns. The balances shown on the petitioner's bank statements will not be further considered.

The petitioner is correct that the amount shown at Schedule A, Line 3, Cost of Labor for each of the salient years exceeds the annual amount of the proffered wage. If that amount were shown to be available to pay the proffered wage, then the petitioner would have demonstrated its ability to pay the proffered wage during each of the salient years, and this office would find that it had shown its continuing ability to pay the proffered wage beginning on the priority date.

The evidence does not demonstrate, however, what portion, if any, of those amounts were paid to contractors for performing the duties of the proffered position, numerical control tool programmer/operator. If those payments were for the performance of other essential duties, then they were not available to pay the proffered wage. The petitioner has not demonstrated that any portion of those funds was available to pay the proffered wage and they will not be further considered.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 instant case, the petitioner did not establish that it employed and paid the beneficiary during the salient years since the priority date.

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<sup>7</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>8</sup> shown on lines 16(d) through 18(d). 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.

The proffered wage is \$49,067.20. The priority date is November 9, 1998.

During 1998 the petitioner had net income of \$9,738. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence from which its net current assets could be calculated. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its

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<sup>8</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 1998.

During 1999 the petitioner had net income of \$97,306. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner had net income of \$19,072. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2000.

During 2001 the petitioner had net income of \$37,994. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner had net income of \$2,280. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner had net income of \$5,364. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

During 2005 the petitioner had net income of \$4,613. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to

demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2005.

The petition in this matter was submitted on January 11, 2005. On that date the petitioner's 2006 tax return was unavailable. That tax return was never subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998, 2000, 2001, 2002, 2003, 2004, and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied for this additional reason, which has not been overcome on appeal.

The petition was correctly denied both because the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and because the proffered position does not qualify as a position for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. The petitioner has overcome neither basis on appeal.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.