



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC-05-196-52485

Office: VERMONT SERVICE CENTER

Date: JUN 14 2007

IN RE: Petitioner:
Beneficiary:



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 Director, Vermont Service Center (“director”) denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a real estate management company and seeks to employ the beneficiary permanently in the United States in a position related to building maintenance, and repair. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (“DOL”). As set forth in the January 25, 2006 decision, the director denied the petition on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

The record shows that the appeal is properly and timely filed, 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.

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 DOL. *See* 8 CFR § 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 of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 10, 1999. The proffered wage as stated on the Form ETA 750 is \$18.98 per hour,² 40 hours per week, for an annual salary of \$39,478.40 per year. The labor certification was approved on November 21, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on June 30, 2005. On the I-140, the petitioner listed the following information: date established: September 1, 1986; gross annual income: \$419,075; net annual income: \$81,409; and current number of employees: two.

On September 12, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide W-2 Forms for the beneficiary for the year 1999 if the petitioner employed the beneficiary. Additionally, the RFE requested that the petitioner provide the beneficiary's individual federal tax return, Form 1040. The petitioner responded. On January 25, 2006, the director denied the petition on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. The petitioner appealed and the matter is now before the AAO.

We will examine information contained in the record and then consider the petitioner's additional arguments on appeal. The petitioner must establish that its job offer to the beneficiary is a realistic one. 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, Citizenship and Immigration Services ("CIS") requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages.

First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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 case at hand, on Form ETA 750B, signed by the beneficiary on March 4, 1999, the beneficiary represented that he has been employed with the petitioner from September 1995 to present (date of signature, March 4, 1999).

The petitioner did not submit any W-2 Forms as proof of wage payment. The beneficiary submitted his Form 1040 federal tax return, and provided a sworn, notarized statement, which provided that he "paid the taxes on my own. I was not issued a Form W-2 or 1099 by [redacted] as I did not have a Social Security number or Temporary I.D. number in 1999."³ The tax return reflects "business income" of \$16,000, and the beneficiary has completed Schedule C for self-employment listing earnings of \$16,000. We note that the beneficiary's statement does not provide that he earned all the wages represented on the tax return from the petitioner. Further, the petitioner has not provided a statement to evidence the amounts that it paid to the beneficiary. Accordingly, it is unclear that we can consider the entire amount paid in 1999 as wages paid by the petitioner.

Neither the petitioner nor the beneficiary provided any documentation of any wages paid in any other year. Accordingly, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage based on

² The petitioner initially listed \$12 per hour, but DOL required that the petitioner increase the wage to \$18.98 prior to filing.

³ We note that the tax return submitted for the tax year 1999 does contain a social security number, and is dated December 1, 2005, and may reflect filing after a social security number was obtained.

prior wage payment. The petitioner must demonstrate that it can pay the full proffered wage from 1999⁴ to the present.

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. 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).

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 evidence indicates that the petitioner is a general partnership. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a partnership has income from sources other than from a trade or business, that income is reported on Schedule K.

Similarly, some deductions appear only on the Schedule K. The cost of business property elected to be treated an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 9 of the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. In the case at hand, the petitioner derives its net income from rental real estate activities, which is reported on Schedule K, Form 1065, page 4, line 2. 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 Schedule K, line 2, as shown in the table below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	\$43,544 ⁵
2000	not provided ⁶

⁴ Wages that the petitioner paid to the beneficiary would reduce the amount of the proffered wage that the petitioner would have to show that it could pay each year, but as noted above, the petitioner has not demonstrated the exact amount that it paid to the beneficiary in 1999.

⁵ The petitioner did not provide its 2000, 2002, 2003, or 2004 federal tax returns, which based on the date of filing the petition should have been available.

⁶ It is unclear why the petitioner did not provide its 2000 federal tax return. Based on 8 C.F.R. § 204.5(g)(2) a petitioner must show its ability to pay from the priority date onward until the beneficiary obtains permanent residence.

1999 \$8,525

Based on the foregoing, the petitioner can demonstrate its ability to pay in the year 2001, but is unable to demonstrate its ability to pay the beneficiary the proffered wage in 1999,⁷ 2000, 2002, or any year 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 partnership 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 partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership'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's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

<u>Tax year</u>	<u>Net current assets</u>
2001	-\$143,067
1999	-\$180,804

The petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage based on its net current assets either.

The petitioner additionally submitted a letter from its owner, which provided that the petitioner has been in business for over 17 years, and that it owns a building valued at over \$1 million, which generates gross rents of over \$419,000. Further, the owner provides that the rental income has increased since the time of the priority date.

The petitioner reports its gross rents on Form 8825 of its federal tax return, and reported gross rents of \$419,075 on its 2001 federal tax return. After subtracting all related expenses, the petitioner was left with net income of \$43,544, which was considered above. Also, as noted above, this would reflect the petitioner's ability to pay in 2001, however the petitioner has failed to demonstrate its ability to pay in 1999, 2000, 2002, 2003, or 2004.

Regarding the petitioner's increase in rental income, the petitioner must establish its eligibility from 1999 onward. A petitioner must establish eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Increased rental income in 2001 or after, would not demonstrate the petitioner's ability to pay in 1999.

Additionally, the petitioner provided that if the petitioner's net income and depreciation deductions were combined, the petitioner could demonstrate its ability to pay. Regarding depreciation, depreciation as a tax

⁷ Even if we considered the \$16,000 paid to the beneficiary in 1999 as wages paid by the petitioner, which the petitioner has not demonstrated, and combined those wages with the petitioner's net income, the petitioner would still not be able to demonstrate its ability to pay the proffered wage.

concept is a measure of the decline in the value of a business asset over time. *See* Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

On appeal, counsel contends that the "accounting methodology used for partnership real estate holdings is different than that used for a business solely engaged in selling products or services." Further, counsel provides that, the difference results from the fact that "a building acquired and placed in business to earn income becomes an asset [from] the date of acquisition and during the life of such asset. The amount of depreciation allowed to such a building is a tax break to lessen the tax liability by lowering the net taxable income."

Counsel then looks at the petitioner's 1999 federal tax return and adds the partner's income of \$8,525, to cash distributions of \$13,000, contributed capital of \$369, partner's income of \$1,279, net income of \$7,246, wages and salaries of \$4,500, management fees of \$3,367, cash of \$1,025, and payroll taxes of \$414, to reach a total of \$39,725, in excess of the proffered wage of \$39,478. Counsel contends that this demonstrates the petitioner's ability to pay the proffered wage without resorting to adding back depreciation.

The petitioner's formula of adding net income, cash assets and other factors mixes concepts of accrual and cash basis accounting by seeking to combine net income and net current assets. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. Income is viewed retrospectively, and net current assets are viewed prospectively. For example, 2001 income, which was greater than the proffered wage would indicate that a petitioner could have paid the wages in 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Additionally, counsel notes that the petitioner is formed as a partnership, and “there is no legal hurdle or barrier to the partners pledging the increase in equity of the buildings and/or the equity in the buildings as of 1999 . . . against the amount proffered to the alien.” We note that the petitioner has not provided any signed statement to this effect. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, buildings that the petitioner owns are not typically immediately liquefiable and unencumbered assets available to pay the proffered wage.

Counsel provides that the petitioner can demonstrate its ability to pay in 2001 based on its net income of \$43,544. We agree, and have noted so above. However, the petitioner must demonstrate that it can pay the proffered wage from the priority date until the beneficiary obtains permanent residence. The petitioner’s demonstration of its ability to pay in 2001, does not obviate the petitioner’s need to demonstrate its ability to pay in the years 1999, 2000, 2002, 2003, and 2004.

Counsel further contends that once the beneficiary has adjusted to permanent resident status, his employment will increase the petitioner’s ability to generate income. Counsel does not explain how the beneficiary’s attainment of permanent residence will increase the petitioner’s income. The Form ETA 750 demonstrates that the beneficiary has been employed with the petitioner since 1995. It is unclear how the beneficiary’s change in status will result in greater income for the petitioner if the beneficiary has already been working for the petitioner for the past twelve years. Further, in this instance, the petitioner has not explained, or provided any details or documentations regarding how the beneficiary’s employment would increase the petitioner’s ability to generate income. Conjecture or speculation does not outweigh the evidence presented in the corporate tax returns. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has demonstrated its ability to pay in 2001, but cannot demonstrate its ability to pay the proffered wage in 1999. The petitioner has failed to provide its 2000, 2002, 2003, or 2004 federal tax returns, or any other regulatory prescribed evidence for these years. Counsel provided no further documentation or arguments on appeal.

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.