

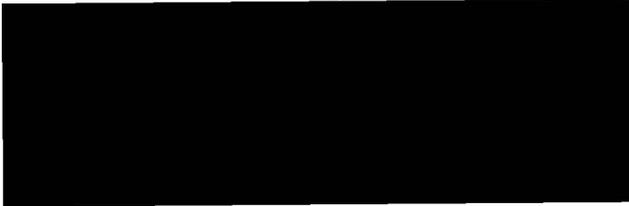


U.S. Citizenship
and Immigration
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FILE: EAC-03-231-50287 Office: VERMONT SERVICE CENTER Date: **MAR 24 2006**

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, 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 case will be remanded.

The petitioner is a delicatessen. It seeks to employ the beneficiary permanently in the United States as a counter supervisor. 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 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$8.50 per hour, which amounts to \$17,680.00 annually. On the Form ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary claimed to have worked for the petitioner as a kitchen helper from January 1995 to November 1997, and beginning in February 2000 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on January 16, 2002.

The I-140 petition was submitted on August 5, 2003. On the petition, the petitioner claimed to have been established in 1986 and to currently have 7 employees. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated June 9, 2004, the director requested additional evidence. The director specifically requested the original Form ETA 750, evidence establishing that the beneficiary possessed the required experience, copies of the beneficiary's Form W-2 Wage and Tax Statements for 2000 and 2001, copies of the beneficiary's individual income tax returns for 2000 and 2001, and the petitioner's date of birth.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on August 18, 2004.

In a decision dated September 22, 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 denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that his analysis of the petitioner's assets and liabilities based on the petitioner's income tax return for 2001 and precedent AAO decisions demonstrates that the petitioner had the ability to pay the proffered wage in 2001. Counsel submits the beneficiary's W-2 Wage and Tax Statements for 2001, 2002, and 2003, the petitioner's pay statements, and a copy of the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2001 which is already in the record.

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 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 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 13, 2001, the beneficiary claimed to have worked for the petitioner as a kitchen helper from January 1995 to November 1997, and beginning in February 2000 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary. The beneficiary's Form W-2's for 2001, 2002, and 2003 show compensation received from the petitioner, as shown in the table below.¹

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
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¹ The record also includes the beneficiary's Form W-2 Wage and Tax Statement for 2000. The beneficiary's Form W-2 for 2000 is irrelevant because the petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date, which is April 19, 2001.

2001	\$15,784.00	\$17,680.00	\$1,896.00
2002	\$16,071.25	\$17,680.00	\$1,608.75
2003	\$16,468.75	\$17,680.00	\$1,211.25

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

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 copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001. The record before the director closed on August 19, 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 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available. The petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2002 and 2003 do not appear in the record.

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. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner's tax return for 2001 shows the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$1,093.00	\$1,896.00*	-\$803.00
2002	No Information	\$1,608.75*	No Information
2003	No Information	\$1,211.25*	No Information

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

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 tax return for 2001 yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	-\$4,210.00	\$1,896.00*
2002	No Information	\$1,608.75*
2003	No Information	\$1,211.25*

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

Counsel states that for 2001, the petitioner "reported a net income in the amount of \$1,093.00 as well as cash on hand in the amount of \$11,148.00, and accounts receivable in the amount of \$5,450.00 and \$7,193.00 as 'other investments' described on Statement 5 [as] cash deposits and \$12,075.00 of merchandise to be sold. This yields the sum of \$35,866.00 to which the net income must be added giving us \$36,959.00 in current assets and net income." As stated above, current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. CIS calculates a corporation's current assets by combining information shown on Schedule L, lines 1 through 6. The \$7,139.00 listed on Schedule L, line 14 as "other assets" and described on Statement 6, not Statement 5, as "deposits" will not be added to the petitioner's current assets.

Moreover, counsel's assertion that "the [petitioner's] net income must be added" to its current assets is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because

it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective “snapshot” of the net total of petitioner’s assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner’s ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer like the petitioner who reports taxes pursuant to accrual convention, accounts receivable.

Counsel also states that a close examination of the petitioner’s current liabilities for 2001 is necessary, and \$500.00 in capital stock, \$2,483.00 in retained earnings, and \$8,068.00 in accrued wages should be deducted from the petitioner’s current liabilities. As stated above, the petitioner’s current liabilities are shown on Schedule L, lines 16 through 18. Thus, CIS does not include the \$500.00 in capital stock and the \$2,483.00 in retained earning when calculating the petitioner’s current liabilities.

CIS, however, does look at other current liabilities, which includes accrued wages, in calculating the petitioner’s current liabilities. Counsel states that “[t]he \$8,068.00 listed in accrued salaries do not represent a debt or an account payable . . . [but] is the result of the difference between the cash method of accounting versus the accrual method of accounting.” The petitioner’s tax return for 2001 was prepared pursuant to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. AAO would, in the alternative, have accepted tax returns prepared pursuant to cash convention, if those were the tax returns the petitioner had actually submitted to IRS. This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner’s present purpose. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner’s tax returns shall be considered as they were submitted to IRS, not pursuant to counsel’s adjustments.

Additionally, counsel states that the analysis and standards used in two other AAO decisions “should be applied in this case . . . [and need to be] relied upon in this matter.” Counsel, in referencing the two decisions, does not provide their published citations. While 8 C.F.R. § 103.3(c), as cited by the counsel, provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Furthermore, counsel states that “the beneficiary is being compensated at a rate above the proffered wage which demonstrates the continued ability of the petitioner to pay the proffered wage to this beneficiary.” In support of this assertion, counsel submits the petitioner’s pay statements for September and October 2004 to show that in those two months, the beneficiary was paid \$9.00 per hour, which is above the proffered wage of \$8.50 per hour. The petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, which is April 19, 2001. Thus, the fact that the petitioner is currently paying a higher wage per hour than the proffered wage does not eliminate the fact that the beneficiary was paid less than the

annual proffered wage in 2001, 2002, and 2003. Additionally, the evidence submitted only shows that the beneficiary was paid a higher wage per hour during two pay periods, and the record does not show that the beneficiary did in fact receive a wage equal to or higher than the proffered wage for all of 2004.

Despite the foregoing, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Based on evidence in the record, the beneficiary was paid \$15,784.00 in 2001, and the wage increase needed to pay the proffered wage in 2001 is \$1,896.00. The petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2001 shows that the petitioner had a net income of \$1,093.00 in 2001, so that, combined with the wage paid, shows that the petitioner had \$803.00 less than the necessary amount to pay the proffered wage in 2001. According to the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2001, officers were compensated \$104,000.00. CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. However, CIS, in looking at the totality of circumstances, may examine the financial flexibility that the owners have in setting their salaries based on the profitability of their corporation. In this case, the petitioner is equally owned by three individuals. Even though it is unlikely that an officer would forego a large part of his or her compensation in order to pay the salary of an employee, in this case, \$803.00 is 0.77% of the total amount of compensation paid to the officers. It is possible that each of the three officers would have been willing to forego 0.77% of his or her compensation. Thus, in looking at the totality of circumstances, the petitioner had the ability to pay the proffered wage in 2001.

In her decision, the director erred in stating that the petitioner had -\$3,236.00, which is the combination of the petitioner's net income and net current assets, to pay the beneficiary. As stated above, net income and net current assets are not, in the view of the AAO, cumulative. In addition, when looking at the totality of circumstances, it appears that the petitioner, contrary to the director's decision, had the ability to pay the proffered wage in 2001. However, a showing that the petitioner had the ability to pay the proffered wage in 2001 is insufficient for the appeal to be sustained because the petitioner must show the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence. In an RFE issued on June 9, 2004, the director did not request evidence of the petitioner's ability to pay the proffered wage in 2002 and 2003. In a decision issued on September 22, 2004, the director only discussed the petitioner's ability to pay the proffered wage in 2001. The record, therefore, lacks evidence of the petitioner's ability or inability to pay the proffered wage in 2002 and 2003, and such evidence was never requested from the petitioner or discussed.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above -- whether the petitioner had the ability to pay the proffered wage in 2002 and 2003. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.