

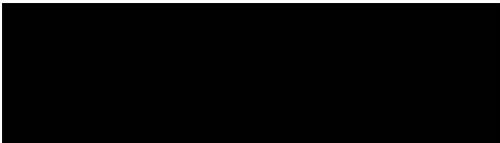
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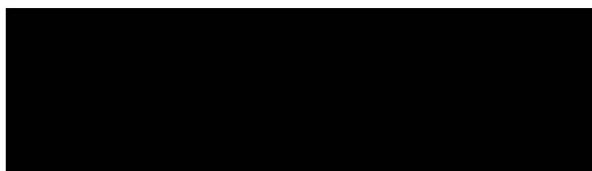
FILE: EAC-04-196-50647 Office: VERMONT SERVICE CENTER Date: MAY 02 2006

IN RE: Petitioner:
Beneficiary:



PETITION: 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$29.25 per hour for 35 hours per week, which amounts to \$53,235.00 annually. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner beginning in March 1998 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on May 12, 2004.

The I-140 petition was submitted on June 18, 2004. On the petition, the petitioner claimed to have been established in 1995, to currently have 16 employees, and to have a gross annual income of \$749,378.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated October 26, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and denied the petition.

On appeal, counsel submits additional evidence. Counsel states on appeal that the petitioner has the ability to pay the proffered wage in 2001 based on a combination of the petitioner's total assets, net income, and

depreciation expense. She also states that the owner's assets may be considered in determining the petitioner's ability to pay. Counsel submits copies of the beneficiary's Form W-2 Wage and Tax Statements for 2002 and 2003, copies of the beneficiary's weekly wage statements from June 25, 2004 to October 29, 2004, and copies of the petitioner's 1120S U.S. Income Tax Returns for an S Corporation for 2002 and 2003.

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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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). In evaluating whether a job offer is realistic, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner beginning in March 1998 and continuing through the date of the ETA 750B.

The record contains copies of the beneficiary's Form W-2 Wage and Tax Statements for 2002 and 2003. The beneficiary's Form W-2's for 2002 and 2003 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2002	\$31,450.00	\$53,235.00	\$21,785.00
2003	\$28,850.00	\$53,235.00	\$24,385.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002 and 2003.

The record also contains copies of the beneficiary's weekly wage statements from June 25, 2004 to October 29, 2004. According to those statements, the beneficiary was paid \$1,023.75 per week during this period, and as of October 29, 2004, the beneficiary was paid \$33,851.25. This is not enough to show that the beneficiary was paid the proffered wage in 2004 because nothing in the record indicates that the beneficiary was paid for

the last two months in 2004. In addition, those statements show that the beneficiary was paid 10 out of 12 months in 2004. Five-sixth of the proffered wage is \$44,362.50, and \$33,851.25 is less than \$44,362.50.¹

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002, and 2003. The record before the director closed on June 18, 2004 with the receipt by the director of the I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$10,949.00	\$53,235.00*	-\$42,286.00
2002	\$19,063.00	\$21,785.00**	-\$2,722.00
2003	\$5,275.00	\$24,385.00**	-\$19,110.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

** Crediting the petitioner with the compensation actually paid to the beneficiary in 2002 and 2003.

¹ If the beneficiary was paid \$1,023.75 per week, which is the proffered wage per week, from June through October 2004 and his cumulative wage as of October 2004 is less than five-sixth of the annual proffered wage, then the petitioner clearly did not pay the beneficiary the proffered wage of \$1,023.75 per week for every single week prior to June 25, 2004.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its 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. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	-\$6,102.00	\$53,235.00*
2002	-\$15,205.00	\$21,785.00**
2003	\$3,352.00	\$24,385.00**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

** Crediting the petitioner with the compensation actually paid to the beneficiary in 2002 and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

Counsel states that "corporate assets were \$41,108.00 and net income was \$10,949.00. Depreciation of \$1913.00 was deducted as well. These total to \$53,990.00 in 2001." Counsel is essentially asserting that CIS should combine the petitioner's total assets, net income, and depreciation expense for 2001. The petitioner's total assets include depreciable assets that the petitioner uses in business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

According to the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2001, \$41,108.00 is the petitioner's total assets. CIS will look at the petitioner's net income or, alternatively, the petitioner's net current assets to determine whether the petitioner has the ability to pay the proffered wage. CIS will not look at the petitioner's total assets without taking into consideration the petitioner's liabilities.

Counsel's assertion that the petitioner's total assets be added to the petitioner's net income is unacceptable. As stated above, CIS will not look at the petitioner's total assets without taking into consideration the

petitioner's liabilities. Net current assets, which are the difference between a corporation's current assets and current liabilities, may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the two figures cannot be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. Thus, because net current assets and net income cannot be combined, total assets likewise cannot be combined with net income.

Counsel also asserts that depreciation expense should be considered, and there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiff's argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

In addition, counsel states that "[a]s a sole proprietorship organized as a sub-chapter S Corporation for tax purposes, the [petitioner's] 100% owner's assets may be considered in determining the [corporation's] ability to pay the salary in the year of filing. The owner received \$156,000.00 from the corporation."

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. However, CIS, in looking at the totality of circumstances, may examine the financial flexibility that the owners have in setting their salaries based on the profitability of their corporation. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation. Thus, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, and the petitioner had a net income of \$10,949.00 in 2001. Thus, taking into account the net income, the

petitioner still needed \$42,286.00 to meet the proffered wage. In 2001, the officer was compensated \$156,000.00. The officer, even after paying the proffered wage, would still have received compensation well in excess of \$100,000.00. Thus, the AAO finds that it is likely that an officer could have foregone the amount of his compensation necessary to pay the salary of an employee.

Similarly, after taking into consideration the wages paid to the beneficiary, the petitioner's net income, and compensations of officers for 2002 and 2003, the officer could have foregone the amount of his compensation in 2002 and 2003 necessary to pay the beneficiary's salary. Even after paying the proffered wage, the officer would still have received compensation in excess of \$100,000.00 in both 2002 and 2003. Thus, the AAO also finds that it is likely that an officer could have foregone 1.5% of his compensation in 2002 and 12.9% of his compensation in 2003 necessary to pay the salary of an employee.

After a review of the evidence, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal have overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained.