

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

*B6*

**JUN 22 2005**

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date:

EAC 03 138 51601

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

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*  
Robert P. Wiemann, Director  
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<sup>1</sup>. The appeal will be dismissed.

The petitioner is an asbestos removal services corporation. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. 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 priority date of the visa petition. The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23.15 per hour (\$48,152.00 per year). The Form ETA 750 states that the position requires no experience but one month's asbestos training.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications.

---

<sup>1</sup> The beneficiary's attorney filed the appeal in the name of the beneficiary. The regulation at § 8 C.F.R. 103.3(a)(1)(iii) states, in pertinent part: (B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to [CIS]) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. However, the attorney for the petitioner has also entered his appearance on the appeal. The appeal will be heard and not rejected.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on July 21, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

"Submit evidence to establish that the employer had the ability to pay the proffered wage or salary of \$926 per week as of April 30, 2001, the date of filing and continuing to present."

"Submit the 2002 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return...."

"If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business...."

"Submit annual reports for 2001 and 2002, which are accompanied by audited or reviewed financial statements."

"Additional evidence such as accredited profit/loss statements, bank records, or personnel records may be considered but only as supplementary evidence to establish employer's ability to pay."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel sent a letter stating that she was working with a labor union to secure financial data from petitioner. No requested information was submitted.

The director denied the petition on December 31, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director stated in part that:

"It was further noted through a search of Bureau records that the petitioner had six petitions pending at the Vermont Service Center .... In order to establish the petitioner's ability to pay it must be established that the petitioner has the ability to pay all six beneficiaries. "

On appeal, counsel asserts:

"The decision is being appealed because we have additional information supporting the employer's position that the company Delta Environmental has the financial capability to pay the proffered wage in the case ... an attorney's affirmation is attached with accompanying documents."

Along with the Form I-290B and the brief in the matter, counsel submitted the following exhibits:

- "Exhibit A" is a letter dated January 16, 2004, from the president of petitioner stating it has a gross income of over two million dollars in 2001, and he said that in 2001 the company had 133 paid employees"

- “Exhibit B” is a letter from the beneficiary’s union’s local.
- “Exhibit C” is a copy of Internal Revenue Service Form 1120S for tax year 2002.

Also enclosed is the petitioner’s employee list for 2000 and 2001 showing over 100 employees on its payroll for each year.

In determining the petitioner’s ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will 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.

Alternatively, in determining the petitioner’s ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner’s federal income tax return, 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

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. Petitioner’s net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the years 2001 through 2002 for which petitioner’s tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>2</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner’s filing of Form 1120 federal tax return. The petitioner’s year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation’s end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the 2001 Form 1120 and Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets exceeded its current liabilities.

---

<sup>2</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2002, petitioner's Form 1120 return stated current assets of \$41,680.00 and \$00.00 in current liabilities. Therefore, the petitioner had \$41,680.00 in current net assets for 2002. Since the proffered wage was \$48,152.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$32,027.00 and \$949.00 in current liabilities. Therefore, the petitioner had a \$31,078.00 in current net assets for 2001. Since the proffered wage was \$48,152.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

A review of the employee lists submitted for 2001 and 2002 that are entitled 'employer's Quarterly State Report of Wages Paid To Each Employee' shows a wide variance between wages paid to the employees. Most received a relatively small amount with only a few receiving wages commensurate with the proffered wage.

Concerning another ability to pay issue raised by the director, at the time of her decision, there were six petitions pending with Vermont Service Center at the time of the director's decision. Concerning the corporation's petitions at the time of this discussion, there have been two denials and two appeals, including this appeal, as well as two nonimmigrant petitions in process. Counsel mentions that of the original six mentioned by the director two were approved

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

*Ability of prospective employer to pay wage.* ... 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.

Counsel has submitted personnel records evidencing that it employed 100 or more workers petitioner in 2001 and 2002, and, also submitted a letter dated January 16, 2004 from the company's president asserting the same. While the petitioner may technically satisfy the regulation cited above, the AAO has decided not to employ the regulation according to its discretion in these matters.<sup>3</sup> In this factual circumstance, as presented by petitioner, the record of proceedings contains information as discussed above that does not support the petitioner's contention that it is able to pay the proffered wage for all of the beneficiaries of the petitioner currently pending. Based upon the tax returns as submitted, and, the fact that it does not appear that many of its employees shown on the tax returns are full time employees, the AAO must conclude that the petitioner has not shown the ability to pay the proffered wage from the priority date.

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.

---

<sup>3</sup> The regulation uses the term "may" accept a statement.