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U.S. Citizenship  
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Office: TEXAS SERVICE CENTER

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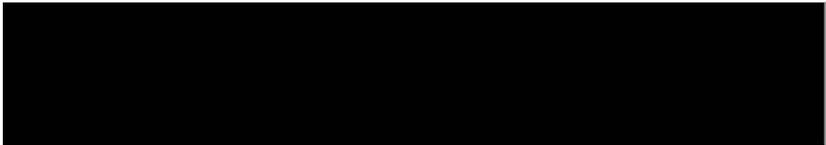
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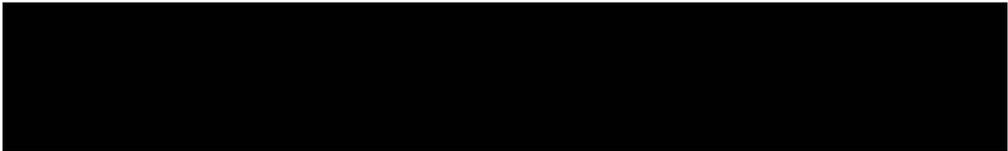
Petitioner:

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, 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 a retail store and gas station. It seeks to employ the beneficiary permanently in the United States as a gas station manager. 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, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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 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)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, 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 April 24, 2001. The proffered wage as explicitly

stated on Part A of the ETA 750 is \$20.55 per hour, which amounts to \$42,744 per year.<sup>1</sup> On Part B of the ETA 750, signed by the beneficiary on April 20, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on March 6, 2006, the petitioner claims that it has a gross annual income of \$4,023,743 and an annual net income of \$5,144.

With the petition and in response to the director's May 31, 2006, notice of intent to deny, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2004. The returns indicate that the petitioner files its taxes using a standard calendar year. The returns also contain the following information:

	2001	2002	2003	2004
Net Income <sup>2</sup>	\$12,244	\$ 14,721	\$ 3,988	\$ 5,144
Current Assets	\$32,428	\$ 44,254	\$ 27,111	\$62,884
Current Liabilities	\$8,419	\$ 17,916	\$ 8,593	\$15,953
Net Current Assets	\$24,009	\$ 26,388	\$ 18,518	\$46,931

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 current assets and current liabilities.<sup>3</sup> 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's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner further provided, through counsel, a copy of its 2005 W-3, Transmittal of Wage and Tax Statements and a letter, dated June 28, 2006, from its accountant, [REDACTED]. [REDACTED] states that he

<sup>1</sup> The director erred in stating that the calculation of the annual proffered wage should be based on 35 hours per week, rather than on the 40 hours per week as explicitly set forth on Item 10 of the ETA 750A.

<sup>2</sup> 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23\* (1997-2003) and line 17e\* (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2001 through 2004, the petitioner's net income is found on Schedule K of its tax returns for 2001 through 2004.

<sup>3</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.

has been providing accounting services since January 2006 and has not completed either the petitioner's 2005 tax return or financial statements due to a change in accounting firms, but has concluded that the petitioner has the ability to pay the proffered wage in each of the years from 2001 through 2003. He explains that the flexibility of declaring officer compensation permits those amounts to be treated as an additional source of funds to pay the proffered wage in 2001, 2002 and 2003.

Following a review of the evidence submitted, the director denied the petition on July 13, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage through the financial documentation provided to the record. The director rejected the use of officer compensation as a source to pay the proffered wage and noted that the total amount of salaries paid to other employees as shown by the W-3 does not establish its ability to pay the beneficiary's wages. She also noted that the petitioner had failed to offer either sufficient evidence of its ability to pay the proposed wage offer in 2005 as required by the regulation at 8 C.F.R. § 204.5(g)(2).

On appeal, the petitioner, through counsel, offers additional evidence in the form of a copy of its 2005 federal income tax return, identified as a "draft." It indicates that the petitioner's net income (line 17e of Schedule K) was \$40,268. It also specifies on Schedule L that the petitioner had \$103,781 in current assets and \$6,688 in current liabilities, resulting in \$33,580 in net current assets. Counsel also provides a letter, dated September 7, 2006, from Wachovia Bank stating that the corporate petitioner has held a mutual fund account and certificate of deposit amounting to \$35,295 since April 25, 2000. Copies of two printouts as referenced in the letter show the certificate of deposit of \$2,500 specified with the principal shareholder's name rather than the corporate petitioner's and reflect an issue date of September 20, 2002. The printout of the mutual fund account is dated September 7, 2006 and indicates a value of \$32,795.77.

Counsel further provides copies of five real estate closing statements, one from 1995 and three from 2003, specifying the petitioner's principal shareholder as one of the individual borrower(s)/buyer(s) and one statement from 2005 identifying him as one of the individual seller(s). Also submitted is a copy of a December 31, 2005, statement of a portfolio account held individually by the petitioner's principal shareholder as well as a copy of a July 31, 2006, statement of his personal consolidated portfolio and retirement account statement.

Counsel asserts on appeal that the calculation of the petitioner's ability to pay the proffered wage should be prorated in 2001 in order to accurately reflect its obligation beginning as of the April 24, 2001 priority date. According to counsel, the petitioner must show that it needed an additional \$934 to pay the proffered salary in 2001. Counsel also contends that the difference between the proffered wage and the petitioner's net current assets in the other relevant years could have been covered by the corporate officers taking a pay cut in order to meet the corporate payroll obligation. He also asserts that the additional sources of funds available to the petitioner to pay the proffered wage, which were not mentioned in the response to the director's notice of intent to deny, are represented by the bank's letter and printouts indicating the certificate of deposit and mutual fund accounts. Finally, counsel states that the real estate closing statements and copies of the principal shareholder's personal investments statements also represent an additional source of funds to pay the proffered wage.

Counsel's assertions are not persuasive. With regard to a prorated calculation to the corporate petitioner's ability to pay the proffered wage in 2001, it is noted that in general, CIS will not consider 12 months of income, as

shown for example on the federal income tax return, towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains specific evidence of net income or, for example payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not the case here.

In this case, we do not find persuasive the assertion that the officer compensation represented on the petitioner's tax returns should be added back to the corporate petitioner's income or net current assets. It is observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer(s) that such compensation could have been foregone during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for the officer or other documentation to specifically identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. 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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With regard to the personal holdings or individual assets belonging to principal shareholder(s) of the corporate petitioner, such as is presented here in the form individual real estate or portfolio holdings, 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.

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).

It is further noted that counsel's suggestion that the Wachovia mutual fund account of \$32,795.77 and the \$2,500 certificate of deposit represent additional available funds held by the corporate petitioner since April 2000 and should be considered in addition to the petitioner's tax returns is not supported by the current record. It has not been demonstrated why the funds should represent additional funds that would not already have been included on its subsequent tax returns, such as part of the petitioner's Schedule L balance sheet reflecting its assets and liabilities. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. The unsupported 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). It is noted that even if the mutual fund account, which was clearly held in the corporate petitioner's name, was included in the consideration of the petitioner's ability to pay the proffered wage, it would have covered only the 2001 shortfall of \$18,735 that represented the difference between the proffered wage and the petitioner's net current assets, and part of the 2002 shortfall of \$16,406 representing the same comparison.

In this case, the petitioner failed to demonstrate its ability to pay the proffered wage in 2001 because neither its net income of \$12,244 nor its net current assets of \$24,009 was sufficient to cover the certified salary of \$42,744.

In the year 2002, the petitioner has not demonstrated the ability to pay the proffered wage because neither its net income of \$14,721 nor its net current assets of \$26,338 was sufficient.

For 2003, neither the petitioner's net income of \$3,988 nor its net current assets of \$18,518 was sufficient to pay the proffered wage of \$42,744. The petitioner has not established its ability to pay for this year.

In 2004, neither the petitioner's net income of \$46,931 was sufficient to pay the proffered wage.

In 2005, the record does not reflect whether the draft copy represents the tax return ultimately filed with the Internal Revenue Service, and as such, it has not established the petitioner's ability to pay the certified salary for this year. It is further noted that neither the estimated net income of \$40,268 nor the \$33,580 in net current assets was enough to cover the certified wage of \$42,744.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is August 9, 1999. Based on a review of the underlying record and the arguments submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

Beyond the decision of the director, it is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that the claimed employment experience must be supported by letters from trainers or employers verifying the employment. The experience required in Item 14 of the approved labor certification is two years in the job offered as a gas station manager. It is noted that in this case, the employment verification letter dated March 20, 2001, from [REDACTED] as the owner of [REDACTED] in El Salvador, submitted in English, states that the beneficiary worked at that company as an assistant manager from June 6, 1993 until June 20, 1995. The beneficiary describes her job as that of a “manager” in Part B of the ETA 750. While the employment verification letter confirmed that the beneficiary’s actual duties included many of those of a manager,<sup>4</sup> it did not establish that her employment was full-time for two years as required by the ETA 750A.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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>4</sup> The job duties of the previous employment should be considered, not just the job titles. *See Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991)(*en banc*).