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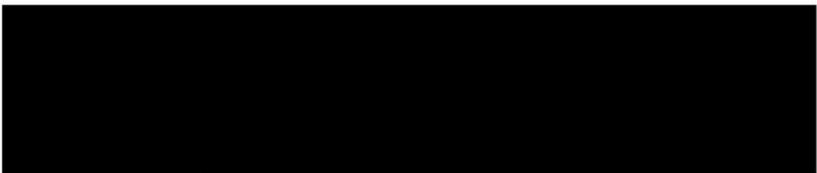
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAY 29 2007

IN RE:

Petitioner:

Beneficiary:



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:

SELF-REPRESENTED

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. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom machining company. It seeks to employ the beneficiary permanently in the United States as a cost accountant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's September 28, 2005 denial, 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.

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 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 CFR § 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 March 14, 2003. The proffered wage as stated on the Form ETA 750 is \$33,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position as an accountant and/or a cost accountant.

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>. On appeal, the

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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

petitioner submits a profit and loss statement and a balance sheet for January through September 2005, the petitioner's Form 1120S for tax year 2004, and an incomplete copy of the petitioner's Form 1120S for tax year 2003.<sup>2</sup> Other relevant evidence in the record includes unaudited profit and loss statements for tax years 2003 and 2004; copies of the petitioner's tax returns for tax years 2001 and 2002; copies of the beneficiary's W-2 Forms for tax years 2003 and 2004; and a letter from [REDACTED] Accountant, Skala And Associates, L.L.C., Madison, Wisconsin. In his letter, [REDACTED] stated that he has prepared the petitioner's financial statement and tax return for nine years, and further stated that for tax years 2003 and 2004, the depreciation expenses would adjust the petitioner's cash flow to \$41,781 in 2003 and to \$38,372 in 2004. The record also contains two letters from the petitioner as to when the beneficiary began to work for the petitioner. The first letter dated September 25, 2003, states the beneficiary had worked for the petitioner for "the last three years." An undated letter submitted by the petitioner in response to the director's second request for further evidence stated that the beneficiary has worked for the petitioner since March 5, 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on May 25, 1993, to have a gross annual income of \$307,998.08, to have a net annual income of \$10,421.18, and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 27, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner states that the beneficiary's employment has turned an unprofitable company into one that can pay the proffered wage. The petitioner noted the beneficiary's wage for tax year 2003 and 2004 and stated that in 2003, the beneficiary was on unpaid leave for a few months due to her pregnancy and then did not work fulltime hours in 2004. The petitioner also asserts that the petitioner's current ratio of current assets to current liabilities of 1.60: 1 suggests that the petitioner can handle the beneficiary's salary with no problem. The petitioner also states that its loan to the officer is not a liability but rather an asset, and that the petitioner's owner has spent \$186,543.47 on the petitioner. The petitioner finally states that it is hard to find good long term employees, and that the beneficiary has proved she can get her salary out of the company's assets by making the petitioner more profitable every month.

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 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. 612 (Reg. Comm. 1967).

The AAO notes that the petitioner only submits its federal tax returns for the priority year and for tax year 2004 on appeal. In the instant case, the director submitted two separate requests for evidence to the petitioner:

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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>2</sup> The 2003 Form 1120S is missing page one.

one dated March 18, 2005 and one dated June 16, 2005. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). Furthermore, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). However, upon review of the record, the director did not specifically request the petitioner's tax returns for 2003 and 2004 in his first request for further evidence. While the record contains the cover sheet for the director's second request for further evidence, the record does not contain the attachment that asks for specific information. Therefore the AAO will accept the petitioner's Forms 1120S submitted on appeal, while acknowledging the missing first page of the 2003 tax return.

The AAO notes that the petitioner'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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. 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. Thus the petitioner's unaudited profit and loss financial statement and balance sheet are given no weight in these proceedings.

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 provided two W-2 forms that indicate the beneficiary was paid \$13,107.35 in tax year 2003 and \$18,565.94 in tax year 2004. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2003 and 2004. These two sums would be \$19,892.65 and \$14,434.06, respectively.

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, contrary to the assertions of the petitioner and its accountant, 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The AAO notes that the petitioner submitted its Forms 1120S tax returns for 2001 and 2002. However, since the priority date year is 2003, these two tax returns are not dispositive in these proceedings. Therefore the AAO will only examine the petitioner's tax returns for tax years 2003 and 2004. The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$33,000 per year from the priority date:

- In 2003, the Form 1120S stated net income<sup>3</sup> of \$20,853.
- In 2004, the Form 1120S stated net income of -\$5,098.

Therefore, for the year 2003, the petitioner did have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage of \$33,000, namely, \$19,892.65. However, in tax year 2004, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage.

If the net income the petitioner demonstrates it had available during that 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 uses in its business, including real property that counsel asserts should be considered. 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.

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<sup>3</sup> 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedules K for 2003 and 2004, the petitioner's net income is found on Schedule K of its tax returns.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> 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 petitioner's net current assets during 2004 were -\$142,106.

Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage. As stated previously, the petitioner has to establish its ability to pay the proffered wage as of the priority date and until the beneficiary obtains permanent legal residency.

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, except for tax year 2003..

On appeal the petitioner states that its current ratio of assets to liabilities can be seen as proof of the petitioner's ability to pay the proffered wage. However, financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.<sup>5</sup>

While counsel argues that the current ratio shows the petitioner has the ability to pay the proffered wage, he provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, he has not provided any authority or precedent decisions to support the use of current ratios

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<sup>4</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.

<sup>5</sup> The observation that a particular ratio is high or low depends on the purpose for which the ratio is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. See *Financial Ratio Analysis*, <http://www.finpipe.com/equity/finratan.htm>, Financial Management, (Available as of March 21, 2006); *Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/financial-ratio.html>; (Available as of March 21, 2006); *Industry Financial Ratios*, *Financial Ratio Analysis*, [http://www.ventureline.com/FinaAnal\\_indAnalysis.asp](http://www.ventureline.com/FinaAnal_indAnalysis.asp) (accessed March 21, 2006).

in determining the petitioner's ability to pay the proffered wage. Moreover, because the current ratio is not designed to demonstrate an entity's ability to take on the additional, new obligations such as paying an additional wage, this office is not persuaded to rely upon it. In addition, as stated previously, the petitioner's depreciation expenses are also not considered additional funds with which to pay the proffered wage.

With regard to the petitioner's assertion that the beneficiary's employment will make the petitioner more profitable, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Furthermore the petitioner's tax returns for tax years 2003 and 2004, a period of time during which the petitioner has established that it employed the beneficiary, document an increase in the petitioner's negative net current assets from -\$36,729 in 2003 to-\$142,106 in 2004. This factor also mitigates against the petitioner's assertion of future profitability based on the beneficiary's employment. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner also has not established that the beneficiary is qualified to perform the duties of the position. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

With regard to establishing that the beneficiary is qualified, the petitioner must 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 March 14, 2003. The Form ETA 750 states that the beneficiary is required to have two years of relevant work

experience as an accountant or a cost accountant. However, the record is inconsistent as to when and where the beneficiary received her two years of relevant work experience prior to the March 14, 2003 priority date.

The regulation at 8 C.F.R. § 204.5(l)(3) 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 worker.* If the petitioner 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 . . . . The minimum requirements for this classification are at least the two years of training or experience.

In two letters submitted to the record dated September 25, 2003, the petitioner stated that the beneficiary had worked for it for at least three years. In another undated letter, the petitioner stated that the beneficiary had worked for the petitioner since March 5, 2001. However, on the Form ETA 750, the beneficiary indicated that as of February 27, 2003, she had not worked for the petitioner, and thus any qualifying experience prior to the 2003 priority date would have to be verified by additional independent, objective evidence of the beneficiary's previous employment. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Thus, the petitioner has not established that the beneficiary had the two years of requisite work experience as of the March 14, 2003 priority date. It is also noted that the ETA 750, Part B does not indicate that the beneficiary has the required eight years of grade school and four years of high school education stipulated on the Form ETA 750, Part A.

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.