

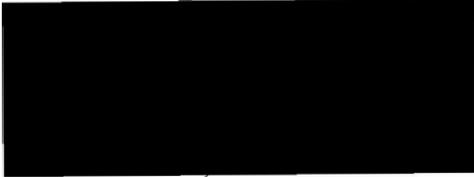
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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OCT 17 2007

FILE: [REDACTED]
EAC 06 002 52505

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 an ironworks company. It seeks to employ the beneficiary permanently in the United States as an ornamental ironworker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's February 2, 2006 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$15 an hour or \$31,200 per year. The Form ETA 750 states that the position requires three years of work experience in the job offered.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, counsel submits a brief and a copy of a memorandum written by [REDACTED] former Citizenship and Immigration Services (CIS) Associate Director for Operations,² as well as an excerpt from the website of [REDACTED] with regard to comments made by [REDACTED] at an American Immigration Lawyers Association (AILA) Conference. Counsel also submits a second letter from [REDACTED]. In this letter [REDACTED] states that his firm has been the petitioner's accountant for the past five years. [REDACTED] also states that the petitioner had an incremental decrease in its bank balance in 2004 because the petitioner's owner purchased a new property and took time off to renovate and improve the new property, as well as withdrew funds from the petitioner's business checking account to purchase the new property.

The record also contains the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for tax years 2001, 2002, 2003, and 2004, as well as monthly bank statements for the petitioner's commercial checking bank account with Atlantic Bank of New York for the years 2001, 2002, 2003 and 2004. The petitioner also submitted a one-page graph that charted the petitioner's ending bank statement balances from January 2001 to December 2003 and a later graph that charted the petitioner's ending bank statement balances from January 2001 to December 2004. The petitioner also submitted a one-page document that lists the petitioner's ending monthly balances for the petitioner's bank account from January 2001 to December 2004. This document indicates that the average monthly end balance for the petitioner's bank account over the forty-seven months listed in the document is \$75,940.

In response to the director's request for further evidence dated November 2, 2005, the petitioner also submitted an initial letter from [REDACTED]. The director had noted in his RFE that the petitioner had not completed Schedules L for the petitioner's 2002 and 2003 tax returns. In his letter [REDACTED] noted that on Schedule K, Other Information, line 13, it states that if a corporation's total receipts and its total assets at the end of the year are less than \$250,000, the corporation was not required to complete the balance sheet. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on October 7, 1998, to have two employees, and referred to its tax return for its gross and net annual income. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's bank statements, resubmitted to the record, clearly demonstrate the petitioner's ability to pay the proffered wage as of the 2001 priority date and continuing to the present.

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

² Memorandum from [REDACTED] Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

³ The letterhead indicates that GJM is an accounting and tax preparation firm

Counsel states that the director with his statement that “the bank statements submitted for 2003 do establish that the ending balances were greater than the offered wage or salary” conceded that the petitioner had established its ability to pay the proffered wage in tax year 2003 based on the petitioner’s bank statements. Counsel asserts that the director then for inexplicable reasons stated that the petitioner had not established its ability to pay the proffered wage in tax years 2001, 2002, and 2004. Counsel states that in tax year 2001, the petitioner’s net income was -\$4,689; however its lowest monthly ending bank balance for tax year 2001 was \$43,560, in the month of January. Counsel states that this monthly ending bank balance greatly exceeds not only the monthly prevailing wage of \$2,600 but also the annual prevailing wage of \$31,200. Counsel notes that the director’s decision failed to mention the petitioner’s bank statements in tax year 2001, but rather relied solely on the petitioner’s federal tax return for its examination of the petitioner’s ability to pay the proffered wage in the priority year.

With regard to tax year 2002, counsel notes that the petitioner’s net income was -\$576, and that the Schedule L balance sheet was not completed; however, the petitioner’s 2002 bank statement establishes that the petitioner had the ability to pay the proffered wage to the beneficiary in 2002. Counsel states that the petitioner’s 2002 monthly bank statements balances were higher than those for 2003, the year for which the director determined that the petitioner had proven its ability to pay the proffered wage. Counsel notes that the lowest monthly ending bank balance for 2002 was \$102,267. Counsel also notes that the petitioner was not required by law to complete the Schedule L Balance Sheet because the petitioner’s total receipts and assets were less than \$250,000.

With regard to tax year 2004, counsel notes that the petitioner’s net income was -\$778, and that Schedule L balance sheet was also not completed; however, counsel states that the petitioner’s 2004 bank statements establish that the petitioner had the ability to pay the proffered wage to the beneficiary in 2004. Counsel notes that the director’s decision states that the 2004 bank statements did not establish that the ending balances increased incrementally and that the ending bank balances for the year were greater than or equal to the proffered wage. Counsel notes that while it is true that the petitioner’s monthly ending bank balances did not increase incrementally in tax year 2004, it was also true that each of the 2004 monthly ending balances was sufficient to pay the monthly prevailing wage of [REDACTED] as the lowest month-ending balance of [REDACTED] in December 2004 was more than three times higher than the monthly prevailing wage. Counsel also refers to [REDACTED] second letter that mentioned the petitioner’s owner’s withdrawal of funds from the petitioner’s bank account, due to the owner’s purchase of real estate. Counsel again notes that the petitioner was not required by law to complete the Schedule L balance sheet because the petitioner’s total receipts and assets were less than [REDACTED]

Finally, counsel refers to the [REDACTED] and notes that based on an article found on the website of attorney [REDACTED] memorandum at the annual conference of the American Immigration Lawyers Association (AILA) in Philadelphia, Pennsylvania in June 2004, and was quoted as saying: “the ability to pay was actually meant, when it was first put into the regulations, to be a tool that officers apply, not a sword, if you will. And that if you had a company that’s been in business for years, there really is no question about the ability to pay or the bona fides of the company.”

Counsel notes the petitioner has been in business for over seven years, and that from January 2001 to December 2004, the petitioner had an average monthly bank balance of \$75,940, which was significantly more than double the prevailing wage for an entire year. Counsel states that the petitioner is a bona fide corporation that has been and will continue to be capable of paying the beneficiary the proffered wage of \$31,200.

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, 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).

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, the initial evidence reflects that the petitioner's net income is equal to or greater than the proffered wage; the initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage; or the record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage. Counsel on appeal does not specify which prong of the three-part analysis is incorrectly addressed by the director, but rather quotes from remarks delivered by [REDACTED]

The AAO is not bound to follow guidance provided during conferences, such as [REDACTED] remarks at the AILA conference. The AAO will examine the petitioner's ability to pay the proffered wage based on the three criteria outlined in the Yates memorandum.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Also, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L.⁴

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 has not established that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

⁴ In the instant petition, since the petitioner did not fill out Schedule L, it is not possible to use this schedule to calculate the petitioner's net current assets in 2002 and 2003.

income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 the Service should have considered income before expenses were paid rather than net income. 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. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng*, 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$31,200 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁵ of -\$4,689.
- In 2002, the Form 1120 stated a net income of -\$576.
- In 2003, the Form 1120 stated a net income of -\$3,847.
- In 2004, the Form 1120 stated a net income of -\$778.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay the proffered wage of \$31,200.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. 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. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As noted by both the director and counsel, in tax year 2001, the petitioner's tax return included a Schedule L, while the petitioner's tax returns for tax years 2002, 2003, and 2004 did not include a Schedule L. Counsel and [REDACTED] that the petitioner, with total receipts and total assets at the end of the tax year less than \$250,000 was not required to file Schedule L. The AAO notes that Form 1120, Schedule K, in tax year 2002 does contain this instruction on line 13, of Schedule K. However, the business filling out the tax return is also instructed on Line 13 to enter total amount of cash distribution and book value of property distributions (other than cash) made during the tax year. The petitioner did not provide this information on Line 13 of its tax return for 2002, 2003, and 2004. The AAO further notes that without the submission of the petitioner's Schedules L for the years 2002, 2003, and 2004, the AAO is only able to examine the petitioner's net current assets for the 2001 priority year.

- The petitioner's net current assets during 2001 were \$26,588.

Therefore, for the 2001 priority year, the petitioner did not have sufficient net current assets to pay the proffered wage of \$31,200.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In the initial petition, in response to the director's request for further evidence and on appeal, counsel states that the petitioner's bank statements establish the petitioner's ability to pay the proffered wage as of the 2001 priority date and to the present. On appeal counsel resubmits documentation that charts the petitioner's monthly ending balances for its commercial banking account with Atlantic Bank of New York. As counsel notes, the director in his decision states that the petitioner's bank statements submitted for tax year 2003 established that the petitioner's ending bank balances were greater than the proffered wage, but that the record did not establish that the employer had the ability to pay the proffered wage for 2001, 2002, and 2004.

In the instant petition, the funds reported on the petitioner's bank statements for tax year 2001 are not reflected on the petitioner's Schedule L. On the Schedule L for tax year 2001, the petitioner reported \$3,409 in cash, while the petitioner's December 2001 bank statement indicated the petitioner had \$105,817.19 in his commercial bank account as of December 31, 2001. As previously stated the petitioner did not submit Schedules L for tax years 2002, 2003, or 2004. Thus the correlation between any cash listed on Schedule L and the petitioner's ending bank statements for the relevant years cannot be established.

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Nevertheless, the petitioner's bank account balances from 2001 to 2003 do demonstrate that the petitioner had sufficient bank resources every month in this period to pay the entire proffered annual wage of \$31,200 each month. Thus, the record is not clear why the director did not determine that the petitioner had sufficient additional cash resources to pay the proffered wage during the 2001 priority year and during tax years 2002 and 2003. In looking at the petitioner's monthly bank balances for tax year 2004, the petitioner as of July 2004, had less than the proffered wage in its ending balances, with an end of year balance of \$10,020. Thus, the petitioner, even if its monthly bank statements were accepted as documentary evidence of the petitioner's ability to pay the proffered wage during the years 2001 to 2003, did not establish its ability to pay the proffered wage based on the additional financial resources in its bank account during tax year 2004. The AAO will withdraw the director's comments with regard to the petitioner's ability to pay the proffered wage in tax year 2003. The AAO further notes that in order for the petitioner to establish its ability to pay the annual proffered wage of \$31,200 over 3 years, the petitioner's bank account balance as of the end of tax year 2003 would have to be \$93,600. The petitioner's bank account records show that the petitioner began the priority year with a balance of \$50,225.64 in its commercial bank account, and as of December 31, 2003 had a bank balance of \$61,794. Therefore the bank statements submitted to the record do not establish that the petitioner had sufficient additional funds in his bank account to pay the proffered wage as of the 2001 priority date and through tax years 2002, 2003, and 2004.

Other factors mitigating against the use of the petitioner's bank account statements in determining the petitioner's ability to pay the proffered wage in the absence of sufficient net income and the non-submission of Schedules L to the record include the lack of any documentation of wages paid by the petitioner, and lack of information as to the actual business volume generated by the petitioner that would provide a more sustaining financial basis upon which to pay a third employee's salary. Since the petitioner filed no Schedules L for tax years 2002, 2003, and 2004, the record is devoid of any information as to the petitioner's current assets and liabilities during these years that would provide a more business-oriented look at the petitioner's financial circumstances. Without more persuasive evidence, the AAO cannot determine that petitioner is offering the beneficiary a bona fide realistic job offer.

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 Department of Labor.

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.