

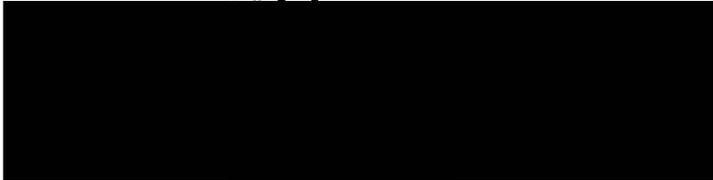


U.S. Citizenship
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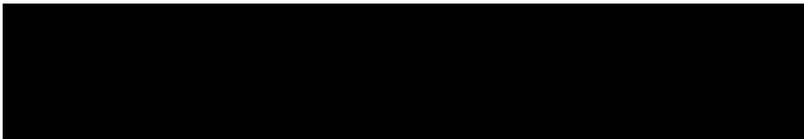


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **JUL 16 2008**
SRC 07 023 50882

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 employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body repair firm. It seeks to employ the beneficiary permanently in the United States as an auto body repair supervisor. 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, contends that the petitioner has demonstrated its financial ability to pay the proffered salary.¹

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* financial ability to pay the certified salary as of the priority date. Because the filing of an ETA 750 labor certification

¹ 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.

application establishes a priority date for any immigrant petition later based on the ETA 750, 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). If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The priority date is the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on July 22, 2003. The proffered wage as stated on Part A of the ETA 750 is \$33.49 per hour, which amounts to \$60,951.80 per year.² On Part B of the ETA 750, signed by the beneficiary on July 20, 2003, the beneficiary claims to have worked for the petitioner from March 1998 to December 2000.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on November 2, 2006, the petitioner claims to have been established in 1985.

As evidence of its continuing financial ability to pay the proposed wage offer of \$60,951.80 per annum and in response to the director's request for evidence, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2003, 2004, and 2005. The returns that were submitted indicate that the petitioner files its taxes using a standard calendar year. The returns also contain the following information:

	2003	2004	2005
Net Income ³	\$ 20,413	\$ 21,271	\$ 23,121
Current Assets	\$ not listed	\$ not listed	\$ not listed
Current Liabilities	\$ not listed	\$ not listed	\$ not listed
Net Current Assets	\$ n/a	\$ n/a	\$ n/a

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's

² This calculation is based on a 35 hour work week as set forth on the ETA 750.

³ For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). CIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

current assets and current liabilities.⁴ 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. In this case, the corporate petitioner elected not to list its assets and liabilities on Schedule L.

The petitioner also provided copies of its bank statements covering the period from August 2003 to January 2007, as well as a letter, dated October 16, 2006, from [REDACTED], the president and sole shareholder of the corporate petitioner. He indicates that he has been acting as the auto body supervisor and received a salary of \$78,000 per year which he will relinquish when the beneficiary becomes a permanent resident and takes over the job.

Following a review of the petitioner's financial documentation, the director determined that the petitioner had not established its ability to pay the proposed wage offer and denied the petition on April 25, 2007.

On appeal, the petitioner, through counsel, asserts that the director erred in not considering the petitioner's bank statement balances in demonstrating the petitioner's ability to pay the proffered wage. Counsel asserts that the director's observation that no liabilities were listed on the petitioner's return supported the petitioner's position as the tax returns were submitted with no liabilities listed.

Counsel's contentions are not persuasive. Although it is noted that the petitioner's bank statements generally revealed a substantial cash flow, they show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as set forth on an audited financial statement or on Schedule L of the corporate tax return. The petitioner elected not to list either its assets or its liabilities on Schedule L in each of the three tax returns submitted.⁵ A handwritten message across the page indicates only that it was "prepared from cash receipts and disbursements." Otherwise no entries appear. If completed, cash assets would have been shown on line 1 of the Schedule L balance sheet and would have been included in the calculation of a petitioner's net current assets for a given period. In this case, we do not conclude that the bank statements considered alone, are probative of the petitioner's ability to pay the proffered wage in lieu of the data set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2). Moreover, it is noted that last four bank statements covering the period from October 2006 until January 2007 failed to reflect sufficient monthly amounts to cover the beneficiary's salary.

In this matter, we do not find persuasive the assertion that the officer compensation represented as \$78,000 per year in 2003, 2004 and 2005 on the petitioner's respective tax returns should be applied to payment of the proffered wage of the beneficiary. There is also no credible evidence from the officer that such compensation could have been foregone during the period given. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for the officer or other documentation to specifically explain why these funds could have been considered as a readily available resource with which to pay the proffered salary. Going on

⁴ 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.

⁵ It is noted that question 13 of Schedule K of the petitioner's 2004 and 2005 tax return(s) waives the completion of Schedule L if the filer answers "yes" to the question of whether its total receipts and total assets are less than \$250,000 at the end of the tax year. This petitioner answered "no."

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)).

Moreover, with regard to the individual assets belonging to the principal shareholder of the corporate petitioner, it is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, as the record stands, there is no indication that the petitioner has employed the beneficiary except as noted by the beneficiary on Part B of the ETA 750.

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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In the instant matter, the petitioner's net income of \$20,413 in 2003; \$21,271 in 2004; and \$23,121 in 2005 was not sufficient to meet the beneficiary's proposed wage offer of \$60,951.80 per year. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing financial ability to pay the proffered wage. Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the petitioner established a 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.

Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.