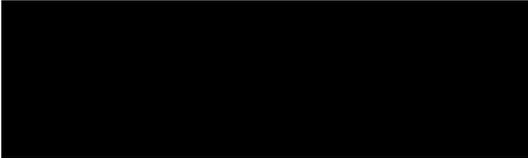




U.S. Citizenship  
and Immigration  
Services

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

**PUBLIC COPY**



*136*

FILE: [REDACTED]  
EAC 03 086 53170

Office: VERMONT SERVICE CENTER

Date: OCT 12 2005

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bread bakery. It seeks to employ the beneficiary permanently in the United States as a supervisory baker. 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 June 8, 1998. The proffered wage as stated on the Form ETA 750 is \$536.80 per week, which amounts to \$13.42 hourly or \$27,913.60 annually. On the Form ETA 750B, signed by the beneficiary on March 3, 1997, the beneficiary did not claim to have worked for the petitioner.

This is an appeal from the Form I-140 petition submitted on December 13, 2002. The director had previously denied an earlier Form I-140 petition that counsel had filed on behalf of the petitioner on November 29, 2001, basing his denial, handed down on September 28, 2002, on the lack of evidence to establish the petitioner's ability to pay the same proffered wage. The petitioner did not appeal this earlier decision, based upon the petitioner's taxable income for the fiscal year beginning October 1, 1997, the petitioner's taxable income of \$8,314.27 was not sufficient to establish the petitioner's ability to pay the proffered wage from the June 8, 1998 priority date and continuing until the beneficiary gains lawful permanent residence status. While counsel did not appeal the director's September 28, 2002 decision, this office notes that it is conducting a *de novo* review of the record of proceedings and will review all evidentiary submissions contained within the file, including tax returns submitted with the petition filed earlier. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989), (noting that the AAO reviews appeals on a *de novo* basis.)

On the instant petition (petition-2), submitted December 13, 2002, the petitioner claimed to have been established on May 19, 1992, to have a gross annual income of \$316,522, but left blank the items seeking its current net annual income and the number it employed.

In support of petition-2, the petitioner submitted:

- A copy of a certified ETA 750 on behalf of the beneficiary;
- The petitioner's fiscal year Form 1120 tax returns for fiscal years 2000 and 2001 beginning October 1, 2000 and October 1, 2001 respectively;
- A September 6, 2002 sworn statement of the petitioner's president, [REDACTED] that the beneficiary has worked as a company baker from 1995 to the present; and,
- A translated letter vouching for the beneficiary's previous experience.

In a request for evidence (RFE) dated October 23, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested the petitioner's 1998 U.S. income tax return<sup>1</sup> or alternatively, its annual reports for that year.

In response to the RFE, the petitioner submitted:

- A letter signed by [REDACTED] its president, notarized December 16, 2003, offering to reduce his own \$78,000 wage<sup>2</sup> to enable the petitioner to pay the beneficiary the proffered wage for 1998 and 2002
- [REDACTED] Form 1040 return for 2001 showing wages received of \$78,000.

In a decision dated April 27, 2004, the director determined 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 petition-2. The director noted that the RFE had "requested a copy of your 1998 fiscal federal tax return," but instead counsel submitted [REDACTED] letter.

On appeal, counsel submits additional evidence but no brief. The additional evidence includes:

- [REDACTED] sworn statement of May 9, 2004, noting that the beneficiary received her employment authorization on April 3, 2003, and stating he is attaching his own 1998 Form W-2 along with the beneficiary's Form W-2s showing \$5,200 in wages paid for 2001, \$10,900 for 2002, and \$26,180 for 2003;
- The beneficiary's 2001-2003 Form W-2 issued by the petitioner for the foregoing amounts;
- The petitioner's 1998 Form W-2 issued [REDACTED] for wages paid of \$78,000; and,
- The beneficiary's 2001 Form 1040 return showing receipt of \$5,200.

Counsel states on the Form I-290B that the director erred in deciding the evidence does not establish the petitioner's ability to pay the proffered wage.

<sup>1</sup> With its earlier petition submitted November 29, 2001, the petitioner had submitted its Form 1120 for fiscal year 1997 beginning on October 1, 1997, which would include the June 8, 1998 priority date.

<sup>2</sup> The submitted 2001 and 2001 Form 1120s do not include a Schedule E nor disclose the owner of its common stock. However, both put officer's compensation at \$78,000, which is the amount on [REDACTED] 2002 Form W-2. The petitioner's 1997 Form 1120 lists [REDACTED] as holder of 51 percent of the petitioner's common stock.

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, earlier documents submitted with the first petition included the petitioner's fiscal year 1997 tax return that the director's decision, on its face, overlooked. The director had requested the beneficiary's 1998 W-2 Form, which counsel only submitted on appeal. However, the petitioner's accountant had supplied information substantially the same as that on the W-2 in his March 12, 2002 letter. The director did not request the beneficiary's W-2s for 2001–2003. No grounds exist to exclude any documents from consideration. 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. 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, the beneficiary did not claim to have worked for the petitioner in 1998, but by affidavit the petitioner claims the beneficiary started working for the petitioner in 1995. While the figures given by the petitioner's president in the May 10, 2004 letter, corroborated by the W-2 forms, suffice to establish the wages paid in 2001–2003, the record contains no evidence of any wages the petitioner may have paid to the beneficiary in 1998–2000.

Because the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period starting with 1998, 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 a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns, for fiscal years 1997, 1998, 2000 and 2001, show the following amounts for taxable income on line 28:

The petitioner's Form 1120 returns<sup>3</sup> show the amounts for taxable income on line 28 as shown in the table below:

10-1-9/30 Fiscal Year	Wage Paid	Prof. Wage	Increase Needed	Net Income	Surplus or (Deficit)
1997	\$0	\$27,913.60	\$27,913.60	\$8,782.63	(\$19,130.97
1998	\$0	\$27,913.60	\$27,913.60	-1,165.00	(\$29,078.60
2000	\$0	\$27,913.60	\$27,913.60	-11,372.00	(\$39,285.60)
2001	\$0	\$27,913.60	\$27,913.60	-1,934.00	(\$29,847.60)

Because the petitioner in fiscal 1997 had a net taxable gain of less than one-third the amount of the proffered wage while in each of the other years analyzed, had net taxable losses, the evidence fails to establish the petitioner's ability to pay the proffered wage in 1998 and continuing thereafter.

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 those an employer expects 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, establishes the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's tax returns submitted during fiscal years 1997 -2001 yields the following figures for net current assets:

10/1-9/30 Fiscal Tax Years	Net Current Assets	Wage Increase Needed To Pay The Proffered Wage
1997	\$1,947.06	\$25,966.54
1998	(\$1,068.00)	\$28,981.60
...		
2000	(\$2,551.00)	\$30,464.60
2001	(\$3,916.00)	\$31,920.60

\* The full proffered wage, since no wage payments were made to the beneficiary in any year.

<sup>3</sup> The record of proceeding does not include the petitioner's tax corporate return for its fiscal 1999.

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

Accordingly, after a review of the petitioner's federal tax returns, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage from the priority date 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.