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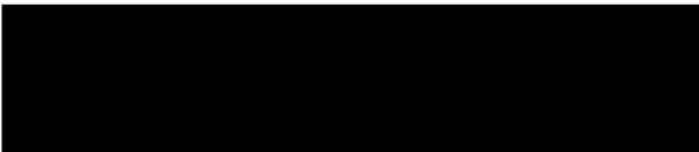
Date:

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 denied the preference visa petition. The petitioner filed a Motion to Reopen. The director reopened the petition, but then affirmed the prior decision to deny the petition. The petitioner then appealed the denial to the Administrative Appeals Office (“AAO”). The AAO affirmed the director’s decision. The petitioner has now filed a Motion to Reopen the AAO decision. The motion to reopen will be granted. The appeal will be sustained.

The petitioner is in the business of custom ironworks and seeks to employ the beneficiary permanently in the United States as a metal fabricator (“Layout Fitter”). 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 April 27, 2005 denial, the AAO affirmed the director’s decision and dismissed the appeal 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).

The history of the case is quite lengthy and complicated, but pertinent to the case, and in order to fully understand its progression, is summarized in a chronology as follows:

- On April 30, 2001, the petitioner filed Form ETA 750 on behalf on the beneficiary for the position of metal fabricator, for 40 hours per week, at a pay rate of \$17.50 per hour, equivalent to an annual salary of \$36,400;
- On April 24, 2002, the Form ETA 750 was approved;
- On June 3, 3002, the petitioner filed Form I-140 on the beneficiary's behalf. On the I-140 Petition, counsel listed the following information related the petitioning entity: date established: May 3, 1994; gross annual income: "see financials"; net annual income: "see financials"; and current number of employees: 18;
- On January 3, 2003, the director issued a Request for Evidence ("RFE") requesting that the petitioner provide documentation that the beneficiary met the experience requirements of the ETA 750; and documentation regarding the petitioner's ability to pay;
- On April 18, 2003, the director denied the I-140 petition on the basis that the petitioner was unable to demonstrate its ability to pay the proffered wage;
- On April 26, 2003, the petitioner filed a Motion to Reopen the petition;
- On July 16, 2003, the director denied the Motion to Reopen, but subsequently decided to reconsider the case, and reopened the petition;
- On September 3, 2003, the director, following the reopening of the case, affirmed the determination that the petitioner had not overcome the basis for denial, and failed to demonstrate that the petitioner had the ability to pay the proffered wage;
- On September 24, 2003, the petitioner appealed to the AAO;
- On April 27, 2005, the AAO dismissed the appeal;
- On May 26, 2005, the petitioner filed a Motion to Reopen the AAO's determination.²

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

The petitioner has provided new evidence concerning its ability to pay the proffered wage, including the beneficiary's W-2 Forms for the years 2003, and 2004 not previously submitted. The petitioner previously submitted only the beneficiary's 2002 W-2 Form. In the petitioner's Motion to Reopen, the petitioner has also submitted a report from a forensic economic specialist concerning the petitioner's ability to pay the proffered wage.³

² We note that present counsel took over representation of the petitioner upon filing of the Motion to Reopen the AAO's determination. Prior counsel represented the petitioner in all the preceding filings.

³ Additionally on appeal, the petitioner has provided documentation and evidence in the form of a statement from the petitioner's owner to clarify the beneficiary's proper first name. The beneficiary's first name was listed as [REDACTED] on the ETA 750 and I-140 Petition, but formal evidence such as the beneficiary's passport listed [REDACTED]. The owner's statement provides that [REDACTED] is the nickname for [REDACTED], and further that the person that the petitioner filed for [REDACTED], is the same individual as [REDACTED]. Additionally, we note that the date of birth listed on Form ETA 750 is the same date of birth that is listed on the beneficiary's passport, so

We will examine the petitioner's ability to pay. 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 April 26, 2001, the beneficiary listed that he was employed with the petitioner from July 2000 to the present (or until the date signed, April 26, 2001). The petitioner previously provided the beneficiary's W-2 Form from the year 2002, but not for other years.⁴ The petitioner submitted the following W-2 Forms with its Motion to Reopen:

<u>Year</u>	<u>W-2 Wages</u>
2004	\$32,950.13
2003	\$28,797.00
2002	\$29,707.58
2001	\$31,581.00 ⁵

The petitioner additionally submitted payroll records for 2005, which exhibited payment to the beneficiary in the amount of \$11,697.68 through May 4, 2005. The petitioner further notes that annualized this would amount to \$33,793.

Based on the foregoing, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment alone to the beneficiary. The petitioner would be deficient the following amounts: 2004: \$3,339.87; 2003: \$7,603; 2002: \$6,692.42; and 2001: \$4,819. The petitioner must establish that it can pay the difference between the wages paid, and the proffered wage.

that we accept the petitioner's explanation as valid based on other documentary evidence in the file. Counsel notes that the AAO instructed in a footnote in its decision to provide such evidence in any future proceeding. We further note that the record of proceeding contains two variations of the beneficiary's last name. Form G-325 filed with the beneficiary's I-485 Adjustment of Status application does identify that the beneficiary uses the second surname spelling, and the first name "██████" in the section "all other names used."

⁴ We note that the RFE specifically requested that the petitioner submit the beneficiary's 2001 W-2 statement, the year of the priority date, but did not request W-2 Forms for other years. However, the burden of proof is on the petitioner to provide evidence of its ability to pay from the time of the priority date until the beneficiary obtains permanent residence. Section 291 of the Act, 8 U.S.C. § 1361.

⁵ The petitioner issued a Form 1099 to the beneficiary for the year 2001. The 1099 Form does designate that the petitioner was the "payer," and therefore would be accepted to show that the petitioner's ability to pay the proffered wage for that year. Prior counsel indicated in a letter submitted on appeal that the petitioner had listed individuals as "subcontractors," and that the Connecticut Department of Labor had reclassified the subcontractors as employees. Presumably, the petitioner paid the beneficiary as a subcontractor on Form 1099.

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 petitioner is a C Corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns demonstrate the following financial information:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$97,498
2003	-\$89,024
2002	\$11,365
2001	\$5,381

From the above net income, the petitioner can demonstrate its ability to pay the beneficiary the proffered wage in 2004 based on net income alone, and can demonstrate its ability to pay the wage in 2001, and 2002 through a combination of net income and prior wages paid. 2003 is the only year in which the petitioner cannot demonstrate its ability to pay the proffered wage.

We note that the petitioner listed the following gross receipts on its federal income tax return:

<u>Tax year</u>	<u>Gross Receipts</u>
2004	\$1,505,464
2003	\$1,116,434
2002	\$1,351,668
2001	\$1,148,479

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 the difference between the petitioner's current assets and current liabilities.⁶ 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 on the Forms 1120. If a corporation's net current

⁶According 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.

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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	-\$27,598
2003	-\$83,976
2002	-\$28,031
2001	-\$52,530

The petitioner cannot demonstrate its ability to pay the difference between the proffered wage and wages paid based on its net current assets.

Counsel additionally submitted a report from a Forensic Economist to demonstrate the petitioner's ability to pay. However, the forensic economic report only addressed the years 2001 and 2002, and concluded that the petitioner had the ability to pay the proffered wage based on the wages paid to the beneficiary and the petitioner's net income, which we have addressed above.

Given the small differential between the wages paid in 2003, and the proffered wage, we will examine the petitioner's business under a totality of the circumstances. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In looking closely at the petitioner's business and tax returns, the petitioner has been in business for over twelve years; the petitioner has demonstrated significant gross receipts; the petitioner can demonstrate that it can pay the beneficiary's wage in 2001, 2002, and 2004, and was not significantly below the proffered wage in 2003, the only year in which the petitioner failed to demonstrate it could pay the proffered wage; the petitioner has employed and has documented prior payment to the beneficiary. In light of the petitioner's longevity, gross receipts, and wages paid, we conclude that the petitioner is able to pay the proffered wage. Although CIS will not consider gross income without also considering the expenses incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In assessing the totality of circumstances in this individual case, we conclude that the petitioner can demonstrate financial strength and viability and has the ability to pay the proffered wage.

Based on the new evidence, in the form of W-2 Forms provided combined with the petitioner's net income, the petitioner can demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence. For the reasons discussed above, the evidence submitted with the petitioner's Motion to Reopen overcomes the decision of the director.

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 been met.

ORDER: The Motion to Reopen is granted. The prior decision of the AAO, dated April 27, 2005, is withdrawn. The appeal is sustained. The petition will be approved.