

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

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B

**PUBLIC COPY**



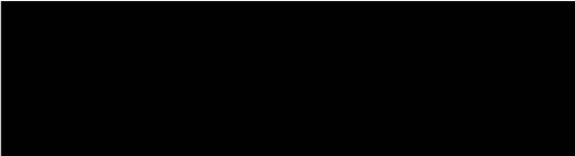
FILE: EAC-03-173-52331 Office: VERMONT SERVICE CENTER Date: **APR 25 2006**

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, Chief  
Administrative Appeals Office

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

The petitioner is a product manufacturer of machine parts and schematics. It seeks to employ the beneficiary permanently in the United States as a machine set up operator. 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, counsel submits a brief statement and additional evidence.<sup>1</sup>

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 nature, for which qualified workers are not available in the United States.

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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on January 11, 1999. The proffered wage as stated on the Form ETA 750 is \$12.04 per hour (\$25,043.20 per year). According to the certified ETA 750, the position of machine set up operator requires two (2) years of experience in the job offered. On the petition, the petitioner claimed to have been established on October 1, 1966, and to currently employ 15 workers. According to the tax return in the record, the petitioner was elected as an S corporation on December 1, 1986 and the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 25, 1998, the beneficiary claimed to have worked for the petitioner since August 1996.

---

<sup>1</sup> 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 any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The petitioner submitted the petition with Form 1120S tax return for 1999 as evidence of the petitioner's ability to pay the proffered wage. On April 16, 2004, because the director deemed the tax return for 1999 insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. The director specifically requested the beneficiary's W-2 forms for 1999, the beneficiary's individual tax return for 1999 and evidence of the petitioner's ability to pay the proffered wage as of January 11, 1999, the date of filing and continuing to the present.

In response to the director's RFE, the petitioner submitted the beneficiary's W-2 form and tax return for 1999, and re-submitted its tax return for 1999, but not for other years.

The director denied the petition on September 22, 2004, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the submitted W-2 forms for the beneficiary demonstrate that he was hired and paid close to the proffered wage for 1999 through 2003 and that the total paid salaries and wages of \$82,000 in 1999 reflected on Line 8 of Form 1120S clearly shows that the petitioner was able to pay the proffered wage.

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

In the instant case, the record of proceeding contains copies of Form W-2 Wage and Tax Statements issued by the petitioner to the beneficiary. The beneficiary's Form W-2's for 1999 through 2003 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1999	\$22,203.50	\$25,043.20	\$2,839.70
2000	\$22,899.25	\$25,043.20	\$2,143.95
2001	\$23,903.89	\$25,043.20	\$1,139.31
2002	\$23,681.46	\$25,043.20	\$1,361.74
2003	\$23,273.18	\$25,043.20	\$1,770.02

The above information shows that the petitioner did not establish that it paid the beneficiary the full proffered wage in any of the years at issue in the instant petition, however, it established that it paid the beneficiary close to the proffered wage in these years. The petitioner is still obligated to demonstrate that it had the ability to pay the difference from \$1,139.31 to \$2,839.70 between the wage actually paid to the beneficiary and the proffered wage in each relevant year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). On appeal counsel resubmits a copy of the first page of the petitioner's 1999 tax return with Line 8 Salaries and Wages of \$82,591 highlighted and claims that the amount clearly shows that the petitioner was able to pay the proffered wage in 1999. The petitioner's reliance on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers in excess of the proffered wage is insufficient.

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 the 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.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1999. The petitioner's 1999 tax return states net income<sup>2</sup> of \$(61,701). Therefore, the petitioner did not have sufficient net income to pay the difference of \$2,839.70 between the wage actually paid to the beneficiary and the proffered wage in 1999.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

<sup>2</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>3</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

liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Calculations based on the Schedule L's attached to the petitioner's tax return yield that the petitioner had current assets of \$126,570 and current liabilities of \$370,945, thus net current assets were \$(244,375) in 1999. Therefore, the petitioner did not have sufficient net current assets to pay the difference of \$2,839.70 in 1999.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the difference between wages paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate its 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 must provide evidence of this ability from the priority date to the present even if there is no request from the director. In the instant case, the record before the director closed on June 7, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was due. Therefore the tax return for 2003 should be the most recent return available. In the RFE dated April 16, 2004, the director asked the petitioner to "[s]ubmit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$12.04 per hour as of January 11, 1999, the date of filing and **continuing to the present**" (Emphasis added). However, the petitioner did not submit any additional evidence to establish the petitioner's continuing ability to pay the proffered wage except resubmitting the 1999 tax return again. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the years from the priority date to the present. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.

---

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.