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U.S. Citizenship
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File: EAC-06-095-50662 Office: NEBRASKA SERVICE CENTER Date: JUN 02 2008

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:

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 for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center (“director”), denied the immigrant visa petition.¹ The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be sustained.

The petitioner operates a business related to jewelry manufacturing, and seeks to employ the beneficiary permanently in the United States as a model and mold maker, jewelry (“Model Maker”). 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 September 12, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date 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).²

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 seeks to 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 C.F.R. § 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

¹ The petitioner initially filed its petition with the Vermont Service Center. The petition was transferred to the Nebraska Service Center for decision in accordance with new procedures related to bi-specialization.

² 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).

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 April 17, 2001. The proffered wage as stated on Form ETA 750 is \$15.00 per hour, based on a 40 hour work week, which is equivalent to \$31,200 per year. The labor certification was approved on November 14, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on February 13, 2006. The petitioner represented the following information on the I-140 Petition: date established: October 22, 1992; gross annual income: \$8.5 million; net annual income: none listed; and current number of employees: 23.

On July 11, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit evidence of its ability to pay the proffered wage, as the petitioner's tax returns submitted did not establish its ability to pay. Specifically, the RFE requested that the petitioner provide the beneficiary's W-2 Forms for the years 2001 through 2005. The RFE also provided that the petitioner should submit other evidence, such as audited financial statements, profit/loss statements, bank account records, or personnel records, if the W-2 Forms did not establish the petitioner's ability to pay. The petitioner responded. Following consideration of the petitioner's response, on September 12, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments 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. In the case at hand, on Form ETA 750, signed by the beneficiary and dated April 9, 2001, the beneficiary listed that she has been employed with the petitioner from August 1998 to the present (date of signature). The petitioner did not provide evidence of payment. In response to the RFE request, the petitioner provided that it had employed the beneficiary since August 1998, but that she did not have a social security number, and was "not paid on the books." As the petitioner is unable to provide proof that it paid the beneficiary, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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. 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 an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists only income from its business and, thus, CIS evaluates the petitioner's net income based on line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	not provided ³
2004	\$24,019
2003	-\$299,167
2002	-\$307,916
2001	-\$91,023

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

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. Current assets include cash on hand, inventories, and receivables expected to be 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 on the Forms 1120S. 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 evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2005	not provided
2004	-\$270,561
2003	-\$453,814
2002	-\$123,097
2001	\$59,529

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in all of the above years with the exception of 2001.⁴

³ The petitioner did not provide its 2005 federal tax return, which would likely not have been available at the time of filing the I-140 Petition, but should have been available at the time of the petitioner's response to the RFE, and would have been available at the time that the petitioner filed its appeal.

⁴ We additionally note that CIS records reflect that the petitioner has filed immigrant petitions for three additional workers. The petitioner would need to demonstrate that it could pay the proffered wage for all sponsored workers.

As additional evidence, the petitioner submitted copies of its bank statements for the years 2001, 2002, 2003, 2004, 2005, and the first six months of 2006. 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." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, 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. If we were to examine the statements specifically, the balances range from a low balance of -\$19,617.53 in September 2005 to a high balance of \$196,379.89 in May 2006.

On appeal, counsel contends that CIS requested that the petitioner provide its bank statements, but then did not properly consider the statements. Counsel contends that the bank statements reflect that the petitioner had cash available to pay the proffered wage, and in the absence of W-2 statements, the bank statements serve as supplementary information to show the petitioner's ability to pay. Counsel further provides that "the funds used to pay the beneficiary are separate and apart from the cash indicated on the Schedule L of the tax returns." Counsel asserts that the bank statements submitted should be accepted as the petitioner provided statements to cover the entire filing time period in question from the time of the priority date, and that the statements show that the petitioner conducts large transactions and has the funds to cover the beneficiary's monthly salary.

Counsel did not provide any evidence that the funds listed on Schedule L are separate and apart from the funds represented by the petitioner's bank statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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)).

Counsel's reliance on the petitioner's bank statements is misplaced. As noted above, the petitioner has not demonstrated that the bank funds represent cash beyond what was listed on the petitioner's Schedule L.

We do note the following, however, from the petitioner's tax returns:

<u>Tax year</u>	<u>Gross Receipts</u>	<u>Salaries Paid</u>	<u>Officer's Compensation</u>
2005	not provided	not provided	not provided
2004	\$8,623,107	\$345,972	\$197,600
2003	\$7,783,886	\$286,680	\$197,600
2002	\$8,040,129	\$296,619	\$178,500
2001	\$6,230,581	\$303,413	\$183,100

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1992 and employs approximately 23 employees. Their gross

receipts have been above \$6 million consistently at the low end, and over \$8.6 million in 2004. The petitioner's federal tax returns reflect consistent payment of salaries to employees of approximately \$300,000 in each year where tax returns were provided, as well as a high amount of Officer Compensation. Additionally, the petitioner's bank statements do reflect, despite the petitioner's liabilities, that it does have cash assets available from which to pay the proffered wage. Thus, in assessing the totality of circumstances in this individual case, we conclude that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Accordingly, based on the foregoing, the petitioner has established that it has the continuing ability to pay the beneficiary the required wage from the priority date. 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 been met.

ORDER: The appeal is sustained. The petition is approved.