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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 02 2007  
WAC 04 216 51008

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:  
[REDACTED]

**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 preference visa petition<sup>1</sup> was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a paper supplier. It seeks to employ the beneficiary permanently in the United States as an account executive. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 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 denial dated August 29, 2005, 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 at 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 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 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).

Here, the Form ETA 750 was accepted on August 7, 2001.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$83,500.00 per year. The Form ETA 750 states that the position requires four years of experience in the proffered position.

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<sup>1</sup> For reference purposes, this is the second petition filed by the petitioner for the beneficiary. The first petition identified in CIS records as WAC 03 171 54418 was denied on March 26, 2004.

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>3</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (found in the previous petition's file); a cover letter dated July 28, 2004; a prior director's decision dated April 29, 2004 concerning the first petition filed by the petitioner for the beneficiary that was denied; a letter dated March 8, 2004, from [REDACTED]; Wage and Tax Statement (W-2) for the years 1999,<sup>4</sup> 2000, 2001 and 2002 from the petitioner to the beneficiary; and, approximately 212 pages of the petitioner's bank statements for June 1, 2001 through August 31, 2002, and, approximately 177 pages of the petitioner's bank statements September 1, 2002 to May 31, 2003.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993 and to currently employ 14 workers. According to the tax returns in the record, the petitioner's fiscal year is not based on a calendar year. In 2001, the tax year was stated as June 1, 2001 to May 31, 2002. In 2002, the tax year was stated June 1, 2002 to May 31, 2003. In 2003, the tax year was stated as January 1, 2003 to May 31, 2004. On the Citizenship and Immigration Services (CIS) Form G-325A submitted with an adjustment of status application, the beneficiary claimed to have worked for the petitioner since January 1, 1997.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on April 19, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, or audited financial statements for 2002, 2003 and 2004.

The director requested that the petitioner provide copies of the beneficiary's Form 1040 U.S. federal income tax returns, and W-2 Wage and Tax Statements for 2003 and 2004. The director also requested, *inter alia*, the beneficiary's three most recent pay statements.

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<sup>2</sup> It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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>4</sup> The priority date in this case is August 7, 2001. W-2 and pay statements as well as tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

The director requested, *inter alia*, California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The director requested that the forms should include the names, social security numbers and number of weeks worked for all employees.

In response to the director's requests, counsel submitted copies of the following documents: an explanatory letter from counsel dated July 11, 2005; Wage and Tax Statement (W-2) for the years 1999, 2000, 2001, 2002, 2003 and 2004 from the petitioner to the beneficiary; three pay statements; four U.S. federal income tax returns Form 1120 for 2000, 2001, 2002 and 2003; and, approximately 212 pages of the petitioner's bank statements for June 1, 2001 through August 31, 2002, and, approximately 177 pages of the petitioner's bank statements September 1, 2002 to May 31, 2003.

On appeal, the petitioner asserts that that the petitioner's liquid assets as evidenced in the bank statements submitted into evidence are evidence of the ability to pay the proffered wage. Counsel also states **generally** that the director departed from CIS policy. Counsel references a May 21 [sic], 2004 memo issued by ██████████ to support his assertions.

Counsel cites various federal court cases in support of his contention that the director abused his discretion by departing from established policies. The AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel cites the statutory and regulatory framework of the nonimmigrant H-1B visa, and, he attempts to apply them in this immigrant visa matter. As a preface to the following discussion, the regulations for non-immigrant H1B petitions are markedly different from those pertaining to immigrant petitions. Counsel's assertions take the applicable statutory and regulatory interpretations out of their context. When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. *See* CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. *See also* 8 C.F.R. § 103.2(b)(8). Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

Accompanying the appeal, counsel submits additional evidence that includes copies of the following documents: Wage and Tax Statement (W-2) for the years 1999, 2000, 2001, 2002, 2003 and 2004 from the petitioner to the beneficiary; three pay statements; the decision of the director dated August 29, 2005; four U.S. federal income tax returns Form 1120 for 2000, 2001, 2002 and 2003; and, approximately 212 pages of the petitioner's bank statements for June 1, 2001 through August 31, 2002, and, approximately 177 pages of the petitioner's bank statements September 1, 2002 to May 31, 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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 CFR § 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,

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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. In the instant case, the petitioner has established that it employed the beneficiary from the priority date and paid the beneficiary according to the W-2 statements and pay statements submitted<sup>5</sup> as follows: in 2001, \$43,665.99; in 2002, \$46,720.01; in 2003, \$43,398.16; and in 2004, \$44,258.96. Two pay statements were submitted for pay periods May 13, 2005 and May 20, 2005. The May 20, 2005 statement demonstrates year-to-date earnings of \$13,182.00. Since the proffered wage is \$83,500.00 per year, the petitioner has not paid the beneficiary the proffered wage from the evidence submitted.

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, 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 sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated no net income of \$0.00.
- In 2002, the Form 1120 stated no net income of \$0.00.
- In 2003, the Form 1120 stated a loss of <\$54,585.00><sup>6</sup>.

Since the proffered wage is \$83,500.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for years 2001, 2002 and 2003 or the difference between wages actually paid and the proffered wage. We note that the director requested the 2004 tax return, but although there has been sufficient time for the return to have been filed by the petitioner, no return was submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

If the net income the petitioner demonstrates it had available during the 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner

<sup>5</sup> In 1999, the W-2 statements submitted stated total wages paid of \$38,140.98, and, in 2000, \$39,832.73.

<sup>6</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

uses in its business. Those 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, CIS 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 and include cash-on-hand. 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 2001 were <\$136,382.00>; during 2002 were <\$71,241.00>; and, during 2003 were <\$53,944.00>.

Therefore, for the years examined, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner asserts on appeal that that the petitioner's liquid assets as evidenced in the bank statements submitted into evidence are evidence of the ability to pay the proffered wage. A review of the record of proceeding relative to that liquid assets appears to a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. Net current assets are stated there as an indicator used to determine an employer's ability to pay the proffered wage. One component of net current assets is cash on hand but counsel's reliance on the balances in the petitioner's bank account 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 was be considered in determining the petitioner's net current assets.

The evidence submitted fails to establish that the petitioner has 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.

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<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.



Page 7

**ORDER:** The appeal is dismissed.