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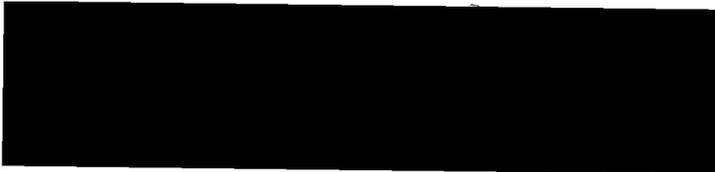
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAR 02 2007  
LIN 04 047 52091

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

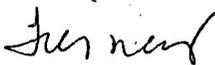
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an engineering and construction firm. It seeks to employ the beneficiary permanently in the United States as a civil engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 26, 2002. The proffered wage as stated on the Form ETA 750 is \$50,250 per year.

The Form I-140 petition in this matter was submitted on December 5, 2003. On the petition, the petitioner stated that it was established during 1981 and that it employs 40 workers. The petition states that the

petitioner's gross annual income is \$9 million and that its net annual income is \$1,300,000.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on June 18, 2002, the beneficiary claimed to have worked for the petitioner since January of 2001. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Farmington Hills, Michigan.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 2002, 2003, 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the 2002 and 2003 Form 1065 U.S. Returns of Partnership Income of Vistas of [REDACTED] LLC, (3) the 2002 and 2003 Form 1065 U.S. Returns of Partnership Income of [REDACTED] C and [REDACTED] LLC, (4) the petitioner's reviewed financial statement for 2001 and 2002, (5) the petitioner's unaudited financial statements for 2003, (6) monthly statements pertinent to the petitioner's bank account and the accounts of some of its subsidiaries, (7) a letter dated February 4, 2005 from the petitioner's controller, (8) a letter dated July 25, 2005 from the petitioner's accountant, and (9) personnel records showing amounts the petitioner paid the beneficiary during 2001, 2002, 2003, 2004, and 2005. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a subchapter S corporation, that it incorporated on December 30, 1986,<sup>3</sup> and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2002 tax return shows that the petitioner declared a loss of \$65,073 as its ordinary income during that year. Schedules M-1 and K of that return show that the petitioner also had interest income, dividends, and other income such that its total net income was \$1,161,209. Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that the petitioner declared a loss of \$410,391 as its ordinary income during that year. Schedules M-1 and K of that return show that the petitioner had other income of \$647,752, so that its total net income was 237,361. Schedule L shows that at the end of that year the petitioner had current assets of \$7,171,085 and current liabilities of \$5,673,356, which yields net current assets of \$1,497,729.

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<sup>1</sup> The tax returns subsequently submitted support those estimates.

<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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> That the petitioner incorporated on December 30, 1986 contradicts the assertion, made on the Form I-140 petition, that the petitioner was established during 1981. This office gathers that the petitioner meant to state that some related entity, rather than the petitioner, [REDACTED], operated the same type of business, possibly under common ownership and management, prior to the petitioner's existence.

The petitioner's 2004 tax return shows that the petitioner declared ordinary income of \$175,530 during that year. Schedules M-1 and K of that return show that the petitioner also had interest income, dividends, and other income such that its total net income was \$292,113. Schedule L shows that at the end of that year the petitioner had current assets of \$7,994,929 and current liabilities of \$6,275,788, which yields net current assets of \$1,719,141.

The Form 1065 U.S. Returns of Partnership Income of [REDACTED] of [REDACTED] [REDACTED] show that the petitioner is the majority owner of [REDACTED] and owns 50% of [REDACTED]. The petitioner's partial ownership of those companies is important only to the extent that those companies add to the petitioner's profits. Because the contribution of [REDACTED] to the petitioner's profits is shown on the petitioner's tax returns the tax returns of [REDACTED] need not, in themselves, be addressed.

The February 4, 2005 letter from the petitioner's controller asserts that Schedule M-1 on the petitioner's tax returns should be consulted for the petitioner's total net income.

The accountant's July 25, 2005 letter notes the additional sources of income shown on Schedule K of a Form 1120S, U.S. Income Tax Return for an S Corporation and argues that they, too, should be included in the determination of the petitioner's ability to pay the proffered wage. The accountant also urged that the decision of denial incorrectly computed the petitioner's net assets.

The petitioner's payroll records show that it paid the beneficiary \$24,875, \$28,750, \$30,000, \$28,750, and \$17,500 during 2001, 2002, 2003, 2004, and 2005, respectively. The 2005 record shows amounts the petitioner paid to the beneficiary through June 14, 2005. The petitioner may have continued to pay the beneficiary beyond that date.

The acting director denied the petition on June 21, 2005. On appeal, counsel reiterated the assertion that the petitioner's other forms of income, in addition to ordinary income, should be considered in determining its ability to pay the proffered wage.

Counsel's reliance on unaudited financial records is misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. **The unaudited financial statements will not be considered.**

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.<sup>4</sup> 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 reported on its tax returns.

The argument of counsel and the accountant that the petitioner's other forms of income, in addition to ordinary income, should be included in the calculations pertinent to the petitioner's ability to pay the proffered wage has merit.

The petitioner is a subchapter S corporation, which is a pass-through entity. Such entities do not pay taxes on their income, but pass it through to their owners, who are taxed on it. The income thus passed through retains its character as ordinary income, interest income, dividend income, etc., and is added to the amounts in those categories on the pass-through entity's owner's or owners' tax returns. Because these various types of income retain their character during the pass-through, they are shown in various locations on the pass-through entity's tax return, thus indicating what type of income they are, just as they will subsequently be entered in various places on the owners' tax returns and taxed in various ways pursuant to the intricacies of the tax code.

Ordinary income, which is essentially income from operations, is shown on page one of the Form 1120S, U.S. Income Tax Return for an S Corporation at Line 21. Additional types of income are shown on Schedule K, with the total of the petitioner's net income appearing at the final line of Schedule K, Income/Loss Reconciliation.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, 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. (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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

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<sup>4</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

instant case, the petitioner established that it paid the beneficiary \$24,875 during 2001,<sup>5</sup> \$28,750 during 2002, \$30,000 during 2003, \$28,750 during 2004, and \$17,500 during 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's accountant is correct that the petitioner's net assets were incorrectly computed. The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. The petitioner's total assets should not, therefore, have been included in the acting director's discussion of the petitioner's ability to pay the proffered wage.

Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

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<sup>5</sup> Because the priority date of the instant visa petition is August 26, 2002 evidence pertinent to the petitioner's finances during 2001 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

typically<sup>6</sup> shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$50,250 per year. The priority date is August 26, 2002. The petitioner must show the ability to pay the proffered wage beginning during 2002.

The petitioner demonstrated that it paid wages of \$28,750 to the beneficiary during 2002, and must demonstrate the ability to pay the \$21,500 balance of the proffered wage during that same year. Although the petitioner declared a loss as its ordinary income during that year, its total net income, including that loss, was \$1,161,209. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner demonstrated that it paid wages of \$30,000 to the beneficiary during 2003, and must demonstrate the ability to pay the \$20,250 balance of the proffered wage during that same year. Although the petitioner declared a loss as its ordinary income during that year, its total net income, including that loss, was \$237,361. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner demonstrated that it paid wages of \$28,750 to the beneficiary during 2004, and must demonstrate the ability to pay the \$21,500 balance of the proffered wage during that same year. During that year the petitioner declared ordinary income of \$175,530. The petitioner declared other income sufficient to bring its total net income during that year to \$292,113. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petitioner demonstrated that it paid the beneficiary \$17,500 during 2005. Ordinarily the petitioner would be obliged to demonstrate its ability to pay the \$32,750 balance of the proffered wage during that year. The visa petition in this case, however, was submitted on December 5, 2003. On that date the petitioner's 2005 tax returns were unavailable. On January 26, 2005 the acting director issued a request for, *inter alia*, evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 return was still unavailable. The petitioner is relieved of the burden of showing its ability to pay the proffered wage during 2005 and subsequent years.

The petitioner has demonstrated that it had the ability to pay the proffered wage during each of the salient years, thereby overcoming the sole basis for the decision of denial.

The burden of proof in these proceedings rests solely upon the petitioner: Section 291 of the Act, 8 U.S.C. § 1361. The petitioner not met that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.