

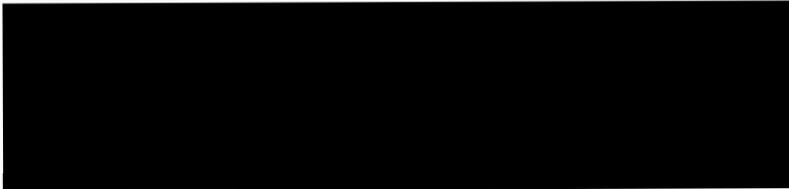
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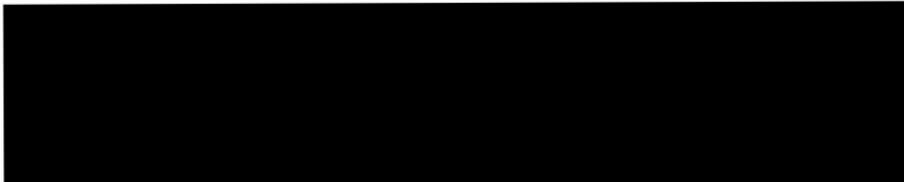
Petitioner:

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 Acting Director, Nebraska 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 an engineering firm. It seeks to employ the beneficiary permanently in the United States as a production engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 and denied the petition accordingly.

On January 17, 2008, this office issued a Notice of Adverse Evidence and Request for Additional Evidence. The petitioner was afforded 12 weeks to respond. As of this date, more than five months later, this office has received no response. On this basis alone, the petition may be denied. 8 C.F.R. § 103.2(b)(13).

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. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 the Service.

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 December 15, 2000. The proffered wage as stated on the Form ETA 750 is \$68,903.12 per year.

The Form I-140 petition in this matter was submitted on June 9, 2005.¹ On the petition, the petitioner stated that it was established during 1985 and that it employs 85 workers. The petition states that the petitioner's gross annual income is \$6 million.² The petitioner left blank the space reserved for it to report its net annual income. On the Form ETA 750, Part B, signed by the substituted beneficiary on May 19, 2005, the beneficiary claimed to have worked for the petitioner since July of 2002.

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).³

In the instant case the record contains (1) the petitioner's 2000, 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) 2002, 2003, and 2004 Form W-2 Wage and Tax Statements, (3) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2004, (4) two photocopies of paychecks and stubs, (5) a photocopy of an earnings statement, (6) copies of monthly statements pertinent to the petitioner's bank account, (7) a September 1, 2005 letter from an accountant, and (8) letters dated May 17, 2005 and September 14, 2006 from the petitioner's president. 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 June 27, 1985, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The petitioner's 2000 tax return shows that it declared a loss of \$158,195 as its taxable income before net operating loss deductions and special deductions during that year. At the end of that year the petitioner's

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² Although the tax returns submitted show gross receipts in the millions of dollars none show \$6 million in gross receipts.

³ 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).

current liabilities exceeded its current assets. During that year the petitioner had gross receipts of \$3,788,869. The petitioner paid wages of \$261,923 during that year and incurred other labor costs of \$2,446,015.

The petitioner's 2001 tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$55,631 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. During that year the petitioner had gross receipts of \$3,357,892. The petitioner paid wages of \$161,517 during that year and incurred other labor costs of \$2,088,730.

The 2002 tax return shows that the petitioner declared a loss of \$60,679 as its taxable income before net operating loss deductions and special deductions during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. During that year the petitioner had gross receipts of \$3,273,008. The petitioner paid wages of \$138,798 during that year and incurred other labor costs of \$2,083,642.

The petitioner's 2003 tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$59,833 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. During that year the petitioner had gross receipts of \$4,578,986. The petitioner paid wages of \$192,823 during that year and incurred other labor costs of \$2,438,778.

The petitioner's 2004 tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$33,984 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. During that year the petitioner had gross receipts of \$5,586,505. The petitioner paid wages of \$381,562 during that year and incurred other labor costs of \$3,118,581.

The W-2 forms submitted show that the petitioner paid the beneficiary \$25,050.47, \$53,719.88, and \$56,971.76 during 2002, 2003, and 2004, respectively.

The record contains an additional 2000 W-2 form showing that the petitioner paid wages of \$44,088.74 to [REDACTED] during that year. As stated above, the instant beneficiary is not the beneficiary for whom the petitioner originally filed the Form ETA 750 labor certification application. [REDACTED] was the original beneficiary of the ETA 750 application.

The petitioner's quarterly returns show that the petitioner paid total wages of \$671,203.09, \$816,758.88, \$836,377.18, and \$984,485.66 during the four quarters of 2004.

The petitioner drew the paychecks submitted to the beneficiary's order on May 31, 2005 and August 31, 2005. The stubs show that the beneficiary's gross pay for both of the pay periods represented by those payments was \$3,250. The stub also shows that the petitioner had paid the beneficiary year-to-date wages of \$45,250 as of the issuance of the August 31, 2005 check.

The earnings statement submitted shows that the petitioner paid the beneficiary gross pay of \$3,250 for the pay period ending August 15, 2006. That statement also shows that as of that check the petitioner had paid the beneficiary a year-to-date total of \$52,000.

The petitioner's accountant's September 1, 2005 letter lists figures that it represents as the petitioner's net current assets for 2000 through 2004. Those amounts range from \$113,962 to \$234,888. These figures are inconsistent with the petitioner's tax returns, as will be explained further below.

The petitioner's president's May 17, 2005 and September 14, 2006 letters state that the petitioner employs 80 or 85 workers,⁴ has gross receipts of \$6 million⁵ annually, and has the ability to pay the proffered wage.

The acting director denied the petition on November 2, 2005. On appeal, counsel asserted that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. More specifically, counsel asserts that the pay stubs and statements demonstrate that the petitioner is currently paying the beneficiary the proffered wage. Counsel also stated that the accountant's September 1, 2005 letter demonstrates that the petitioner's net current assets exceeded the proffered wage during each of the salient years.

Finally, counsel argues that the volume of the petitioner's business shows that it is able to pay the proffered wage.

The pay stubs, paychecks, and earnings statements show that during certain periods the petitioner has paid the beneficiary an amount equal to the proffered wage. They do not demonstrate, in themselves, that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

This office is aware that a recent memorandum from William R. Yates, CIS Associate Director for Operations, can be read to state that the petitioner need only show that it was paying the proffered wage during some shorter period or on some given date in order to satisfy 8 C.F.R. § 204.5(g)(2). That interpretation, however, is contrary to the language of 8 C.F.R. § 204.5(g)(2), which makes clear that the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Further, that memorandum, by its own terms, was not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but was merely offered as guidance. The petitioner will be held to the language of the governing regulation.

Counsel'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 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 cannot show the sustainable ability to pay a proffered wage.⁶

⁴ The May 17 letter states that the petitioner has 85 workers, whereas the September 14, 2006 letter states that the petitioner employs 80.

⁵ Again, the balance of the evidence does not support that assertion.

⁶ 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

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, such as cash reflected on Schedule L that was taken into account when calculating the petitioner's net current assets.

While funds paid to the original beneficiary can be considered, in this matter, the only funds documented as paid to the beneficiary were in 2000. As the priority date in this matter is December 15, 2000, the petitioner's ability to pay the proffered wage beginning in 2001 is more probative to whether the job offer was realistic.

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 Sonogawa*, 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 current or original 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. As stated above, the wages paid to the original beneficiary mostly predate the priority date. The petitioner established that it paid the current beneficiary \$25,050.47, \$53,719.88, and \$56,971.76 during 2002, 2003, and 2004, respectively. The petitioner is obliged to show that it was able to pay the balance of the proffered wage during those years. Further, the petitioner established that it had paid the beneficiary year-to-date total wages of \$25,750 by May 15, 2005 and \$52,000 by August 15, 2006.

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

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.

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 typically⁷ 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 \$68,903.12 per year. The priority date is December 15, 2000. On the priority date only approximately two weeks of 2000 remained. Under the petitioner's ability to pay the proffered wage in subsequent years is more probative of the realistic nature of the job offer.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 and must show the ability to pay the entire proffered wage during that year. The petitioner declared taxable income before net operating loss deductions and special deductions of \$55,631 during that year. That amount is less than the proffered wage. At the end of that year the petitioner had negative net current assets in the amount of -\$144,004. 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's 2001 tax return is insufficient, in itself, to show the ability to pay the proffered wage during that year.

The petitioner paid the beneficiary \$25,050.47 during 2002 and is obliged to show the ability to pay the \$43,852.65 balance of the proffered wage during that year. The petitioner declared a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year the petitioner had negative net current assets in the amount of -\$89,427. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

proffered wage out of its net current assets during that year. The petitioner's 2002 tax return is insufficient, in itself, to show the ability to pay the proffered wage during that year.

The petitioner paid the beneficiary \$53,719.88 during 2003 and is obliged to show the ability to pay the \$15,183.24 balance of the proffered wage during that year. The petitioner declared taxable income before net operating loss deductions and special deductions of \$59,833 during that year. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2003.

The petitioner paid the beneficiary \$56,971.76 during 2004 and is obliged to show the ability to pay the \$11,931.36 balance of the proffered wage during that year. The petitioner declared taxable income before net operating loss deductions and special deductions of \$33,984 during that year. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2004.

The petitioner demonstrated that it paid the beneficiary year-to-date total wages of \$25,750 by May 15, 2005, but did not demonstrate the amount it paid him during the balance of that year. The petitioner would ordinarily be obliged to demonstrate the ability to pay the remaining \$43,153.12 balance of the proffered wage during that year. The petition in this matter, however, was submitted on June 9, 2005. On that date the petitioner's 2005 tax return was unavailable. The service center issued a request for evidence in this matter on June 30, 2005. On that date the petitioner's 2005 tax return was still unavailable. No evidence pertinent to 2005 was ever requested. Today's decision will not be based, even in part, on the lack of evidence pertinent to 2005 and later years.⁸

Counsel asserts, however, that notwithstanding that the tax returns do not, in themselves, demonstrate that the petitioner has continually been able to pay the proffered wage, this office should find that the totality of the circumstances of the case, and specifically the volume of the petitioner's operations, demonstrates that it was continually able to pay the proffered wage.

This office is unable to find any support in the tax returns or elsewhere in the record for the proposition that the petitioner's gross annual income is \$6 million as the petitioner's president asserts. The petitioner's gross receipts, however, ranged from \$3,273,008 in 2002 to \$5,586,505 in 2004. The petitioner's president stated that it employs 80 to 85 workers and its tax returns show that it paid combined wage and labor costs of over \$2 million during each of the salient years, and during 2004 its wage and labor costs exceeded \$3.5 million. Further, the petitioner demonstrated its ability to pay the proffered wage with the W-2 forms and tax returns submitted during 2003 and 2004. The petitioner also paid a portion of the proffered wage to the beneficiary during 2002. Although the petitioner is not obliged to show the ability to pay the proffered wage during 2005 and 2006 it paid him substantial wages during those years as well. Assuming that all of those figures are accurate, they demonstrate, in sum, that the petitioner was able to pay the \$68,903.12 proffered wage during each of the salient years.

⁸ This office notes, however, that the petitioner demonstrated that it had paid the beneficiary year-to-date wages of \$52,000 by August 15, 2006. That amount is significantly greater than the pro-rata share of the proffered wage that would have been due during the first seven and one half months of that year.

The petitioner's tax returns, however, contain an apparent discrepancy. As was noted above, the petitioner's 2004 Form 941 quarterly returns show that the petitioner paid total wages of \$671,203.09, \$816,758.88, \$836,377.18, and \$984,485.66 during the four quarters of 2004, for a total of \$3,308,824.81 during that year. The petitioner's 2004 income tax return, on the other hand, states that the petitioner paid total salaries and wages of \$381,562 during that year and incurred other labor costs of \$3,118,581.⁹ Those figures are not readily reconcilable.

On January 17, 2008 the AAO issued a Notice of Adverse Evidence and Request for Additional Evidence to the petitioner to clarify these inconsistencies. The AAO did not receive a response from the petitioner. As such, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

⁹ Although "other labor" typically refers to non-employee contract labor, upon which the petitioner would not pay FICA or Medicare, and which would not typically be shown on a Form 941 quarterly return, this office notes that the figures from the Form 941 and the figures from the petitioner's tax return cannot readily be reconciled even considering the other labor costs.