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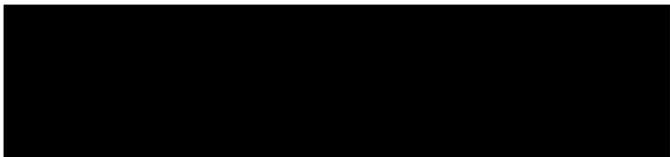
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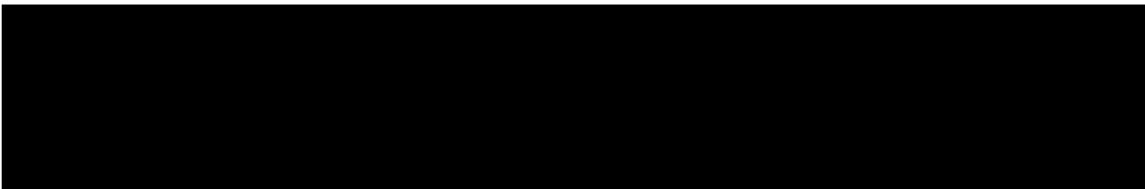
Office: VERMONT SERVICE CENTER

Date: JAN 02 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center ("director"), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a business related to computer networking and repair, and seeks to employ the beneficiary permanently in the United States as a systems analyst. The petition filed was submitted with a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's September 7, 2006 decision, the petition was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains 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).<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. 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 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

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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).

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<sup>2</sup> with the relevant state workforce agency on June 3, 2002. The proffered wage as stated on Form ETA 750 is \$26.99 per hour based on a 40 hour work week, which is equivalent to \$56,139.20.<sup>3</sup> The labor certification was approved on December 6, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on February 21, 2006. The petitioner listed the following information: established: December 1998; gross annual income: \$823,911; net annual income: not listed; and current number of employees: fourteen.

On May 19, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of its ability to pay the proffered wage from June 3, 2002 to the present in the form of either federal tax returns, annual reports, or audited financial statements. Additionally, the RFE provided that the petitioner should submit copies of the beneficiary's Forms W-2 if the petitioner employed the beneficiary. The petitioner responded.

On September 7, 2006, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("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. On Form ETA 750B, signed by the beneficiary on May 15, 2002, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not claim to have employed the beneficiary, and did not submit any evidence that it previously employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payments.

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

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<sup>2</sup> The petitioner listed on Form ETA 750 is [REDACTED] with an address of [REDACTED]. However, the company name listed on the "Final Determination" is [REDACTED]. The petitioner listed on the Form I-140 is [REDACTED] with an address of [REDACTED]. While DOL did not change or stamp the name change on the Form ETA 750, a search of Virginia State Corporation Commission records does reflect that [REDACTED]'s former name was [REDACTED], and that the company recorded its name change as of May 21, 2002. See <http://s0302.vita.virginia.gov/servlet/resqportal/resqportal> (accessed December 10, 2007).

<sup>3</sup> The petitioner initially listed a different salary, but DOL required that the petitioner change the salary prior to certification. We note that the initial salary is "whited out" with \$26.99 typed over the initial pay listed. The change on Form ETA 750 does contain initials to approve the change, as well as the DOL stamp to signify that the correction had been approved.

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.

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's tax returns reflect that 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 submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005 <sup>4</sup>	\$93,032
2004	\$39,524
2003	\$68,718
2002	-\$77,531

Based on the petitioner's net income, it is unable to demonstrate its ability to pay the proffered wage in the years 2002, or 2004.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</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 are as follows:

<u>Tax Year</u>	<u>Net Current Assets</u>
2005	-\$263,950
2004	-\$325,639
2003	-\$344,568
2002	-\$127,094

<sup>4</sup> The petitioner submitted its 2005 tax return on appeal.

<sup>5</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.

The petitioner's federal tax returns reflect that the petitioner had substantial negative net current assets for all of the years in question.

The petitioner additionally submitted bank statements for the time period February 2002 to December 31, 2005. The statements submitted show significant variation in the amount that the petitioner had in its account from a low balance of \$5,701.01 (as of December 31, 2005) to a high balance of \$77,659.77 (as of February 28, 2002).

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." Further, the petitioner's cash assets listed on Schedule L have already been considered in calculating the petitioner's net current assets above. The petitioner has not established that the bank balances represent funds in addition to cash assets, and, therefore, 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.

The petitioner additionally submitted unaudited profit and loss statements for January through June 2006, as well as for the year 2005. 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 compiled statements are unaudited, and, therefore, are not persuasive or reliable evidence, and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, the petitioner asserts that it is a "million dollar company with substantial assets;" that the company had cash on hand of over \$100,000 for each calendar year; that the petitioner's bank statements evidence substantial cash flow; and that the petitioner's 2003 net income was over \$68,000.

The petitioner's net income, cash on hand, and its bank statements have been addressed above.

The petitioner's president provided a letter in support explaining the petitioner's 2002 loss:

[The petitioner] showed a loss and reduction of income in 2002 in direct result of some economic downturns related to September 11, 2001. Our business deals almost exclusively with Hotels and most notably hotels in the Washington, DC market. After September 11 many of the hotels we serviced at Reagan National Airport were closed and did not open for some time. Once these customers did return it took some time to rebuild the business lost.

Evidence in the record shows that the petitioner provides technical services. The petitioner's letter is vague regarding what technical services it provides to hotels, how long the hotels were closed, and the exact loss from this segment of its customer base.<sup>6</sup> The petitioner's general statement suggests, without supporting

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<sup>6</sup> 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)).

evidence, that the petitioner's financial status would have been stronger had it not been for the events of September 11, 2001. The petitioner did not provide any evidence of its 2000, or 2001 income for comparison to show a later decline. If we examined the petitioner's gross receipts, its tax returns reflect the following: 2002: \$823,911; 2003: \$1,007,946; 2004: \$1,028,993; 2005: \$997,845. While the tax returns exhibit growth between the years 2002 and 2003, without reference to its prior income, whether the events of September 11, 2001 accounted for the difference is unclear. The petitioner's lower gross receipts in 2002 might also be the result of the business' recent formation, as corporate records show that it incorporated in March 2000.<sup>7</sup> Further, we note that despite the petitioner's 2003 growth, that it also exhibited much higher negative net current assets in that year. The petitioner's gross receipts similarly declined in 2005. The petitioner has provided no information for this decline. Accordingly, the record does not contain enough information to show that the events of September 11, 2001 critically impacted the petitioner's business for just one year.

While the evidence demonstrates that the petitioner can pay the proffered wage in two years, the petitioner has not provided sufficient documentation that it can pay the proffered wage in the other two years in question.

Accordingly, based on the foregoing, the petitioner has failed to establish 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 not been met.

**ORDER:** The appeal is dismissed.

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<sup>7</sup> See <http://s0302.vita.virginia.gov/servlet/resqportal/resqportal> (accessed December 10, 2007).