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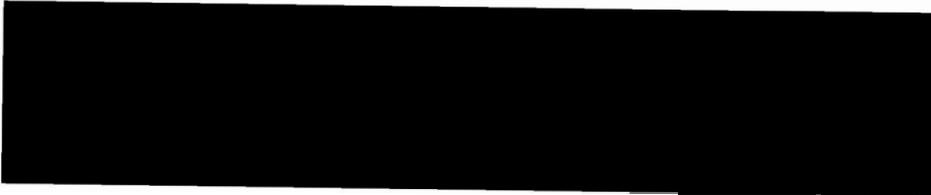
Office: VERMONT SERVICE CENTER

Date: JUL 12 2007

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 residential and commercial construction company, and seeks to employ the beneficiary permanently in the United States as a plasterer. 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 January 30, 2006 decision, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

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. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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.

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$20.77 per hour, based on a 40 hour work week, which is equivalent to \$43,201.60 per year. The petitioner listed an overtime rate of \$31.16 per hour. The labor certification was approved on May 17, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on June 20, 2005. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1909; gross annual income: \$750,000; net annual income: not listed; and current number of employees: 9.

On September 12, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional documentation regarding the petitioner's ability to pay from the time of the priority date, as the evidence previously submitted was insufficient. Further, the RFE requested that the petitioner submit copies of the beneficiary's Forms W-2 for the years 2001, 2002, 2003, and 2004, if the petitioner employed the beneficiary. The petitioner responded to the RFE. Following review, the director denied the petition on January 30, 2006 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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 April 23, 2001, the beneficiary listed that he was employed with the petitioner from April 1999 to the present (date of signature). The petitioner submitted the following W-2 statements:

<u>Year</u>	<u>Amount Paid</u>
2004	\$39,282.40 (Form W-2 wages)
2003	\$16,855.50 (Form 1099) \$18,079.50 (Form W-2 wages)
2002	\$30,513.00 (Form 1099)
2001	\$13,494.00 (Form 1099)

The W-2 and 1099 statements would exhibit partial payment of the proffered wage to the beneficiary. However, as the payments are less than the proffered wage, the petitioner cannot establish its ability to pay the beneficiary from the priority date of 2001 until the beneficiary obtains permanent residence based on prior wage payments alone. The petitioner must show that it can pay the difference between the wages paid and the proffered wage.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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 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. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003 ²	\$127,327
2002	-\$40,636
2001	-\$35,145

Based on the above, the petitioner's net income would allow for payment of the beneficiary's proffered wage in 2003, but not in 2001, or 2002, even if the wages paid to the beneficiary were added to the petitioner's net income.

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.³ 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, or, if filed on Form 1120-A, on Part III. 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, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2003	\$65,391
2002	-\$93,277
2001	-\$123,508

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets in 2001 or 2002 either, but can in 2003, although the petitioner previously established this through its net income.

The petitioner additionally submitted an accountant "compiled" statement of the petitioner's assets and liabilities for the year-end December 31, 2001. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's letter provides that the report is a compilation, which "is limited to presenting in the form of financial statements information that it the representation of management. I have not audited or reviewed the accompanying financial statements and, accordingly, do no [sic] express an opinion or any other form of assurance on them." As the accountant's statement makes clear, the statements

² The petitioner did not submit its 2004 federal tax return, which should have been available at the time of filing, and would have been available at the time of the petitioner's response to the RFE, or on appeal. The petitioner did not provide an explanation for not submitting its 2004 return.

³According 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.

were compiled statements, and the representations of management, and not audited. As such, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence to demonstrate that the petitioner can pay the proffered wage.

On appeal, counsel contends that the petitioner can demonstrate its ability to pay the proffered wage, and submitted secondary evidence, which demonstrates its ability. Counsel contends that:

According to USCIS National Standard Operating Procedure, an examiner should consider secondary evidence if a question arise as whether [sic] the employer has the ability to pay . . . one such secondary evidence [sic] is documentation showing that the petitioner's net income is greater than or equal to the salary offered; and when determining net income, USCIS will look at income before the losses are deducted.

As noted above, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS 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 petitioner's net income on its tax returns submitted did not demonstrate the petitioner's ability to pay, except for in 2003. Regarding secondary evidence, the petitioner provided a financial statement for one year, which, as noted above, was compiled and not audited in accordance with 8 C.F.R. § 204.5(g)(2). Further, the petitioner must demonstrate its ability to pay the proffered wage from the priority date onward. The petitioner's submission of the additional evidence, even if it were accepted to show the proffered wage, would not address the issue of additional evidence for 2002, or 2004. 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act. Here, counsel has provided no citation to any precedent for his assertion that CIS should use income before losses as the determining figure.

Counsel further contends that CIS "failed to apply the National Standard Operating Procedure to Petitioner's [sic] 2001 Federal Income tax return," and further that a review of the petitioner's 2002, and 2004 tax returns based on the National Standard Operating Procedure would demonstrate the petitioner's ability to pay. As noted above, CIS considered the petitioner's net income in conformance with established practice, and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084.

Further, counsel contends that CIS erred in rejecting the petitioner's financial statement "erroneously . . . calling it a "compilation."" The accountant's letter accompanying the statement provides that the report is a compilation. Therefore, it is unclear how terming the statement a compilation is in error.

Counsel provides that the CIS references to 8 C.F.R. § 204.5(g)(2), *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080; and *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) all fail to provide a reference allowing the rejection of a "year end financial statement prepared by employer/petitioner presented to establish its ability to pay the proffered wage."

Specifically, we note again that 8 C.F.R. § 204.5(g)(2) provides, "Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." A petitioner may provide a financial statement to show its ability to pay the proffered wage, but that statement must be audited -- not compiled, not reviewed, but audited. See 8 C.F.R. § 204.5(g)(2).

On appeal, the petitioner submitted a Balance Sheet, dated as of December 31, 2005, along with Profit and Loss Statements for January through December 2005. We note the same objection as above. The petitioner provided no evidence that these statements were audited in accordance with 8 C.F.R. § 204.5(g)(2). The petitioner additionally submitted Accounts Payable, and Accounts Receivable “Aging Summaries,” dated December 31, 2005. The summaries provided a list of clients, payments, and payment totals made to the petitioner. While the ledgers show that the petitioner has income flowing in regularly, the information is not in conformance with 8 C.F.R. § 204.5(g)(2). The petitioner provided this information only for 2005. The petitioner must demonstrate its ability to pay from the priority date until the beneficiary obtains permanent residence. The petitioner has failed to do so.

As demonstrated above, the wages paid to the beneficiary were insufficient standing alone or combined with the petitioner’s net income or net current assets to pay the beneficiary the proffered wage. Further, CIS records reflect that the petitioner has filed an I-140 petition for twelve beneficiaries.⁴ The petitioner would be required to demonstrate its ability to pay for all sponsored individuals. Based on the petitioner’s net income, net current assets, and other information supplied, it is not clear that the petitioner can pay the proffered wage for either one, or all sponsored individuals.

Additionally, although not raised in the director’s decision, we find that the letter provided to document the beneficiary’s experience is inadequate, and therefore, the petitioner has failed to document that the beneficiary met the requirements of the certified Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

On the Form ETA 750, the “job offer” position description provides:

Applies coats of plaster to interior walls, ceilings, and partitions of buildings to produce finished surface according to blueprints, drawings or oral instructions using handtools and portable power tools. Spreads plaster over lath or masonry base using trowel and smooths plaster with darby and float to attain uniform thickness.

Further, the job offered listed that the position required 2 years in the job offered, Plasterer.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) the petitioner, from April 1999 to present, position: plasterer; (2) Kings Eifs Applicators LLC, Annandale, VA, from January 1997 to January 1999, plasterer.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(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

⁴ We note that the petitioner lists on the I-140 Petition that it only has nine workers, so that it would appear the petitioner has filed for all of its workers.

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.

To document the beneficiary's experience, the petitioner provided:

Letter from [no title listed], Kings Eifs Applicators, LLC, Annandale, VA, dated April 23, 2001;
Position title: "was a plaster" [sic];
Dates of employment: not listed, the letter states "he has been employed with our firm for over two years;"
Description of duties: not listed.

The letter provided is deficient in that the person who wrote the letter did not provide his title as required by 8 C.F.R. § 204.5(1)(3). Further, the letter provided did not list the beneficiary's job duties, also required by 8 C.F.R. § 204.5(1)(3). The petitioner submitted no further documentation related to the beneficiary's prior work experience. As the letter submitted is deficient, the petitioner has failed to demonstrate that the beneficiary has the required work experience for the certified Form ETA 750 position.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.