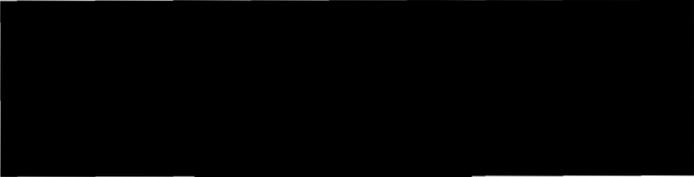




U.S. Citizenship
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Services

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B6



File: [Redacted]
LIN-07-190-52440

Office: NEBRASKA SERVICE CENTER

Date: MAR 06 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:

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

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

The petitioner is a software development and consulting company, and seeks to employ the beneficiary permanently in the United States as a computer system analyst (Programmer Analyst). 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 July 30, 2007 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. Further, Citizenship & Immigration Services (CIS) records showed that the petitioner had filed four other immigrant visa petitions. The petitioner failed to establish that it could pay for all of the sponsored workers.

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).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 professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

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:

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).

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 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 December 6, 2004. The proffered wage as stated on Form ETA 750 is \$70,000 per year based on a 40-hour work week. The labor certification was approved on August 21, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 22, 2007. The petitioner listed the following information: established: 1998; gross annual income: \$500,000; net annual income: not listed; and current number of employees: five.

On June 27, 2007, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of the petitioner's ability to pay the proffered wage from the date of December 6, 2004 onward. The petitioner had submitted its 2004 state tax return, and 2005 and 2006 federal tax returns, which failed to demonstrate the petitioner's ability to pay. The RFE requested that the petitioner provide its 2004 federal tax return, annual report or audited financial statement, as well as additional evidence such as bank statements, personnel records, and/or profit/loss statements. The RFE additionally requested that the petitioner provide W-2 statements if the petitioner employed the beneficiary. Also, the director noted that the petitioner had filed multiple I-140 petitions, and that the petitioner would need to demonstrate its ability to pay for each beneficiary. Therefore, the RFE requested that the petitioner show it could pay for all the sponsored beneficiaries. The petitioner responded.

On July 30, 2007, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage for the instant beneficiary, and denied the petition. Further, the director noted in his decision that the petitioner failed to provide any evidence, address, or demonstrate its ability to pay for all the sponsored beneficiaries. 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 November 22, 2004, the beneficiary did not list that he was employed with the petitioner.

The petitioner provided that it hired the beneficiary as an employee in February 2006, and submitted the beneficiary's 2006 W-2 statement showing that the petitioner paid the beneficiary wages in the amount of \$72,425. The petitioner can, therefore, demonstrate its ability to pay the proffered wage in that year. The petitioner also provided the beneficiary's monthly pay records for the time period March 1, 2007 to July 1, 2007, which exhibited that the petitioner paid the beneficiary at a rate of \$35 per hour and that the beneficiary worked between 136 to 172 hours monthly depending on the month. If the petitioner

paid the beneficiary at a rate of \$35 for 40 hours a week, for the full year, the beneficiary would earn an amount above the proffered wage.

Prior to 2006, the petitioner asserted that it paid the beneficiary for work completed as outside contract labor while the beneficiary worked as a consultant for Acumen Consulting, where he was employed from March 1, 2003 to January 15, 2006. In support, the petitioner provided the beneficiary's W-2 statements from Acumen Consulting. His W-2 Form for 2004 demonstrated that Acumen paid the beneficiary wages in the amount of \$44,457.76, and 2005 W-2 wages in the amount of \$50,750.62. The petitioner also provided "quick book Vendor reports," which showed that the petitioner had made various payments to Acumen Consulting. The petitioner, therefore, asserted that the payments made to Acumen Consulting would demonstrate the petitioner's ability to pay the proffered wage.

The director, however, noted that a corporation is a separate and distinct legal entity and the assets of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." Accordingly, the beneficiary's wages received from Acumen would not demonstrate the petitioner's ability to pay the proffered wage as the payments to Acumen had not been adequately documented to the work the beneficiary allegedly performed in a consulting capacity for the petitioner.

On appeal, the petitioner provided a more specific break down of the quick books report of wages paid to the beneficiary. The quick book report shows that the petitioner made payments to Acumen for the beneficiary's work in 2004 in the amount of \$35,640, and payments in the amount of \$71,720 in 2005. The amount that the petitioner allegedly paid to Acumen for the beneficiary's work in 2005 resulted in a number greater than the beneficiary's claimed wages in that year. The reason for the discrepancy is unclear. The petitioner did not provide any more specific documentation to explain this discrepancy. Therefore, we find the documentation lacking and would not substantiate that the beneficiary's wages paid by Acumen could be attributed to the petitioner's ability to pay the proffered wage.

Accordingly, the petitioner must show that it can pay the full proffered wage in the years 2004, and 2005, as well as its ability to pay for the additional four sponsored beneficiaries.

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.

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 does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2006	-\$42,669
2005	\$11,353
2004 ²	\$16,156
2003 ³	\$8,136

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

Even if we accepted that the petitioner has sufficiently demonstrated that the amounts paid to Acumen were for work that the beneficiary performed for the petitioner, which we do not, the amounts listed on the beneficiary's 2004, and 2005 W-2 statements, if added to the petitioner's net income would still be less than the proffered wage. Further, CIS records reflect that the petitioner has filed for four additional beneficiaries. The petitioner would not be able to demonstrate its ability to pay for all five workers.⁴

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

² The petitioner provided its state tax return for 2004. On appeal, the petitioner submitted its 2004 federal tax return.

³ The petitioner provided its 2003 federal tax return. As the instant petition's priority date is December 6, 2004, the petitioner's 2003 federal tax return is not required to show the petitioner's ability to pay from the priority date onward, but will be considered generally.

⁴ Further, CIS records reflect that the petitioner has filed for a large number of H-1B workers. The exact amount of currently employed H-1B workers is unclear. 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.

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>
2006	-\$49,697
2005	\$18,941
2004	\$9,998
2003	\$3,766

Based on the petitioner's net current assets, it would not be able to demonstrate its ability to pay the individual beneficiary, or multiple beneficiaries in any of the above years.

The petitioner also provided that it used a number of subcontractors from Acumen Consulting, as well as from other computer consulting firms. In 2004, the petitioner provided that it employed four individuals that worked for the partial year, and that it made payments to those workers in the amount of \$89,350; that in 2005, it paid subcontractors \$96,264 per year; and in 2006, it paid \$107,568 to subcontractors. The petitioner provided a list with the individual's name, the company that the individual worked for, and the amount paid to the worker.

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. Further, the petitioner did not provide any official documentation such as Forms 1099 to exhibit wages paid to subcontracted workers. The petitioner's tax returns do not reflect additional expenses under "costs of labor." Even if we were to accept that the subcontracted wages could be used to pay the proffered wage, the additional wages would not demonstrate the petitioner's ability to pay for all five sponsored beneficiaries.

On appeal, the petitioner submitted the same documentation that it previously submitted, copies of the beneficiary's paychecks for March 2007 to July 2007; tax returns for 2004, 2005, and 2006; and "Vendor Quick Book Reports." The petitioner argues that the wages paid to the subcontracted workers would demonstrate the petitioner's ability to pay the proffered wage.

We have addressed this argument above. The documentation provided was deficient to establish the exact amounts paid to each worker. While the petitioner provided a "Quick Book" summary of the amounts it asserts it paid to each worker, the record does not contain official evidence such as Forms 1099 or W-2s to show the amounts paid to each. Further, even if we accepted that the subcontracted wages could be used to show the petitioner's ability to pay, the wages paid would not demonstrate that the petitioner could pay for all five sponsored beneficiaries.

Additionally, the director specifically raised in both his RFE and his decision, that the petitioner had filed for multiple beneficiaries, and that the petitioner must demonstrate its ability to pay for each sponsored beneficiary from the time of the priority date onward.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§

103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner failed to address this issue either in response to the RFE, or on appeal. As a result, the petitioner has precluded a material line of inquiry.

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, and further, has specifically failed to demonstrate that it can pay the proffered wage for multiple sponsored beneficiaries. 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.