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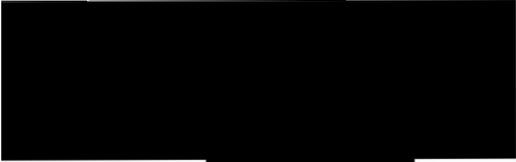
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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EAC-04-163-50094

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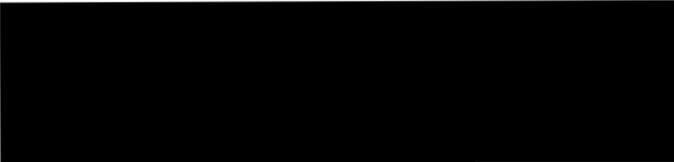
Date: **MAY 02 2006**

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.

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 dismissed.

The petitioner is a residential construction firm. It seeks to employ the beneficiary permanently in the United States as a drywall carpenter. 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 \$17.50 per hour, which amounts to \$36,400.00 annually. On the Form ETA 750B, signed by the beneficiary on April 14, 2001, the beneficiary claimed to have worked for the petitioner beginning in August 1999 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on June 24, 2003.

The I-140 petition was submitted on April 28, 2004. On the petition, the petitioner claimed to have been established in September 1993, to currently have 30 employees, and to have a gross annual income of \$1,512,559.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated October 8, 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 a brief and additional evidence. Counsel states that the petitioner's guaranteed payments to partners and total assets should be considered in determining the petitioner's ability to pay the proffered wage. Counsel submits the beneficiary's Form 1099-MISC Miscellaneous Income for 2002.

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 Sonogawa*, 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 14, 2001, the beneficiary claimed to have worked for the petitioner beginning in August 1999 and continuing through the date of the ETA 750B.

The record contains a copy of the beneficiary's Form 1099-MISC Miscellaneous Income for 2002, which shows 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	\$20,635.00	\$36,400.00	\$15,765.00

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

The record also contains a list titled "D & J Drywall 1099 Summary January through December 2001." According to the summary list, the beneficiary received \$24,135.00 as nonemployee compensation from the petitioner. Counsel refers to this amount when stating that the petitioner can demonstrate its ability to pay the difference between the actual wages paid and the proffered wage in 2001.¹

¹ Counsel also states on appeal that "D & J Drywall in 2001 paid income to [redacted], as noted by USCIS, 1099 misc. for 2001 of \$26,945.00." Counsel then states that "[t]he proffered salary in this case is \$36,400.00. The difference between the actual salary and the [proffered] wage is \$12,265.00." The director's decision states that for 2001, "[the petitioner] submitted a 1099 Summary listing that [it] paid the alien \$24,135.00, falling short by \$12,265.00 of the proffered wage." The director did not mention any Form 1099-MISC and did not state that the beneficiary was paid \$26,945.00. The record does not contain a copy of the beneficiary's Form 1099-MISC for 2001. In addition, the difference between \$36,400.00 and \$26,945.00 is \$9,455.00, not \$12,265.00.

The AAO would accept Form W-2's, Form 1099's, pay stubs, or cashed checks as competent supporting evidence. The petitioner's 1099 summary list, however, is not persuasive evidence. Nothing in the record indicates that the summary list is issued by the Internal Revenue Service. Similar to unaudited financial statements, it appears to have been compiled by the petitioner. There is also no evidence that the summary list has been reviewed or audited. Thus, it is the representations of management, and the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the amount of wages the petitioner paid the beneficiary in 2001. The accuracy of the summary list is also called into question because according to the summary list, the petitioner paid \$954,067.58 in wages in 2001. According to the petitioner's Form 1065 U.S. Return of Partnership Income for 2001, the petitioner paid \$958,177.00 in wages in 2001. The two figures do not match up, and no explanation for the inconsistency exists in the record. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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. Finally, 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 evidence indicates that the petitioner is a domestic general partnership. The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2001 and 2002. The record before the director closed on April 28, 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. However, the petitioner's federal tax return for 2003 would have been due before April 28, 2004. Therefore the petitioner's tax return for 2003 is the most recent return available. The petitioner's 1065 U.S. Return of Partnership Income for 2003 does not appear in the record.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. Where a partnership has income from sources other than from a trade or business, that income is reported on the Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on the Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

In the instant petition, the petitioner's tax returns show amounts for income on the Schedule K as shown in the table below.



Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$83,885.00	\$36,400.00*	\$47,485.00
2002	\$0.00	\$15,765.00**	-\$15,765.00
2003	No Information	\$36,400.00*	No Information

* The full proffered wage, since the record contains no persuasive evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2003.

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

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

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 a partnership 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 partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership'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	\$0.00	\$36,400.00*
2002	\$0.00	\$15,765.00**
2003	No Information	\$36,400.00*

* The full proffered wage, since the record contains no persuasive evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2003.

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

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

Counsel states that the petitioner's guaranteed payments to partners in the amount of \$83,885.00 should be considered in determining the petitioner's ability to pay the proffered wage in 2001. As stated above, where a partnership has income from sources other than from a trade or business, that income is reported on the Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on the Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. The petitioner's net income on the Schedule K is \$83,885.00 because "guaranteed payments to partners" is one of the items listed as income on the Schedule K. Thus, CIS does look at the petitioner's guaranteed payments to partners.

Counsel states that the petitioner had sufficient funds to pay the difference between the actual income paid and the prevailing wage in 2002 because "[the petitioner] had \$43,558.00 in assets at the end of the year." According to the petitioner's 1065 U.S. Return of Partnership Income for 2002, \$43,558.00 is the petitioner's total assets. CIS rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its 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. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Thus, instead of looking at the petitioner's total assets, CIS will, as shown above, consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel also states that "should [CIS] desire financial evidence of ability to pay the [proffered] wage since the date of filing of the instant petition, we will be more than happy to demonstrate that [the petitioner] [c]ould in 2003 and it can continue to pay the proffered salary today." The petitioner has to show the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and the record before the director closed on April 28, 2004 with the receipt by the director of the I-140 petition and supporting documents. Thus, the petitioner should have included evidence demonstrating the petitioner's ability to pay the proffered wage in 2003 and failed to do so in its initial submission of evidence and on appeal.

After a review of the evidence in the record, it is concluded that the petitioner has not 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. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to 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 not met that burden.

ORDER: The appeal is dismissed.