

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B4



FILE: [REDACTED]
EAC 05 132 51208

Office: VERMONT SERVICE CENTER Date: JUL 19 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant 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 acting director, Vermont Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer.¹ It seeks to employ the beneficiary² permanently in the United States as a welder. 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 in the 2001 priority year, the petitioner's combined net income, net current assets, bank balance statement as of December 30, 2001, and the beneficiary's 2001 wages were not sufficient to establish that the petitioner 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.³

As set forth in the director's October 13, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department

¹ The I-140 petition identifies the petitioner as a manufacturer, while the petitioner's 2001 tax return on Schedule E identifies the petitioner as a wholesale business involving radiator covers.

² The record reflects that the beneficiary is a substituted beneficiary for a previous beneficiary Daniel Torres.

³ The AAO will address the director's calculation of the petitioner's ability to pay the proffered wage on the basis of the combined items more fully further in these proceedings.

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$15.80 per hour for a 37.5-hour per week work schedule or \$30,810 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.⁴ Relevant evidence submitted on appeal includes counsel's brief, copies of two Citizenship and Immigration Services (CIS) Forms I-797, and an excerpt from an Internet website with information on the tax structure of an S Corporation. The two Forms I-797 submitted by counsel are one dated September 14, 2004 that stated CIS had received the petitioner's appeal to the AAO, and a subsequent form dated December 2, 2004 that states the petitioner's I-140 petition for [REDACTED] had been approved.

The record also contains the petitioner's Forms 1120S for tax years 2001, 2002, and 2003; the beneficiary's W-2 Forms for tax years 2000, 2001, 2002, 2003 and 2004;⁵ and the petitioner's bank statements from M & T Bank from January 1, 2001 to December 30, 2003. The petitioner also submitted a one-page document that lists the petitioner's monthly ending balances in its bank account for the same period of time.

In response to the director's request for further evidence dated July 8, 2005, the petitioner submitted a letter from [REDACTED] CPA, New Rochelle, New York. In his letter, [REDACTED] stated that the petitioner was his client and has been in existence for 17 years. [REDACTED] stated that the petitioner's shareholders at its inception, elected to be taxed as an S Corporation that allowed the corporate income to be passed through to shareholders to be reported on the shareholders' individual tax returns. [REDACTED] stated that under the S Corporation tax structure, the officer compensation figure identified on line 7 of the tax return is actually income of the corporation, which is passed through to the shareholder and available for the payment of employee salaries. [REDACTED] identified the proffered wage in the instant I-140 petition as \$32,864⁶, and noted that the petitioner, after subtracting the beneficiary's wages in 2001, 2002, and 2003, had to pay the difference between the beneficiary's actual wages and the proffered wage of \$24,064 in tax year 2001, \$23,064 in tax year s 2002 and 2003. [REDACTED] noted that the officer compensation identified in the petitioner's tax return for tax year 2001, 2002, and 2003 was \$32,240, \$33,520, and \$33,120, respectively. The record contains no further relevant evidence as to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on May 22, 1987, to have a gross annual income of

⁴ 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).

⁵ The beneficiary, in his I-485 Adjustment application also submitted his Forms 1040 for tax years 2002 and 2003 that reflect he earned the same income indicated on the petitioner's W-2 Forms for these same two years.

⁶ The proffered wage, based on a salary of \$15,80 an hour for 37.5 hours a week, or 52 weeks a year, is \$30,810. Mr. Paverman's figures for the differences between the beneficiary's actual wages and the proffered wage are thus incorrect.

\$199,944, and to currently employ four workers. On the Form ETA 750, signed by the beneficiary on January 25, 2005, the beneficiary claimed that he had worked for the petitioner since May 1997.

On appeal, counsel states that the instant I-140 petition involves a substituted beneficiary. Counsel then states that the AAO previously approved the I-140 petition for the original beneficiary, and refers to the I-797 documents submitted on appeal that indicate an approval of the petition for [REDACTED]. Counsel states that in the previous petition the beneficiary was paid \$10,400 in 2001, and the petitioner needed to establish its ability to pay the balance of \$20,410 in 2001. Counsel further states that CIS denied the previous I-140 petition based on the petitioner's inability to pay the proffered wage and asks the AAO to consider a letter submitted by a CPA that explained the special characteristic of an S corporation and the issue of officer compensation.

Counsel states that when the petitioner appealed the prior CIS decision, the AAO approved the I-140 petition because the AAO presumably took into consideration the petitioner's officer compensation. Counsel states that there is no other reason to have approved the previous I-140 petition. Counsel then notes that when CIS denied the instant I-140 petition, CIS explicitly refused to take into consideration the compensation of officers in computing the petitioner's income available to pay the proffered wage.

Upon review of the record, the director erroneously combined such items as the petitioner's net income, net current assets, beneficiary's wages, and the petitioner's monthly bank account balance as of December 30, 2001 in her analysis of the petitioner's ability to pay the difference between the beneficiary's wages and the proffered wage in tax year 2001. While the beneficiary's wages, the petitioner's net income and the petitioner's net current assets are considered in determining whether the petitioner has the ability to pay the proffered wage, the AAO does not combine these figures to determine whether the petitioner has the ability to pay the proffered wage. Although the director's analysis of the petitioner's ability to pay the proffered wage is erroneous, her ultimate conclusion, that the petitioner did not have the continuing ability to pay the proffered wage was correct. The AAO will discuss the use of the beneficiary's wages, the petitioner's net income, and net current assets to establish the petitioner's ability to pay the proffered wage more fully further in these proceedings.

The AAO does not combine the petitioner's net income and net current assets in its examination of the petitioner's ability to pay the proffered wage. This approach 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 ways of 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 who reports taxes pursuant to accrual convention, accounts receivable.

With regard to the petitioner's bank account statements, the petitioner's and the director's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered

wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner’s net current assets.

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 during a given period, 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, as previously stated, the petitioner has submitted the beneficiary’s W-2 forms for tax years 2000 to 2004. The AAO notes that the beneficiary’s W-2 Form for tax year 2000 is not dispositive in these proceedings, because it documents wages received prior to the 2001 priority date. Therefore the AAO will not examine the beneficiary’s 2000 wages any further in these proceedings. Based on the documents in the record, the petitioner paid the beneficiary \$8,800 in 2001, \$9,800 in 2002, \$9,800 in 2003 and \$10,400 in tax year 2004. Thus, the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage of \$30,810 during the 2001 priority year or during tax years 2002 and 2003.⁷ The petitioner thus has to establish its ability to pay the difference between the beneficiary’s actual wages and the proffered wage of \$22,018, \$21,010, and \$21,010, in tax years 2001, 2002, and 2003, respectively.

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

⁷ The AAO notes that the record closed as of the petitioner’s response to the director’ request for further evidence received by CIS on September 1, 2005. Although the petitioner may have had its 2004 tax return available at this time, the AAO notes that the director did not request the return in her RFE dated July 8, 2005. Therefore the AAO will not examine any further the petitioner’s ability to pay the proffered wage in tax year 2004.

(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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$30,810 per year from the priority date:

- In 2001, the Form 1120S stated a net income⁸ of \$2,014.
- In 2002, the Form 1120S stated a net income of \$1,636.
- In 2002, the Form 1120S stated a net income of \$10,216.

Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net income to pay the proffered wage.

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, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become

⁸Where 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003). *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and adjustments shown on its Schedule K for tax years 2001 to 2003, the petitioner's net income is found on Schedule K of its tax returns.

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.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current 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.

- The petitioner's net current assets during 2001 were \$13,666.
- The petitioner's net current assets during 2002 were \$17,049.
- The petitioner's net current assets during 2003 were \$28,093.

Therefore, for the 2001 priority year and for tax year 2002, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage. However, in tax year 2003, the petitioner's net current assets of \$28,093 were greater than the difference between the beneficiary's actual wages and the proffered wage, namely, \$21,010. Thus, the petitioner has established its ability to pay the proffered wage as of tax year 2003. However, the petitioner has to establish its ability to pay the proffered wage as of the 2001 priority year and until the beneficiary obtains lawful permanent residence, not just during one of the relevant years in question.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate 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. On appeal, and in the petitioner's response to the director's request for further evidence, counsel raises the issue of officer compensation. On appeal, counsel states that as an S Corporation, the petitioner is able to use officer compensation as additional funds with which to pay the difference between the beneficiary's actual wages and the proffered wage. The AAO notes that counsel raised this issue prior to the issuance of the director's decision, and that the director stated in his decision that the funds paid to officers have already been distributed to them and cannot be counted as available funds. However, the director's analysis is not correct. Thus, the AAO will discuss the issue at greater length in these proceedings.

Counsel on appeal states that the petitioner's compensation of officers expense item can be utilized as additional funds to pay the proffered wage. Counsel states that the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, a petitioner's figures for compensation of officers may generally be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

⁹According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 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.

The AAO does consider officer compensation in its examination of particular petitions. To determine whether or not an entity's officer compensation would have been available to the proffered wage, the AAO examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officers compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more than the amount of the proffered wage. In addition, the CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder.

In addition, the totality of the circumstances (i.e., other information in the record) should support the fact that the petitioner is a viable, profitable enterprise. Such information would include issues examined in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. In *Matter of Sonegawa*, the courts looked at such issues as the petitioner's longevity, number of employees, and reputation, in examining the totality of the petitioner's circumstances.

The documentation in the record indicates that the petitioner submitted no Schedule K-1 documentation in its 2001 tax return; however line 1 of the petitioner's Form 1120S, part G, indicates the petitioner had two shareholders in tax year 2001. With regard to tax years 2002 and 2003, the petitioner's tax returns and accompanying Schedules K indicate that the petitioner's shareholders are [REDACTED] and [REDACTED] both of whom own 50 percent interest in the petitioner. The record is not clear as to whether these two shareholders are also the petitioner's officers. The record does reflect that the petitioner paid \$32,240 in officer compensation in 2001, and \$33,520 in 2002.

Furthermore the record is not clear as to whether [REDACTED] or [REDACTED] actually work for the petitioner and receive a salary, or simply receive officer compensation. The I-140 petition submitted to the record indicates the petitioner has four employees, and the petitioner's Forms 1120S indicates wages and salaries paid of \$44,600 in 2001, \$34,600 in 2002, and \$24,000 in 2003.

In looking at the officer compensation in relation to the proffered wage, the petitioner needs additional funds of \$23,000 to pay the difference between the beneficiary's actual wages in 2001 and the proffered wage of \$31,800. In addition, the petitioner needs \$21,010 in additional funds in tax year 2002 to pay the difference between the beneficiary's actual wages and the proffered wage. The necessary additional funds are 72 percent of the petitioner's officer compensation in tax year 2001, and 68 percent of the petitioner's officer compensation in tax year 2002.¹⁰ Thus the petitioner's officer compensation is not significantly higher than the amounts needed to pay the difference between the beneficiary's actual wages and the proffered wage.

Furthermore, while the I-140 petition reflects that the petitioner has been in business since 1987, the record indicates very low net income during both the 2001 priority year and 2002, and the record indicates that the wages and salaries paid by the petitioner have decreased every year in the relevant period of time between the 2001 priority year and tax year 2003. The documented level of wages provided in 2001, 2002, and 2003 and the number of employees does not provide any probative weight to counsel's assertion that the petitioner should be allowed to use officer compensation as an additional source of funds with which to pay the proffered wage. Finally, neither of the petitioner's shareholders nor any officer has submitted any

¹⁰ Since the petitioner established its ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net current assets in tax year 2003, the AAO will not examine the issue of officer compensation in tax year 2003.

documentation that states they would be willing to reduce their compensation to pay the proffered wage. Upon examination of the issues identified above, and after examining the totality of the petitioner's circumstances, the AAO does not find the use of the petitioner's officer compensation to pay the proffered wage to be reasonable.

Beyond the decision of the director, the AAO notes that the beneficiary and Julio Munoz, one of the 50 percent shareholders, share the same last name and address. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Based on the similar names and addresses indicated by the record, the petitioner needs to establish that the proffered job is a *bona fide* job offer.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.