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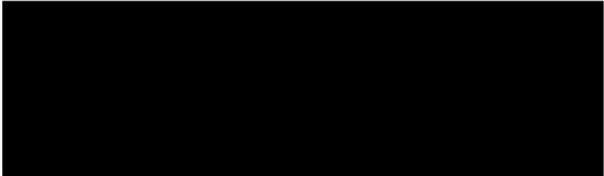
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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File: [Redacted]  
EAC-05-195-51710

Office: VERMONT SERVICE CENTER

Date: NOV 07 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:  
[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 Acting Director, Vermont Service Center ("director"), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be sustained.

The petitioner is in the transportation business, and seeks to employ the beneficiary permanently in the United States as a diesel mechanic. The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's February 10, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

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

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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 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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 is \$21.50 per hour, which would be equivalent to \$44,720 per year, based on a schedule of 40 hours per week. The labor certification was approved on November 21, 2002, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 24, 2005.<sup>2</sup> The petitioner listed the following information on the I-140 Petition: date established: September 19, 1995; gross annual income: \$9,652,170; and net annual income: -\$122,941. The petitioner listed its current number of employees as ten.

On August 30, 2005, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay from April 27, 2001 to the present, including the petitioner's 2002, and 2004 federal tax returns (the petitioner had provided only its 2001 and 2003 tax returns), as well as the beneficiary's Forms 1099, if any, that the petitioner issued to the beneficiary. Alternatively, the RFE requested that the petitioner submit audited financial statements or annual reports for the years 2001, 2002, 2003, and 2004 to determine the petitioner's ability to pay. The petitioner responded to the RFE. Following review, the director denied the petition on February 10, 2006, as the petitioner had not demonstrated its ability to pay the proffered wage. Counsel appealed and the matter is now before the AAO.

On July 12, 2007, the AAO issued a Notice of Intent to Deny ("NOID") for the petitioner to provide its 2002 federal tax return. The NOID additionally requested that the petitioner provide evidence that Auscor Transportation, listed on the Form I-140 was the same entity as Auslander Corporation, the entity for which the petitioner submitted tax returns.<sup>3</sup> Further, the petitioner's federal tax returns did not demonstrate that the petitioner directly employed any workers. The petitioner was asked to provide evidence that it intended to directly employ the beneficiary.

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 did not list that he was employed with the petitioner. On appeal, the petitioner provided the following evidence of wage payment:

<u>Year</u>	<u>1099 Income</u>
2005	\$18,920.00

In response to the NOID, the petitioner additionally provided copies of paychecks dated July 6, 2007, August 3, 2007, and August 17, 2007, which showed wage payments from the petitioner to the beneficiary in the amount of \$1,720 for the two week pay period, and year to date wages of \$29,240. The wage paid would be equivalent to \$44,720 per year. The petitioner can demonstrate for 2007 that it is now paying the beneficiary the proffered wage. However, the petitioner was only able to demonstrate partial payment to the beneficiary

<sup>2</sup> The petitioner previously filed an I-140 petition on the beneficiary's behalf on April 9, 2003 based on the same position and labor certification. That petition was automatically terminated on February 5, 2004.

<sup>3</sup> The petitioner provided evidence to document that Auslander Corporation "does business as" Auscor Transportation Services, and uses the same tax identification number.

in the year 2005, but has not paid the beneficiary the full proffered wage. Therefore, the petitioner is unable to demonstrate its ability to pay the beneficiary the proffered wage based on prior wage payment alone. The petitioner must demonstrate that it can pay the full proffered wage in 2001, 2002, 2003, and 2004, and that it can pay the difference between the wage paid and the proffered wage in 2005.

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>	<u>Gross Receipts<sup>4</sup></u>
2004	-\$531,401 <sup>5</sup>	\$8,742,396
2003	-\$122,941	\$9,652,170
2002	-\$40,766	\$8,975,543
2001	-\$141,537	\$6,859,042

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

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.<sup>6</sup> Current assets include cash on hand, inventories, and receivables expected to be

<sup>4</sup> As the petitioner has substantial gross receipts, we have additionally listed those amounts, although based on *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the proper figure for consideration is the petitioner's net income.

<sup>5</sup> Based on the date of filing the I-140 petition and the appeal, the petitioner's 2005 federal tax return would not have been available. However, it is unclear why the petitioner failed to provide its 2002 federal tax return. Further the director's RFE specifically requested that the petitioner provide regulatory prescribed evidence for 2002, but the petitioner did not. The purpose of an RFE is to obtain further information to clarify whether the beneficiary is eligible for the benefit sought. Eligibility must be established as of the time that the petition was filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). A petitioner's failure to submit requested evidence, which would preclude a material line of inquiry, serves as a ground to deny a petition. 8 C.F.R. § 103.2(b)(14).

<sup>6</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.

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>
2004	\$5,329
2003	\$31,730
2002	not provided
2001	\$10,437

The petitioner cannot establish its ability to pay the beneficiary the proffered wage in any of the above years based on its net current assets either.

The petitioner additionally submitted bank statements for each month end in 2003, and 2004, as well as bank statements for the first eight months of 2005.<sup>7</sup> First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

If we examined the statements, the statements showed significant variation in the petitioner's account.

Month	Amount	Month	Amount
January 31, 2003	\$220,269.77	April 30, 2004	\$240,636.31
February 28, 2003	\$33,609.59	May 28, 2004	\$234,382.97
March 31, 2003	\$63,627.17	June 30, 2004	\$147,136.34
April 30, 2003	\$113,705.41	July 30, 2004	\$200,616.76
May 30, 2003	\$118,464.83	August 31, 2004	\$191,305.30
June 30, 2003	\$83,319.55	September 30, 2004	\$99,708.95
July 31, 2003	\$61,566.09	October 29, 2004	\$129,570.70
August 29, 2003	\$71,445.83	November 30, 2004	\$73,885.40
September 30, 2003	\$176,524.93	December 31, 2004	\$172,655.34
October 31, 2003	\$153,742.73	January 31, 2005	\$263,198.64
November 28, 2003	\$221,267.09	February 28, 2005	\$67,571.11

<sup>7</sup> The petitioner initially submitted only four statements: for the months ending January 31, 2003, November 28, 2003, December 31, 2004, and August 31, 2005, but submitted all statements in 2003 and 2004 on appeal. The director noted in her decision that the petitioner's initial submission was deficient and that the petitioner would need to show that the bank balances at year end were greater than or equal to the amount of the proffered wage or that the monthly bank balance increase incrementally with the amount of funds necessary to meet the proffered wage.

December 30, 2003	\$379,573.12	March 31, 2005	\$49,570.98
January 30, 2004	\$388,499.70	April 29, 2005	\$115,769.46
February 27, 2004	\$269,921.79	May 31, 2005	\$236,105.84
March 31, 2004	\$155,782.74	June 30, 2005	\$257,884.81

The statements reflected a low balance of \$33,609.59 (as of February 28, 2003), and a high balance of \$388,499.70 (as of November 30, 2004) and do reflect that the petitioner had substantial amounts consistently in its accounts.

On appeal, counsel provides that the petitioner can pay the proffered wage, despite the fact that its tax returns reflect a net loss. Further, counsel provides that the petitioner has maintained "an accrual basis" of \$482,125 in 2001, \$228,334 in 2002, \$175,750 in 2003, and \$134,241 in 2004. Therefore, counsel asserts that the petitioner could pay the proffered wage.

As noted above, the relevant figure is the petitioner's net income, and not any other figure, such as gross receipts or a petitioner's "accrual basis." See *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084. Further, it is unclear from where counsel has obtained the accrual basis figure, as the number does not clearly match any figure or figures listed on the petitioner's tax returns. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel further contends that the petitioner's bank statements exhibit the petitioner's ability to pay the proffered wage. Counsel notes that the petitioner had \$642,687 in its account in January 2006. Counsel did not provide a copy of this statement. See *Matter of Obaigbena*, 19 I&N Dec. at 534.

Counsel provides that the petitioner had employed several independent contractors, who were paid \$170,000 in 2005 as evidenced by Forms 1099 provided, but that this income "will be free and available to be used on the beneficiary as he will take the position these former workers (independent contractors) have taken."

The petitioner's president additionally provided a statement. He explained that the business had 80 units to run, and was looking to increase the number of units. Accordingly, the petitioner needed to hire more service personnel. The petitioner's president noted that it was preferable to hire personnel rather than use outside services, as this would allow the petitioner to maintain its equipment at a lower rate, since outside repair services had increased their rates by 50%. He estimated that, in comparison, the petitioner could perform repairs internally with rates that only increased by 15%. The petitioner's president asserts that the petitioner's taxes show an increase in revenue while maintaining or decreasing maintenance costs. Further, he contends that by hiring another sponsored beneficiary in 2005, the petitioner saved 22% in maintenance expenses and decreased outside vendor utilization. He provides that he was "enclosing various documents that let you visualize true picture of our company and a sensible explanation of our operations." It is unclear to which documents the petitioner refers.

While the petitioner may realize a cost savings in maintenance costs by hiring the beneficiary, a petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N

Dec. 45, 49 (Comm. 1971). The petitioner must show that it can pay the proffered wage. It cannot hire the beneficiary, and then show that it can pay the proffered wage.

The petitioner's president further provides that in 2005, the petitioner changed its accounting method "to an accrual basis from a cash basis, which means that the company recognizes revenue as it occurs, and not as cash is on hand. We were therefore incurring a carry-over loss. This could explain your questioning of our loss thru those years, and adequately shows our ability to afford new position for [the beneficiary]."

If expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not pursuant to any theoretical adjustment. The tax returns as reviewed above do not demonstrate the petitioner's ability to pay the proffered wage.

Counsel contends that the petitioner's tax returns, bank statements and Forms 1099 together "undeniably prove [the] petitioner's ability to pay" and that CIS failed in considering all of the petitioner's information in determining its ability to pay in a *Sonegawa* analysis.

Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1995 and employs approximately 10 employees. Their gross receipts have been above \$6 million consistently at the low end, and over \$9.5 million in 2003, and the petitioner's federal tax returns list contract labor costs of over one million in two years, and over two million in a third year. Thus, in assessing the totality of circumstances in this individual case, we conclude that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Accordingly, based on the foregoing, the petitioner has established that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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 been met.

**ORDER:** The appeal is sustained.