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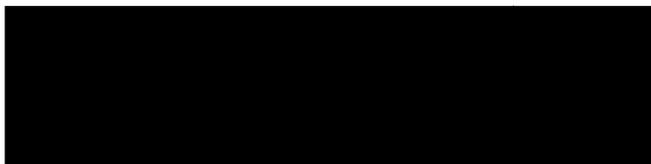
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U.S. Citizenship
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Services

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File: [Redacted]
WAC-06-127-50658

Office: TEXAS SERVICE CENTER Date: SEP 20 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

cc: LAUREN H. MASON
INTER-WORLD IMMIGRATION SERVICE
3250 WILSHIRE BLVD. S-391
LOS ANGELES, CA 90010

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

The petitioner operates a residential facility for the elderly and seeks to employ the beneficiary permanently in the United States as a residential advisor (“Residential Supervisor”). As required by statute, 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 June 6, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

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).

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 2, 2004. The proffered wage as stated on Form ETA 750 is \$14.49 per hour,² based on a 40 hour work week, which is equivalent to \$30,139.20 per year. The labor certification was approved on December 27, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on March 14, 2006. The petitioner listed the following information on the I-140 Petition: date established: 1987; gross annual income: \$1.3 million; net annual income: not listed; and current number of employees: 16.

On May 2, 2006, the director issued a Request for Evidence ("RFE"), for the petitioner to provide further evidence related to its ability to pay from 2004 onward, including Forms W-2 issued to the beneficiary if employed. The petitioner responded. On June 6, 2006, the director denied the case finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 23, 2004, the beneficiary listed that he has been employed with the petitioner from June 2001 to the present.³ The petitioner submitted the following evidence of prior wage payment to the beneficiary:

<u>Year</u>	<u>W-2 Wages Paid</u>
2005	\$14,117.12
2004	\$13,870.34

The amount that the petitioner paid the beneficiary in each year is less than the proffered wage. Therefore, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payment alone. The petitioner must establish that it can pay the difference between the proffered wage and the wages already paid.

² The petitioner initially listed \$12.50 an hour as the proffered wage, which would equate to \$26,000 per year based on a 40 hour work week. DOL required that the petitioner increase the wage to \$14.49 per hour prior to certification.

³ Whether the listed start date for the beneficiary's work with the petitioner is a typographical error is unclear. On the same form, the beneficiary has listed that he was employed at Gianni Catering Services in the Philippines from February 2001 to February 2003. The Form ETA 750B, therefore, lists that the beneficiary is employed in both the U.S. for the petitioner, and in the Philippines for a separate employer during the same time period. As the petitioner has relied on the beneficiary's experience in the Philippines to meet the requirements of the certified Form ETA 750, the petitioner must explain this conflict in any further filings. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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, Citizenship & Immigration Services ("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. 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 record demonstrates that 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> ⁴	<u>Net income or (loss)</u>
2004	\$24,840
2003	-\$1,213

Based on the foregoing, the petitioner cannot establish its ability to pay the beneficiary the proffered wage in either year. If we added the 2004 calendar W-2 wages to the 2004 tax year wages, this would result in \$38,710, and exhibit the petitioner's ability to pay the instant beneficiary. However, the petitioner did not provide any regulatory prescribed evidence for the year 2005 to demonstrate its ability to pay the proffered wage in that year.⁵ Further, we note that the petitioner has filed I-140 petitions for a number of beneficiaries. The petitioner would need to demonstrate that it can pay the proffered wage for all the sponsored beneficiaries. CIS records reflect that the petitioner filed petitions for four other beneficiaries in 2005, and petitions for eight other beneficiaries in 2006. The petitioner's net income would not demonstrate that it could pay for all the sponsored beneficiaries.

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.⁶ Current assets include cash on hand, inventories, and receivables expected to be

⁴ The petitioner files its taxes based on a tax year rather than a calendar year. The petitioner's tax year runs from June 1 to May 31, so that the petitioner's 2003 federal tax return reflects the time period from June 1, 2003 to May 31, 2004, and its 2004 return reflects the time period from June 1, 2004 to May 31, 2005. We further note that the petitioner did not provide its 2005 tax return, which would not have been available at the time of filing the I-140 petition, or at the time of filing the petitioner's appeal.

⁵ While the petitioner's 2005 federal tax return might not have been available, the petitioner alternatively could have provided an audited financial statement to meet the regulatory requirement.

⁶ According 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,

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	-\$8,903
2003	\$29,716

The petitioner cannot demonstrate its ability to pay the proffered wage from its net current assets in either year, even if the wages paid to the beneficiary in 2004 were added to the petitioner's net current assets.

On appeal, the petitioner provides that its 2004 tax return reflects significant gross receipts in the amount of \$1,354,646.

As noted above, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held the petitioner's net income figure, rather than the petitioner's gross income was the proper figure to rely on. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner asserts that it can pay the proffered wage of \$27,820, and that its net current assets in the amount of \$29,716 reflect this ability. The petitioner provides that previous tax returns do not reflect a net loss, and that the petitioner established its economic stability at the time of the priority date.

As noted above, the proffered wage is to \$30,139.20 per year. It is unclear from where the petitioner has obtained the figure \$27,820, which is below the proffered wage. Therefore, net current assets of \$29,716 would reflect an amount close to, but not above the proffered wage.

The petitioner further contends that it paid wages to other employees and partially to the beneficiary, which were factored into the petitioner's net income. In general, wages already 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. Wages paid to the beneficiary were considered above, and in connection with the petitioner's net income and net current assets.

The petitioner additionally provides that its business has progressed in 2006 and has demonstrated a "tremendous increase in its gross income and net profit within the last 2 Quarter period." The petitioner did not provide any documentation to demonstrate its 2006 growth. 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)). 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).

short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's ability to pay has not been clearly demonstrated. The petitioner has filed I-140 petitions for a number of beneficiaries. The petitioner must establish that it can pay the proffered wage for all the sponsored beneficiaries. The petitioner can show its ability to pay in one year, and is close in another year. However, based on the foregoing, it is not clear that the petitioner can pay for all sponsored workers.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage from the priority date onward, and the petition was properly denied. 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.