

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

FILE:

EAC 06 068 51256

Office: VERMONT SERVICE CENTER Date:

NOV 28 2008

IN RE:

Petitioner:

Beneficiary:

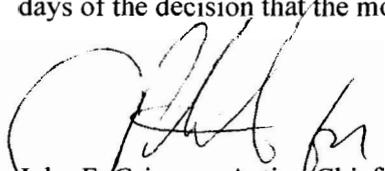
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The 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 machine shop. It seeks to employ the beneficiary permanently in the United States as machine programmer operator. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2005 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.

As set forth in the director's October 30, 2006 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. . . . 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 the [Citizenship and Immigration Services].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Permanent 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 9089 Application for Permanent 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).

In the instant matter, the Form ETA 9089 was accepted on October 6, 2005.<sup>1</sup> The proffered wage as stated on the Form ETA 9089 is \$16 an hour or \$33,280 per year. The Form ETA 9089 states that the position requires two years of work experience in the proffered job.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. 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.<sup>2</sup>

On appeal, counsel submits a brief and resubmits copies of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2003 to 2005, and a letter from [REDACTED], the petitioner's general manager, dated August 30, 2006. This letter was originally submitted in response to the director's Request for Further Evidence (RFE) dated June 5, 2006. In her letter, the general manager stated that the petitioner had shown a dramatic loss for the years 2003 to 2005. The general manager stated that the petitioner's losses were the result of a sharp decline of orders and an increase in the costs of the materials. She also stated that to adjust for this decline, the petitioner's owner had decreased her salary significantly to keep funds in the business account, and had also increased cash flow by loaning the petitioner funds from a business savings account. The general manager also stated that the petitioner, despite the losses shown, was fully capable of continuing payment of the petitioner's employees. As evidence, with the initial I-140 petition, the petitioner submitted copies of its monthly HSBC business bank account statements from January 2004 to December 2004.<sup>3</sup>

On appeal, counsel states that the director capriciously and arbitrarily denied the petition. Counsel notes that in a precedent case *Elatos Restaurant Corp. v. Sava*, 632 F. Supp 1049 (S.D.N.Y. 1986) the court held that legacy INS could rely on income tax returns, but that the Service had provided no specific formula to determine what evidence was sufficient to establish the petitioner's ability to pay the proffered wage. Counsel also cites to *Masonry Masters Inc. v. Thornburgh*, 875 F. 2d 89,903 (D.C. Cir. 1989), and states that the court in this decision also questioned legacy INS' analysis of the petitioner's ability to pay the proffered wage. Counsel refers to the director's decision in which the director requested the petitioner's 2003 to 2005 tax returns, and also stated that the priority date for the instant petition is October 6, 2005. Counsel states that it was "unfathomable" that the U.S. Citizenship and Immigration Services (USCIS) would request more than the statute requires or have differing requests.

Counsel also asserts that the director did not review the petitioner's 2005 tax return, which establishes that the petitioner has been in business since 1990, had a total income of \$191,525, paid salaries and wages of

---

<sup>1</sup> The director stated in the RFE that the priority date is January 3, 2006, the date of filing the I-140 petition. This is an incorrect date. The priority date is established at the date when the ETA Form is accepted by the Department of Labor (DOL).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> These statements cover the time period before the priority date, and, therefore, would not evidence the petitioner's ability to pay the proffered wage from October 6, 2005 onward.

\$127,702, and had accumulated depreciation of \$148,013. Counsel states that the petitioner's depreciation is a paper expense and that the petitioner's ordinary business loss was a paper loss and the petitioner did establish its ability to pay the proffered wage. Counsel states that it is an abuse of discretion for the USCIS to act as if there is no evidence to support the decision or an abuse of discretion if the decision was based on an improper understanding of the law. Counsel adds that in the instant petition USCIS has made frivolous blanket statements that the petitioner cannot afford to pay the prevailing wage, has incorrectly cited *Matter of Brantigan* as authority, and also ignored the documentation submitted to the record. Counsel finally states that the petitioner's 2001 and 2002 U.S. Income Tax return, W-2 statements and pay stubs indicate that the petitioner had the ability to pay the \$28,704 proffered salary.<sup>4</sup>

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on December 5, 1989, to have a gross annual income of \$377,978, and to currently employ five workers. On the Form ETA 9089, signed by the beneficiary on December 5, 2005, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, USCIS 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).

On appeal, counsel appears to state that the director erred in requesting further evidence of the petitioner's ability to pay the proffered wage prior to the 2005 priority year date. The AAO notes that the petitioner submitted no tax returns with the initial I-140 petition. Given this omission of evidentiary documentation, the director is well within her authority to ask for both the petitioner's 2005 federal tax return and other previous tax returns, since the petitioner's 2006 tax return would not have been available at the time the director requested further evidence. The AAO acknowledges that the prior tax returns are not necessarily dispositive in these proceedings; however, the director's request can be viewed as means to examine the petitioner's more long-term financial resources, and also as one way to see if the petitioner's 2005 tax return within the context of earlier financial reports, is uncharacteristically unprofitable. The petitioner in *Sonogawa* during the priority year had an uncharacteristically unprofitable year; however, when the totality of the circumstances of the *Sonogawa* petitioner was examined, the court decided that the petitioner had the ability to pay the proffered wage.

On appeal, counsel also refers to *Elatos Restaurant Corp v. Sava*, 632 F. Supp. 1049 (S.D. N.Y. 1986). The AAO uses the guidance provided in this decision in its determination of the petitioner's ability to pay the

---

<sup>4</sup> This final reference of counsel appears to pertain to another beneficiary or petition. The record of proceedings does not contain any tax returns from 2001 or 2002, any of the beneficiary's W-2 statements or pay stubs. The proffered wage in the instant petition is a proffered hourly wage of \$16.00, multiplied by 2080 annual work hours, or \$33,280.

proffered wage and will discuss the case more fully when it considers the petitioner's net income as a basis for establishing the petitioner's ability to pay the proffered wage.

The AAO notes that counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of this petition. As counsel notes, this decision is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage. The AAO notes that the May 2004 Yates memorandum was written in part to establish three different analysis paths to be followed by adjudicating officers when examining the petitioner's ability to pay the proffered wage. The AAO also notes that on appeal counsel refers to the petitioner's depreciation expenses as only a paper loss. The AAO will examine the issue of the petitioner's depreciation expenses more fully when it examines the petitioner's ability to pay the proffered wage based on its net income.

With the initial I-140 petition, the petitioner submitted its HSBC bank account statements for tax year 2004. Counsel's reliance on the balances in the petitioner's bank accounts 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 return, 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.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. Although counsel on appeal refers to W-2 Tax and Wage Statements, this remark appears to be for another petition. Neither the petitioner nor the beneficiary claimed that the petitioner had employed the beneficiary. Thus the petitioner cannot establish it had the ability to pay the proffered wage through wages paid to the beneficiary as of the 2005 priority date. The petitioner, therefore, has to establish its ability to pay the entire proffered wage of \$33,280 in tax year 2005.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, contrary to counsel's assertion, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 USCIS, 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. [USCIS] 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 Chang* 719 F. Supp. at 537. Therefore, the petitioner cannot rely on its depreciation expenses to show its ability to pay the proffered wage.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$33,280 per year from the priority date:

- In 2003,<sup>5</sup> the Form 1120S stated a net income<sup>6</sup> of -\$90,722.
- In 2004, the Form 1120S stated a net income of -\$95,089.
- In 2005, the Form 1120S stated a net income of -\$48,618.

Therefore, for the years 2003 to 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$33,280.

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, USCIS 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

---

<sup>5</sup> As noted above, the priority date is October 6, 2005. Therefore, the petitioner's 2003 and 2004 tax returns are before the priority date and would not show the petitioner's ability to pay from October 2005 onward, but will be considered generally.

<sup>6</sup>Where an S corporation's income is exclusively from a trade or business, USCIS 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), line 17e (2004-2005) and line 18 (2006) of Schedule K. *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 no additional income, deductions or other adjustments, the petitioner's net income is found on line 21, of the Form 1120S for tax year 2004 and 2005. In tax year 2003, the petitioner had a further deduction on Schedule K, and thus its net income for tax year 2003 is found on line 23 of Schedule K.

depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> 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 2003 were -\$25,530.
- The petitioner's net current assets during 2004 were -\$72,646.
- The petitioner's net current assets during 2005 were -\$115,716.

Therefore, from the priority date onwards, the petitioner has not established its continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets. Further, an examination of the petitioner's tax returns for the two tax years prior to the 2005 priority date does not indicate that the petitioner's circumstances were uncharacteristic to warrant further examination of the totality of the petitioner's circumstances.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the Department of Labor.

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.

---

<sup>7</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.