

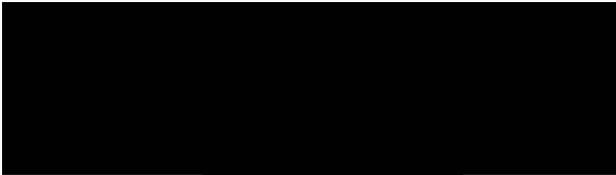
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
LIN 07 102 53023

Office: NEBRASKA SERVICE CENTER

Date: DEC 01 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting, development/IT solutions firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its ability to pay 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).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on December 23, 2003. The proffered wage as stated on the ETA 750A is \$65,000 per year. Part B of the ETA 750, signed by the alien beneficiary on September 25, 2003, indicates that he has worked for the petitioner as a programmer analyst since August 3, 2003.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on February 2, 2007, it is claimed that the

petitioner was established on January 17, 1999, claims an annual gross income of \$853,623 and currently employs seven workers.

In support of its continuing financial ability to pay the certified wage of \$65,000 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2003, 2004, and 2005. The 2003 tax return was incomplete and did not contain all of the referenced schedules or statements. The returns indicate that the petitioner uses a standard calendar year to file its taxes. The returns contain the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

	2003	2004	2005
Net Income ¹ (Form 1120S)	\$ 2,233	\$11,105	\$15,752
Current Assets (Sched. L)	\$158,084	\$60,554	\$37,995
Current Liabilities (Sched. L)	\$117,096	\$87,204	\$66,508
Net Current Assets	\$ 40,988	-\$26,650	-\$28,513

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets.² Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

¹ Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) 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 (2003) or on line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. In this case, this petitioner had additional income and/or other adjustments from sources other than a trade or business so its net income is reflected on line 23 for 2003, on its tax return(s). Its net income is shown on line 17e of its tax returns for 2004 and 2005.

² 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, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner additionally submitted copies of its checking account bank statements for one account number (partially ending in [REDACTED] covering the period from September 13, 2003, until February 11, 2005; from March 12, 2005 until November 14, 2005, and from January 4, 2006 through November 13, 2006. A copy of a checking account bank statement under a different account number (partially ending in [REDACTED]) was provided for the month of December 9, 2005 through January 10, 2006. The petitioner further provided copies of a money market bank account (partially ending in [REDACTED]) covering March 19, 2004 through April 30, 2004, and the month ending February 13, 2006.

It is further noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L.

Copies of Wage and Tax Statements (W-2s) were also supplied representing wages paid to the beneficiary in 2004 and 2005. They reflect the following amounts:

Year	Wages Paid to Beneficiary	Difference from Proffered Wage of \$65,000
2004	\$33,833.28	-\$31,166.72
2005	\$10,950	-\$54,050

No W-2 for 2003 was submitted. Counsel's transmittal letter submitted with the petitioner's response to a request for evidence indicated that the petitioner did not employ the beneficiary in 2006.

The director denied the petition on March 20, 2007. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage because neither its net income, nor the difference between its current assets and current liabilities as shown on the 2004 and 2005 tax returns,³ was sufficient to cover the proposed wage offer even when considering the wages paid to the beneficiary.

On appeal, counsel submitted copies of the tax returns submitted to the underlying record. Counsel additionally provided copies of W-2s issued to another individual, [REDACTED], reflecting that he

³ The director calculated net income for all years based on the figures shown on line 21 of the petitioner's tax returns.

was paid wages, tips and other compensation of \$110,000 in 2003; \$120,000 in 2004; and \$55,000 in 2005. Counsel asserts on appeal that the beneficiary will fill the position of programmer analyst, previously occupied by [REDACTED]. Counsel maintains that the petitioner's combined salaries and wages plus compensation of officers of \$671,703 in 2003, \$646,678 in 2004, and \$535,575 in 2005, respectively, as well as the petitioner's gross sales and receipts of \$1,023,505 in 2003, \$1,012,689 in 2004, and \$853,623 in 2005, respectively, demonstrates the petitioner's continuing ability to pay the proffered wage.

In this case, we do not find persuasive the assertion that [REDACTED] salary and/or officer compensation as one of the two principal shareholder's of the corporate petitioner, represented on the petitioner's tax returns should be added back to the corporate petitioner's income or retroactively applied toward monies available to pay the proffered wage. It is observed that [REDACTED] has been represented as one of the 50% shareholders within each of the federal income tax returns provided. Except for 2005, his W-2 compensation has been well in excess of the certified wage for a programmer analyst as stated on the ETA 750. It is further observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary as a programmer analyst and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. Moreover, there is also no first-hand evidence from the officer(s) that such compensation could have been foregone during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. 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)). Finally, it is noted that the beneficiary was already employed by the petitioner in the certified position as shown on Part B of the ETA 750. As such, it is difficult to see how he could have replaced [REDACTED] if they were already simultaneously employed.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner paid the beneficiary \$31,166.72 less than the proffered salary of \$65,000 in 2004 and \$54,050 less than the proffered salary in 2005. As noted by the director, a W-2 for 2003 was not provided.

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 (or net current assets) as

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 or the cumulative salaries and wages paid to others as is asserted in this case. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, USCIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources.

In this matter, in 2003, neither the petitioner's net income of \$2,233, nor its net current assets of \$40,988 demonstrates its ability to pay the proffered wage of \$65,000 in this year.

In 2004, neither the petitioner's net income of \$11,105, nor its net current assets of -\$26,650 could cover the difference of -\$31,166.72 resulting from the comparison between the proffered wage of \$65,000 and the wages of \$33,833.28 paid to the beneficiary. The petitioner did not demonstrate its ability to pay the proffered wage in this year

Similarly, in 2005, the \$15,752 reported as net income, as well as the -\$28,513 indicated as net current assets were each inadequate to cover the difference of -\$54,050 resulting from a comparison of the beneficiary's actual wages of \$10,950 and the certified wage. The petitioner failed to demonstrate the petitioner's ability to pay the full proffered wage during this year. Moreover, other than selected bank statements, the record did not contain evidence such as an audited financial statement to demonstrate the petitioner's ability to pay the certified wage in 2006.

It is additionally noted that USCIS electronic records indicate that the petitioner has filed at least fourteen other petitions since the petitioner's establishment in 1999, including eight I-129 petitions and six other I-140 petitions. The petitioner would need to demonstrate its ability to pay the respective wage for each I-140 beneficiary from the priority date until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). 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.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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

ORDER: The appeal is dismissed.