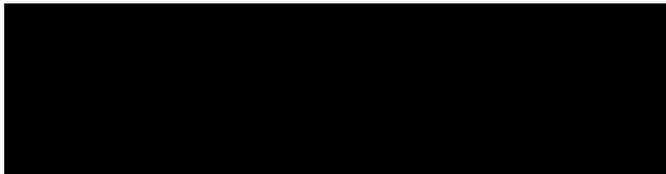


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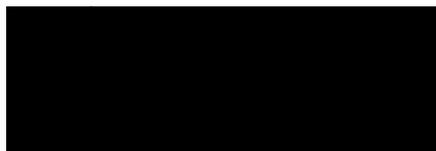
FILE: LIN 03 209 50446 Office: NEBRASKA SERVICE CENTER Date: NOV 07 2005

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 "Michael Valdez".

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a retail convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$19.85 per hour, which amounts to \$41,288 annually. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on June 26, 2003. On the petition, the petitioner claimed to have been established in 1997, to currently have one employee, to have a gross annual income of \$150,178, and to have a net annual income of \$23,905.

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- The original certified ETA 750;
- Bank statements for 2002; and,
- Income tax returns for 1999–2002.

In a request for evidence (RFE) dated February 6, 2004, the director a copy of the petitioner's 2003 federal income tax go back.

In response to the RFE, the petitioner submitted the petitioner's 2003 Form 1120S return.

In a decision dated June 9, 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. He also noted the petitioner's bank statement showed a balance of \$3,392.20 as of February 28, 2002. The decision noted the petitioner's Form 1120S returns showed ordinary

income for 2001 of \$23,905, \$30,011 for 2002, and \$41,253 for 2003; and showed cash asset losses of -\$3,127 for 2001, and -\$1,049 for 2002. The decision states the petitioner had not demonstrated its ability to pay the proffered wage for 2001 and 2002, and the director accordingly denied the petition.

On appeal, counsel submits no brief or additional evidence.

On the I-290B, signed by counsel on June 29, 2004, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. However, no further documents have been received by the AAO to date.<sup>1</sup>

Counsel states on appeal that the petitioner has enough funds available to pay the proffered wage.

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 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).

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 petitioner's tax returns show the following amounts for ordinary income:

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<sup>1</sup> On October 25, 2005, the AAO faxed counsel an inquiry asking whether he had sent the brief and/or additional evidence previously, as promised, to which counsel replied in writing that he had not. Accordingly, this office will review the documents currently in the file as the complete record of proceedings.

Tax Year	Net Income	Wage Increase Needed To Pay Proffered Wage	Surplus or (Deficit)
2001	\$23,905	\$41,288	(\$17,383)
2002	\$30,011	\$41,288	(\$11,277)
2003	\$41,253	\$41,288	(\$35)

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

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 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 an employer can expect to 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 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	Surplus (Deficit) After Paying Proffered Wage
2001	\$25,350	(\$15,938)
2002	\$34,854	(\$6,434)
2003	\$45,099	\$3,811

Since there are deficits in two of the three years, the petitioner's net current assets fail to establish the ability of the petitioner to pay the proffered wage for 2001 and 2002.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, in the instant petition, no bank statements for 2001 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage continuously from the priority date and until the beneficiary obtains lawful permanent residence status.

After a review of the federal tax returns, it is concluded that the petitioner has not 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.

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.