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File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **JUL 27 2006**  
WAC-04-187-50592

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 Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a textile dyeing and finishing company and seeks to employ the beneficiary permanently in the United States as a first line supervisor (production and warehouse) ("Dyeing Supervisor (Textile)"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 10, 2005, denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtained 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 appeal.<sup>1</sup>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, 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).

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.

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<sup>1</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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 2, 2001. The proffered wage as stated on Form ETA 750 for the position of a first line supervisor is \$4,108.44 per month, 40 hours per week, which is equivalent to \$49,301.28 per year. The labor certification was approved on April 5, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on June 12, 2004. On February 3, 2005, the Service Center issued a Notice of Intent to Deny ("NOID") based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage. The evidence submitted in response to the NOID was found to be insufficient, and the director denied the case on March 10, 2005.

Counsel listed the following information related the petitioning entity: established 06/30/1987; gross annual income: \$11 Million; net annual income: -\$22,164; and current number of employees: 120; salary: \$4,108.44 per month. The evidence in the record of proceeding regarding the petitioner's ability contains the petitioner's U.S. Federal Tax Returns for the years 2001, and 2002. Additionally, the petitioner forwarded a 2004 W-2 statement for the beneficiary, and several of the beneficiary's 2005 paystubs to show prior wage payment.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (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.

On Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner appears to now employ the beneficiary, or to have employed the beneficiary from at least 2004 onward, however, the beneficiary's exact start date with the petitioner is unclear from the record. The record contains the following W-2 forms for the beneficiary:

<u>Tax Year</u>	<u>Employer Name</u>	<u>Amount Paid</u>
2004	[REDACTED]	\$10,500

The amount paid in 2004 would be significantly less than the full proffered wage of \$49,301.28 per year. The petitioner additionally submitted the beneficiary's paystubs from the pay periods ending 10/15/2004 to 2/15/2005 showing a bimonthly pay in the amount of \$2,100 or \$4,200 per month. While these statements may demonstrate that the petitioner is now paying the proffered wage to the beneficiary, the statements fail to establish that the petitioner has paid the beneficiary the full proffered wage in any of the entire years from the priority date onward.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$49,301.28 per year from the priority date. The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Line 21 indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	-\$22,164
2001	-\$901,656

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in either year.<sup>2</sup>

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.<sup>3</sup> 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 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Following this second analysis, the petitioner's Federal Tax Returns shows that the petitioner lacks the ability to pay the required wage in either year.

<u>Tax year</u>	<u>Net current assets</u>
2002	-\$965,994
2001	-\$478,044

Counsel contends on appeal (and in response to the NOID) that based on the May 4, 2004 [REDACTED] Memo, "Determination of Ability to Pay under 8CFR 204.5(g)(2)," that the petitioner need only demonstrate one of the three methods regarding the petitioner's ability to pay, either based on: (1) sufficient net income; (2) sufficient net current assets; or (3) that the petitioner is "not only employing the beneficiary but has also paid or currently is paying the proffered wage."

While counsel is correct that the petitioner need only demonstrate one method to show that the petitioner can pay the proffered wage, counsel has missed the requirement that the petitioner must demonstrate that it can pay the proffered wage from the time of the priority date (again, April 2, 2001), until the time that the

<sup>2</sup> The petitioner did not submit a tax return for 2003, but presumably would have had this document by the date of responding to the NOID.

<sup>3</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

beneficiary obtains permanent residence.<sup>4</sup> The Yates Memo should not be read to abridge or simplify any requirements set forth in the regulations, but rather provides guidance related to the interpretation of 8 CFR Section 204.5(g)(2). Based on the documentation submitted, the petitioner had documented its ability to pay for only a four month time period (instead of the required approximately four year time period).

Accordingly, the petition was properly denied for the petitioner's failure to establish that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent residence.

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.

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<sup>4</sup> See 8 CFR Section 204.5(g)(2) above.