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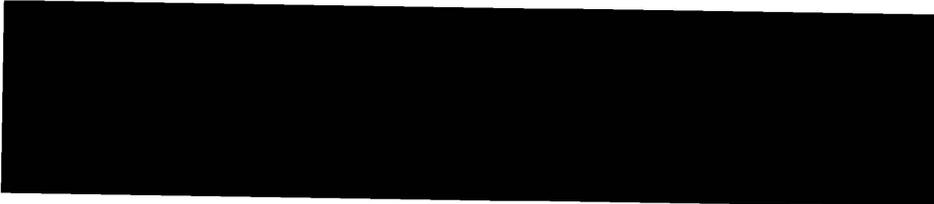
File: [Redacted]
SRC-07-088-51239

Office: TEXAS SERVICE CENTER Date: MAR 11 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, Texas Service Center (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be sustained.

The petitioner provides services related to the design and installation of HVAC systems, and seeks to employ the beneficiary permanently in the United States as a civil engineer. The petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s September 20, 2007 decision, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary 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).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 9089 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Application for Permanent Employment Certification was accepted for processing by 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

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).

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 9089² with the relevant processing center on October 11, 2005. The proffered wage as stated on Form ETA 9089 is \$25.30 per hour, based on a 40 hour work week, which is equivalent to \$52,624 per year. The labor certification was approved on February 14, 2006, and the petitioner filed the I-140 petition on the beneficiary's behalf on January 24, 2007. The petitioner represented the following information on the I-140 Petition: date established: August 27, 1999; gross annual income: \$375,311; net annual income: \$58,370; and current number of employees: seven.

On July 12, 2007, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit a more detailed letter regarding the beneficiary's experience with the petitioner from the beneficiary's date of hire in May 2002 to the present; to provide documentation that the beneficiary had the required six months of prior experience using AutoCAD and Privavera as specified on Form ETA 9089; and to provide evidence of the petitioner's ability to pay, including a copy of the petitioner's 2006 federal tax return, audited financial statement, and/or annual report, as well as any evidence of wages that the petitioner paid the beneficiary in 2006 or 2007. The petitioner responded. Following review, the director denied the petition on September 20, 2007 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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 9089, signed by the beneficiary on January 5, 2007, the beneficiary listed that he was employed with the petitioner from May 13, 2002 to the present (date of filing). The petitioner provided a copy of the beneficiary's Form W-2 statement for 2006, which exhibited wages paid to the beneficiary in the amount of \$49,204.34, or \$3,419.66 less than the proffered wage.

The petitioner also submitted a payroll summary for the beneficiary's work for the time period January through December 2006, and January through July 2007. As the petitioner submitted the beneficiary's 2006 W-2 statement, the 2006 payroll summary does not provide any additional information related to his annual pay, although we note that the 2006 summary lists the beneficiary's hourly rate as \$24.00 per hour. The payroll statement for 2007 lists that the petitioner paid the beneficiary at a rate of \$27.00 per hour, which is above the proffered hourly wage rate, and further, that the petitioner had paid him \$27,619 through July 2007.

Wages paid to the beneficiary will be considered as partial payment of the proffered wage. The petitioner must show that it can pay the full proffered wage in 2005, and the difference between the proffered wage, and the wages paid in 2006. Accordingly, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payment alone.

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program ("PERM"), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004).

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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 petitioner 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. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2006 Amended ³	\$9,634
2006	-\$30,366
2005	\$58,370

Based on the above, the petitioner's net income would allow for payment of the beneficiary's proffered wage in 2005, but not in 2006.

If the petitioner's amended net income were added to the wages paid to the beneficiary, the petitioner would be able to demonstrate its ability to pay the proffered wage in 2006. We note, however, that the petitioner did not provide evidence of filing the amended return with the IRS.

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.⁴ 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, or, if filed on Form 1120-A, on Part III. 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, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net Current Assets</u>
2006 Amended	\$78,595

³ On appeal, the petitioner provided an amended Form 1120 for 2006 as the petitioner provides that it made two errors on its original return. The amended Form 1120 provides that the petitioner would change its "auto expenses from \$18,802 to \$8,802. Second, we change the professional fees and services from \$39,031 to \$9,031." As a result of the change in deductions, the petitioner's net income increased.

⁴According 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.

2006	\$40,041
2005	\$53,465

The petitioner has established through its net income that it can pay the proffered wage in 2005. The petitioner's net income from its amended 2006 return would demonstrate the petitioner's ability to pay, however, as noted above, the petitioner failed to provide evidence that it filed its 2006 amended tax return with the IRS. The petitioner's prior tax return for 2006 would not reflect sufficient net current assets to pay the proffered wage.

The director's decision provides that the petitioner's net current assets cannot be combined with the beneficiary's wages paid, as the petitioner's net income and net current assets reflect two separate measures. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of the petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

While net income and net current assets cannot be combined, wages paid to the beneficiary can be combined with the petitioner's net current assets. The petitioner has documented that it paid the beneficiary \$49,204.34 based on the W-2 Form submitted. The petitioner can document that it can pay the remaining \$3,419.66 of the proffered wage through its 2006 net current assets, based on the initially filed tax return, or the amended 2006 return.

Accordingly, based on the foregoing, the petitioner established 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 been met.

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