



U.S. Citizenship
and Immigration
Services

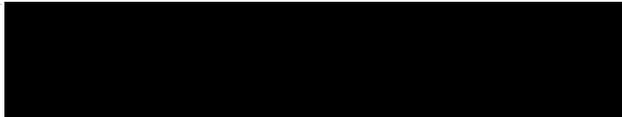
identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy
PUBLIC COPY



Ble

FILE: LIN-04-114-51582 Office: NEBRASKA SERVICE CENTER Date: NOV 10 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.

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican style cook. 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.

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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$1,910.00 per month, which amounts to \$22,920.00 annually. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on March 12, 2004. On the petition, the petitioner claimed to have been established in 1987, to currently have 24 employees, to have a gross annual income of \$469,425.00, and to have a net annual income of \$262,983.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated June 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.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the petitioner's net current assets in 2002 were sufficient to establish the petitioner's ability to pay the proffered wage.

Only one evidentiary document was submitted for the first time on appeal. 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 the document 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 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 April 19, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has 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 (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 an S corporation. The record contains two copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002. The record before the director closed on March 12, 2004 with the submission of the petition and supporting evidence. No request for additional evidence was issued by the director. As of March 12, 2004, the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available. Although the priority date is April 25, 2001, no copy of the petitioner's federal tax return for 2001 was submitted in evidence.

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."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

In the instant petition, the petitioner's tax return for 2002 indicates income from activities other than from a trade or business. Therefore the figure for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return for 2002 does not include portions of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income. In the instant case, the petitioner's tax return for 2002 shows the amount for income on line 23, Schedule K as shown in the following table:

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	not submitted	\$22,920.00*	no information
2002	-\$3,131.00	\$22,920.00*	-\$26,051.00*

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

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 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 attached to the petitioner's Form 1120S tax return for 2002 yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	not submitted	not submitted	\$22,920.00*
2002	-\$110,796.00	\$475.00	\$22,920.00*

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

The record also contains copies of unaudited financial statements. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record also contains a copy of a letter dated August 19, 2004 from [REDACTED] which is submitted for the first time on appeal. On the letterhead and on the signature line, the letters "PA" follow the name of [REDACTED] but the record does not explain the significance of those letters. No indication appears in the record that [REDACTED] a certified public accountant.

In her letter, [REDACTED] states that stock investments held by the petitioner, shown on Schedule L, line 9, for other investments, should be included in the petitioner's current assets. The end-of-the-year figure on that line is \$28,902.00. [REDACTED] therefore states that the petitioner's current assets for the end of 2002 consist of \$10,160.00 in cash, \$38,660.00 in inventory and \$28,902.00 in stock investments, for a total of \$77,722.00 in current assets. Concerning current liabilities, [REDACTED] suggests no calculations different from those discussed above, namely the liabilities listed on lines 16, 17 and 18 of the Schedule L.

A supporting itemized statement attached to the petitioner's Form 1120S, Schedule L describes the petitioner's other investments on line 9 as [REDACTED]. It appears likely that an investment account with [REDACTED] which is the name of a well-known brokerage firm, would contain assets which could be readily converted into cash. The information on the Schedule L and the attached supporting statement therefore appear to be consistent with the assertion in the letter from [REDACTED] that the amounts shown for that investment account should be included in the petitioner's current assets. For the foregoing reasons, in the instant petition it is reasonable to consider the amounts listed on Schedule L, line 9 as additional current assets.

The Schedule L for 2002 shows the figure of \$19,263.00 on line 9 for the beginning of the year and, as noted above, the figure of \$28,902.00 on line 9 for the end of the year.

Calculations based on the Schedule L attached to the petitioner's Form 1120S tax return for 2002 including the foregoing amounts as additional current assets yield the amounts for net current assets as shown in the following table.

Tax year	Net Curr. Assets (incl. Sch L, line 9)		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	not submitted	not submitted	\$22,920.00*
2002	-\$91,553.00	\$29,377.00	\$22,920.00*

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

The above information would be sufficient to establish the petitioner's ability to pay the proffered wage in 2002, but not in 2001. It may be noted that the figure for the beginning of the year for 2002 is equivalent in accountant terms to the figure for the petitioner's net current assets for the end of 2001. But since that figure is negative, it fails to establish the petitioner's ability to pay the proffered wage in 2001.

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income in 2002. The director correctly calculated the petitioner's year-end net current assets for that year, without including the amounts on Schedule L, line 9. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in 2002.

As noted above, on appeal the petitioner submits a letter which states that the amounts on Schedule L, line 9 should be considered as additional current assets. Since that claim is consistent with evidence in the petitioner's tax returns, the letter submitted on appeal is found sufficient to overcome the director's analysis of the petitioner's net current assets for the end of 2002.

In his decision, the director failed to note that no federal tax return of the petitioner for 2001 had been submitted in evidence. The director's analysis was therefore incomplete. Nonetheless, 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 to deny the petition.

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.