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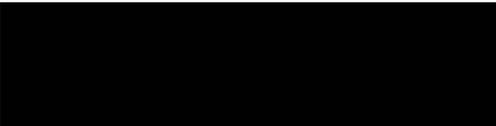


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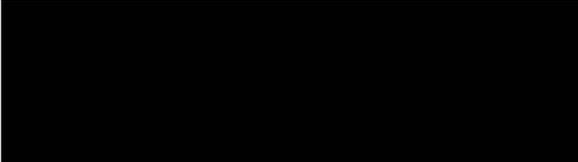
Petitioner:

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:



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 Center Director, Vermont Service Center (“director”) denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a software development and consultancy business and seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). As set forth in the August 9, 2004 decision, the director denied the case on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

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).¹

The record shows that the appeal is properly and timely filed, 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 professional worker or as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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:

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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on February 7, 2003.² The proffered wage as stated on Form ETA 750 for the position of software engineer is \$75,000 per year based on a 40 hour work week.³ The labor certification was approved on May 22, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on December 17, 2003. Counsel listed the following information on the I-140 Petition related the petitioning entity: date established: August 27, 1997; gross annual income: \$2 million; net annual income: not listed; and current number of employees: 35.

On August 9, 2004, the director denied the case based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The director additionally noted that the petitioner had filed at least 16 other petitions in 2003 and in 2004,⁴ and that the petitioner would need to demonstrate its ability to pay the proffered wage for all sponsored workers. The petitioner appealed to the AAO.⁵

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The petitioner initially listed \$62,000 per year on Form ETA 750, but DOL required that the wage be changed to \$71,760 prior to certification.

⁴ The 16 petitions filed would represent only those petitions filed in 2003 and only part of 2004, prior to the director's August 2004 decision.

⁵ On appeal, counsel contends that CIS erred in considering the petitioner's 2002 federal tax return since the priority date for the labor certification was February 7, 2003. Counsel is correct that the 2002 tax return would not be required. We have considered the information generally below. Further, the petitioner had not submitted its 2003 tax return with the initial filing, but did submit the return on appeal, which we have considered below.

Citizenship and Immigration Service (“CIS”) records indicate that the petitioner has filed 449 petitions since the petitioner’s establishment in 1997, including 335 I-129 petitions, and 112 I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).⁶

On March 1, 2007, the AAO issued a Request for Evidence (“RFE”) for the petitioner to provide additional evidence of its ability to pay for all sponsored employees. The RFE requested that the petitioner provide:

1. The petitioner’s number of employees for each of the following years, 2000, 2001, 2002, 2003, 2004, 2005, and 2006.⁷
2. For each I-140 Petition filed from May 2001 to the present to indicate the beneficiary’s (a) name; (b) position; (c) priority date of labor certification; (d) proffered wage listed on the labor certification; (e) proof of employee compensation paid to date; (f) whether any of the sponsored immigrant beneficiaries have adjusted status to legal permanent residence, and the date of adjustment; (g) whether any of the beneficiaries were ever employed with the petitioner; and (h) the length of time that the petitioner employed each beneficiary, including each start date and end date of employment.
3. To provide information related to the petitioner: (a) the number of locations where the petitioner has an office; (b) the number of employees at each of the petitioner’s locations; (c) an organizational chart; and (d) whether the petitioner is H-1B dependent. *See* 20 CFR § 655.736.

Further, in relation to the instant petition, the RFE requested the following documentation:

As additional evidence on appeal, counsel submitted a 2003 financial statement along with a statement from an accountant. According to the accountant’s statement, the document is a compilation. The accountant provides that, “a compilation is limited in the form of financial statements to information that [are] representation[s] of the management of Numbers Only Inc. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.”

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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant’s report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant’s report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form.

As the petitioner submitted its 2003 federal tax return, we will consider that document as the regulatory prescribed evidence for 2003.

⁶ Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

⁷ The petitioner’s number of employees have increased substantially since it filed Form I-140. The petitioner indicated that it had the following number of employees: 2000: 45; 2001: 46; 2002: 43; 2003: 53; 2004: 101; 2005: 141; and 2006: 120.

1. The petitioner's 2004 and 2005 federal tax returns;
2. Any W-2 statements for the present beneficiary if employed now, or previously by the petitioner; and
3. Exhibits referenced in counsel's appeal: bank statements, quarterly statements for deposits and filings for the first and second quarters 2004, and quarterly statements for deposits and filings for all four quarters in 2003; auditor's statement; bank letter; and payroll records for 2004. The AAO notes that the record of proceeding before us did not contain any of the foregoing exhibits despite counsel's reference to forwarding the foregoing documentation.⁸

The petitioner responded.

In order to determine the petitioner's ability to pay, 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. The petitioner must establish that its job offer to the beneficiary is a realistic one. 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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages.

First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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 case at hand, on Form ETA 750B, signed by the beneficiary on December 4, 2003, the beneficiary did not list that he was employed with the petitioner. The petitioner has submitted no documentation to show that it employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage based on prior wage payment to the beneficiary.

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. 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.*

⁸ Counsel indicated in his response to the RFE that the petitioner had provided such documentation in lieu of its tax returns, as the tax returns were not yet available. In response to the AAO's RFE, the petitioner provided its 2003, 2004, and 2005 federal tax returns as these items were now available.

On appeal, counsel had listed the petitioner's monthly bank account ending balance for each month in 2003, but the record does not contain bank statements in support. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *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)).

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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net 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. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005 ^{9,10,11}	\$120,648
2004	\$120,653
2003 ¹²	\$127,085
2002 ¹³	-\$2,143

From the above net income, the petitioner can demonstrate its ability to pay the instant beneficiary's proffered wage in 2003, 2004, and 2005. However, based on the documentation that the petitioner provided in response to the AAO's RFE, the information indicated that the petitioner had filed for 15 beneficiaries that had 2003 priority dates, as well as 55 beneficiaries that had priority dates in 2004, and 6 beneficiaries in 2005. The petitioner's net income would not demonstrate its ability to pay for all the sponsored beneficiaries in any of these years.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the

⁹ The petitioner submitted its 2004 and 2005 federal tax returns in response to the AAO director's RFE on appeal.

¹⁰ We additionally note the following from the petitioner's tax returns:

<u>Year</u>	<u>Gross Receipts</u>	<u>Wages Paid</u>
2005	\$9,347,748	\$5,767,501
2004	\$6,403,493	\$3,420,846
2003	\$3,027,116	\$1,404,599
2002	\$2,084,932	\$950,237

¹¹ The petitioner additionally submitted a "quick book report of financial statements for the year ending 2006," as the petitioner had not yet filed its 2006 federal tax return. We note that the statement provided was for the time period ending December 1, 2006, and was unaudited. 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. The 2006 statement provided that the petitioner's 2006 net income was \$98,103.

¹² The petitioner's 2003 tax return was not available at the time of filing, but was submitted on appeal.

¹³ The priority date is February 7, 2003, however, we will consider the petitioner's 2002 tax return generally.

petitioner's current assets and current liabilities.¹⁴ 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 were as follows:

<u>Year</u>	<u>Amount</u>
2005	\$835,989
2004	\$273,103
2003	\$98,281
2002	\$54,991

The petitioner would have sufficient net current assets to pay the instant beneficiary's proffered wage in 2003, 2004, and 2005. However, we note again that the petitioner would need to demonstrate its ability to pay the proffered wage for all sponsored workers.

In response to the AAO director's RFE, the petitioner provided information related to each sponsored worker. Based on the petitioner's response, the petitioner would need to demonstrate that it could pay proffered wages in the amount of \$1,073,700 in 2003.¹⁵ The petitioner provided that it had paid \$280,231.26 wages for these sponsored workers, so that the petitioner would need to show that it could pay a remainder amount of \$793,468.80 to demonstrate that it could pay for all sponsored beneficiaries in 2003. As the petitioner's net income was \$127,085 in that year, and its net current assets were \$98,281, the petitioner would not be able to demonstrate its ability to pay the proffered wages of all sponsored beneficiaries in that year.

In 2004, the petitioner provided information to show that it sponsored 55 beneficiaries with priority dates in that year, and would need to show that it could pay \$4,550,000 in that year for all sponsored workers.¹⁶ The petitioner provided documentation to show that it had paid \$1,090,673.50 to those workers with priority dates

¹⁴According 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.

¹⁵ We have only included salaries listed for petitions with priority dates in 2003. The estimated wages would not include salaries to be paid for beneficiaries sponsored in 2002, but whose permanent residence had not yet been approved. Therefore, the wages that the petitioner would be responsible to show that it could pay would likely be higher than the \$1,073,700 figure listed. The petitioner did not provide the exact date of adjustment as requested in the RFE. Accordingly, we cannot determine what additional amounts that the petitioner would be required to pay in 2003 based on petitions filed in 2002, but not yet approved.

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).

¹⁶ Again, we have only included salaries listed for petitions with priority dates in 2004. The estimated wages would not include salaries to be paid for beneficiaries sponsored in 2002, or 2003, but whose permanent residence had not yet been approved. Therefore, the wages that the petitioner would be responsible to show that it could pay in 2004 would likely be higher than the \$4,550,000 figure listed.

in 2004. This would leave an amount of \$3,459,326.50 that the petitioner would need to demonstrate that it could pay. Based on the petitioner's net income of \$120,653, and its net current assets of \$273,103, the petitioner would not be able to demonstrate its ability to pay for all of the sponsored beneficiaries.

Counsel additionally submitted Form W-3 exhibiting wages that the petitioner paid in 2003, which reflected wage payments in the amount of \$1,444,150.24. In general, wages paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel also submitted copies of W-2 statements for all employees for the years 2002, 2003, 2004, 2005, and 2006.¹⁷ Counsel provides that the petitioner paid salaries of \$5.452 million in 2006, and paid \$1,756,142 in wages for the first quarter of 2007.

We have listed wages paid and the petitioner's gross receipts above in a footnote. The petitioner's business has shown substantial growth between the years 2002 and 2007, and the petitioner's gross receipts and wages paid have increased significantly. However, a petitioner must demonstrate its ability to pay from the time of the priority date onward. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not demonstrated that it can pay the proffered wage for all of the workers sponsored as set forth above in the years 2003 and 2004.

Based on the foregoing, we find that the petitioner has failed to demonstrate its ability to pay all sponsored beneficiaries the respective proffered wages from the priority date until each beneficiary obtains permanent residence. 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.

¹⁷ We note that the petitioner also provided a "year to date register" for the time period ending November 26, 2005. While most of the sponsored beneficiaries have proffered wages in a range of \$70,000 to \$86,000, many of the year-to-date wages listed are below the proffered wage levels (although we note that the individuals listed on the register may not be the sponsored individuals), so that despite the high wages paid by the petitioner, this would not necessarily represent that the petitioner can pay the proffered wages for all the sponsored individuals.