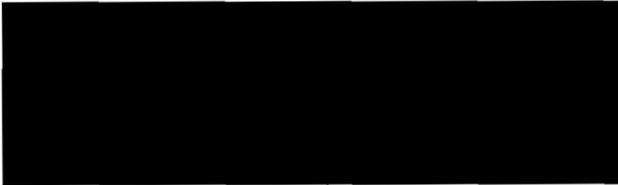


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File: EAC-04-166-51669 Office: VERMONT SERVICE CENTER Date: OCT 19 2006

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, Vermont 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 nursing home and seeks to employ the beneficiary permanently in the United States as a secretary ("bilingual secretary"). 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 February 18, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence. The petitioner also failed to document the beneficiary's qualifications for the certified position.

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.¹

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

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on November 24, 1999. The proffered wage as stated on Form ETA 750 for the position of an bilingual secretary is \$14.79 per hour, 40 hours per week, equivalent to \$30,763.20 per year. The labor certification was approved on November 30, 2000, and the petitioner filed the I-140 on the beneficiary's behalf on May 13, 2004. On the I-140, counsel listed the following information related the petitioning entity: date established: 1998; gross annual income: \$287,000.00; net annual income: not listed; and current number of employees: 5.

On February 18, 2005, the case was denied base on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, and for failure to document the beneficiary's qualifications. The petitioner appealed to the AAO. We will examine the petitioner's ability to pay based on standards enumerated and then consider the petitioner's additional arguments on appeal.

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.

In the case at hand, on Form ETA 750B, signed by the beneficiary on October 5, 1999, the beneficiary did not list that she was employed with the petitioner. 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 \$30,763.20 per year from the priority date. 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 petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	not submitted ²
2002	not submitted
2001	-\$10,865
2000	-\$37,347
1999	-\$15,997

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage in any of the years above.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 net current assets were as follows:

<u>Year</u>	<u>Amount</u>
2003	not submitted
2002	not submitted
2001	\$2,000
2000	\$6,000
1999	\$4,000

As demonstrated above, the petitioner did not have sufficient net current assets in any year to pay the beneficiary the proffered wage.

On appeal, counsel provides only that "the petitioner is a profitable entity which is more than able to pay the proffered wages. The petitioner has access to funds sufficient to pay the prevailing wage." As noted above, the petitioner's federal tax returns demonstrate negative net income, and very low net current assets, and would not demonstrate the petitioner's ability to pay, or that the petitioner's business was profitable to the level that it could pay the beneficiary the proffered wages in the years noted above. The petitioner did not provide any further documentation to demonstrate the petitioner's ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

Further, the denial provides that "there is no evidence of the beneficiary's work experience contained in the record." Accordingly, the petitioner has also failed to document that the beneficiary meets the requirements of the certified ETA 750.

² The petitioner did not submit tax returns for the years 2002 or 2003. The petitioner's 2002 federal tax return should have been available at the time of filing. The petitioner's 2003 federal tax return likely would have been available as well by the date of filing.

³ According 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.

On the Form ETA 750A, the “job offer” states that the position requires two years of experience in the job offered, as a bilingual secretary, with duties partially including: “schedules appointments, gives information to clients, takes dictation and otherwise relieves officials of clerical work and minor administrative detail. Reads and routes incoming mail . . . composes and types routine correspondence. Answers telephone.” The petitioner listed educational requirements in Section 14 as requiring four years of high school, and listed special requirements for the position in Section 15 as: must speak French and Creole.

On the Form ETA 750B, signed on October 5, 1999, the beneficiary listed her prior work experience as: (1) University Hospital of Saint Luc, 10 Avenue Hippocrate, 1200 Brussels, Belgium, as an Assistant Information System Consultant, from September 1994 to August 1996, 40 hours per week; and (2) Dr. [REDACTED] New Jersey, Volunteer Medical Assistant, April 1999 to June 1999, 40 hours per week.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary’s prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(I)(3), which provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The only documentation contained in the record regarding the beneficiary’s experience is: a certificate the beneficiary received for a “Personal Care Home Administrator 40-hour Training Program” from P.E.P.P. Unlimited; and a letter to confirm that the beneficiary was a full-time student at the New York Institute of Business Technology, where she was enrolled in the Clerical Office Assistant Program from January 5, 1997 to August 27, 1998. Neither document is sufficient to confirm that the beneficiary had the required two years of experience as a bilingual secretary before to the priority date to qualify for the certified position. The petitioner submitted no evidence on appeal, and further did not address the issue of the beneficiary’s qualifications on the appeal form filed.

Based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and further, has failed to document that the beneficiary met the requirements of the certified ETA 750. Accordingly, the petition was properly denied.

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.