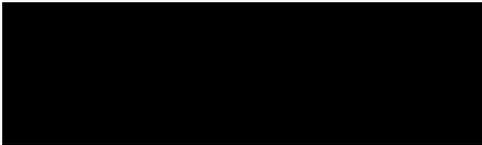


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Services**

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*AC*

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 14 2005  
WAC 03 144 54772

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

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, Director  
Administrative Appeals Office

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

The petitioner is a maker of jewelry boxes. It seeks to employ the beneficiary permanently in the United States as a quality control technician. 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.

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 August 17, 2000. The proffered wage as stated on the Form ETA 750 is \$14.85 per hour, which amounts to \$30,888 annually. On the Form ETA 750B, signed by the beneficiary on August 10, 2000, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on April 8, 2003.

On the petition, the petitioner claimed to have been established on December 26, 1990, to currently have 28 employees, to have a gross annual income of more than \$1.2 million, but left blank the box asking for its net annual income.

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- Original approved Form ETA 750; and,
- The petitioner's Form 1120S returns for 2000, 2001 and 2002.

In a request for evidence (RFE) dated September 18, 2003, the director requested additional evidence relevant to the beneficiary's job experience and current employment status, as well as a discrepancy between the I-140 and the ETA 750 as to the beneficiary's birth date.

In response, counsel submitted:

- A letter dated October 7, 2003, from the beneficiary stating the correct birth date is June 23, 1956;

- A translated letter dated July 31, 2000, from the president of [REDACTED] verifying that the beneficiary had worked for the company as a quality control inspector from March 1989 to June 1994, and stating the company had been established on June 20, 1988. (Counsel noted the company had paid the beneficiary cash wages.<sup>1</sup>)

On November 20, 2003, the director issued a second RFE seeking certified copies of the petitioner's tax returns for 2000–2002.

In response to the RFE, the petitioner on February 6, 2004, submitted:

- A copy of a form ordering the requested tax returns from the Internal Revenue Service; and,
- More uncertified copies of Form 1120S returns for 2000-2002.

By letter dated March 12, 2004, counsel submitted certified copies of the petitioner's Form 1120S returns for 2000–2002.

In a decision dated July 21, 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 continuing until the beneficiary obtains lawful permanent residence, and denied the petition. The director stated:

Net assets and liabilities equaled themselves out to \$0.00 during these three years. On line 8 of the 2000 return, \$18,000 was stated as salaries paid, in 2001 \$25,500 was stated, and in 2000 \$0.00 was stated. The figures are all below the proffered wage. The returns do not show an ability to pay the proffered wages.

As far as net assets are concerned there is no evidence to show that the petitioner has the assets to pay the proffered wage.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the director ignored the petitioner's gross income, labor costs or assets for the three years as well as its retained earnings, capital surplus and its capital stock. Counsel asserts that, in each of the three years, the petitioner's gross income exceeded \$1 million, that its wages exceeded \$281,000, and that it had assets worth \$414,000 to \$546,000.

Counsel submits on appeal:

- A CPA's September 8, 2004 letter redefining the petitioner's net income for the three years, including restoring depreciation deductions, resulting in the petitioner's "adjusted net income" of \$73,411 in 2000, \$63,226 in 2001, and \$46,402 in 2000.
- The petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2002–2000, stating the petitioner had issued 48 W-2 Forms to employees in 2002, 28 in 2001, and 37 in 2000; and,

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<sup>1</sup> On November 20, 2003, the director initiated an investigation into the beneficiary's claimed job with [REDACTED]. On October 20, 2004, the Immigration Office with the American Embassy in Seoul, Korea, reported that Korean tax records only showed [REDACTED] legally registered as a Korean company in August 1998, and that under Korean law, the beneficiary could not claim herself an employee of the company without an income tax record. The report also states that the president of [REDACTED] told investigators that the beneficiary was his sister and that she had worked at the company during the years indicated.

- Copies of the petitioner's W-2 Forms issued for 2002–2000.

It is noted this office relies upon federal income tax returns to determine an employer's ability to pay the proffered wage. 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 that 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. (Original emphasis.) *Chi-Feng* at 537.

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). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director did not specifically request any of the documents submitted for the first time on appeal. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one, which the petitioner has done in this case. 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 first year of 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 August 10, 2000, the beneficiary did not claim to have worked for the petitioner.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

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 following amounts for ordinary income:

Tax Year	Net Income	Wage Increase Needed * To Pay Proffered Wage	Surplus or (Deficit)
2000	(\$7,750)	\$30,888	(\$38,638)
2001	(\$11,835)	\$30,888	(\$42,723)
2002	\$1,495	\$30,888	(\$29,393)

\* The full proffered wage, since no wage payments were made to the beneficiary in 2000-2002.

Since each of those figures is negative they fail to establish the ability of the petitioner to pay the proffered wage.

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 those an employer might readily convert 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 petitioner's Schedule Ls show net current assets on the following table.

Tax Year	Net Current Assets	Wage Increase Needed * To Pay Proffered Wage
2000	\$72,895	none
2001	\$114,543	none
2002	\$177,075	none

\*Calculated at the full proffered wage, since no wage payments were made to the beneficiary in 2000–2002.

Each of the three years' net current asset figures establishes the petitioner's ability to pay the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, the AAO notes that the record of proceedings contains discrepancies relating to the beneficiary's claimed job experience in Korea. Based on the investigative report, the company at which the beneficiary stated she gained her qualifying experience from 1989 to 1994 did not register as a Korean company until 1998. The record of proceedings does not contain any explanation for this discrepancy. Obviously, if the business were not in existence in 1989, the beneficiary's claimed experience would not be credible.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.