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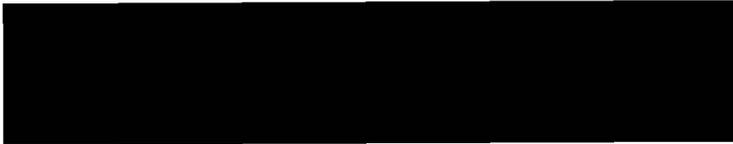
Office: VERMONT SERVICE CENTER

Date:

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

The petitioner is an automotive repair firm. It seeks to employ the beneficiary permanently in the United States as a European vehicles automotive mechanic 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, 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 December 22, 1995. The proffered wage as stated on Part A of the ETA 750 is \$18.40 per hour, which amounts to \$38,272 per year.

On Part B of the ETA 750, signed by the beneficiary on November 1, 1995, the beneficiary claims to have worked for the petitioner since August 1993.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on October 23, 2004, the petitioner states that it was established in June 1975, has one employee and claims a gross annual income of \$101,895.

It is noted that the petitioner filed an I-140 on behalf of the beneficiary in 1999.¹ It was also based on the 1995 labor certification. The director determined that the petitioner had not established the ability to pay the proffered wage and denied the petition on January 5, 2001. Former counsel's motion to reopen/reconsider was denied by the director on April 2, 2001. The AAO summarily dismissed the subsequent appeal on March 12, 2002.

With the current petition and as evidence of its continuing financial ability to pay the proposed wage offer of \$38,272 per annum, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2000, 2001 and 2002. The petitioner did not provide any financial information for 2003 or 2004. The returns that were submitted indicate that the petitioner files its taxes using a standard calendar year and that it was incorporated in 1975. The returns also contain the following information:

	2000	2001	2002
Net Income ²	-\$ 8,249	-\$ 6,763	-\$ 3,874
Current Assets	\$ 2,750	\$ 4,983	\$ not listed
Current Liabilities	\$ 5,174	\$ 5,324	\$ not listed
Net Current Assets	-\$ 2,424	-\$ 341	\$ 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 current assets and current liabilities.³ 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-

The receipt number is EAC 00 026 50561.

²Where 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* (1996-2003) 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. This petitioner had no additional income or other adjustments from sources other than a trade or business so its net income is reflected on line 21 of its tax returns for 2000, 2001 and 2002.

³ 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.

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.

Following a review of the evidence submitted, the director issued a notice of intent to deny the petition on May 26, 2006. The director advised the petitioner that the record of the instant filing did not contain any new evidence relating to its ability to pay the proffered wage of \$38,272 since the AAO's dismissal of the previous appeal on March 12, 2002. He did not discuss the 2000-2002 tax returns contained in the current proceedings, but stated that unless the petitioner could provide new evidence then that already presented, the petition would not be approved. The petitioner was permitted thirty days to supply any evidence that supported its ability to pay the proffered wage.

In response, former counsel submitted a letter from the beneficiary and from the petitioner's sole shareholder, [REDACTED]. Both letters are dated June 23, 2006. Mr. [REDACTED]'s letter affirms that the beneficiary is an employee of the petitioning corporation and states that the beneficiary will earn between \$38,000 and \$40,000 in the year 2006. Mr. [REDACTED] added that he has reached retirement age and has cut down his working hours and salary. He stated that the beneficiary had assumed more responsibilities and was receiving greater compensation.

The director denied the petition on August 9, 2006. He noted that the information relating to [REDACTED]'s retirement and circumstances that might allow the proffered wage to be paid in the 2006 tax year, but concluded that the petitioner had not demonstrated its continuing ability to pay the certified salary as of the priority date of December 22, 1995 as required by regulation.

On appeal, the petitioner, through current counsel, resubmits copies of the petitioner's 2000, 2001 and 2002 corporate federal returns and additionally provides a partial copy of the petitioner's 1995 Form 1120S tax return consisting of two copies of the cover page and one copy of Schedule K-1 that ends at line 14e. Line 21, ordinary income from a trade or business is reflected as \$1,237. The remaining statements and/or schedules are omitted.

Counsel asserts on appeal that the petitioning business was established in 1975 and that the founding officer and principal has planned his retirement for years. Counsel claims that the salaries paid to the principal would be paid to the beneficiary although the principal would retain complete day to day management of the business. Counsel refers to the payment of officer compensation of \$31,000 as the principal's salary as reflected on the 1995 tax return.

Counsel's assertions are not supported by the record and are not persuasive. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the retirement of [REDACTED], raised for the first time in this proceeding as shown in [REDACTED]'s letter, does not suggest that it related back to the 1995 sponsorship of the beneficiary in the labor certification proceedings, but is impending due to his age. We do not find persuasive the assertion that the officer compensation represented on the petitioner's tax returns since 1995 should somehow be imputed to have been available to have been paid to the beneficiary or possibly added back to the corporate petitioner's income or net current assets in order to establish the ability to pay the proffered wage. 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 sole shareholder/owner that such compensation could have been foregone during the relevant period since the priority date.⁴

Additionally, it must be noted that 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 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. In the instant matter, the petitioner failed to submit any financial documentation consisting of either federal tax returns, audited financial statements, or annual reports relating to 1997, 1998, 2003, and 2004. It is observed that copies of its 1996 and 1999 corporate tax returns were provided in support of the previous proceeding and were included as part of the director's review in determining the petitioner's ability to pay.⁵ It is noted that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). 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)).

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

⁴ The petitioner also failed to provide any Form 1040, U.S. Individual Income Tax Return, for the officer or other documentation to demonstrate that such compensation could have been foregone during the relevant period.

⁵ In that proceeding, tax returns provided for 1997 and 1998 belonged to a separate corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or 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."

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, the record suggests that the petitioner has employed the beneficiary but there is no first-hand evidence of wages or compensation paid to him such as Wage and Tax Statements (W-2) or Form 1099s.

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 this case, the petitioner failed to demonstrate its ability to pay the proffered wage in 1995 as shown on its corporate tax return because its net income of \$1,237 was not sufficient to cover the proffered wage of \$38,272.

It is noted that the petitioner's 1996 corporate tax return provided in the earlier filing failed to establish the petitioner's ability to pay the proffered wage in this year through either its net income of -\$824 (as shown on line 21) or its net current assets of -\$177 as indicated on Schedule L.

The petitioner failed to submit any financial documentation in this proceeding supporting its ability to pay the proffered wage in either 1997 or 1998.

As shown on its 1999 corporate tax return provided in the earlier filing, neither its net income of \$197 (as shown on line 21) nor its net current assets of -\$1,635 were sufficient to pay the proffered wage as indicated on Schedule L.

In the year 2000, the petitioner has not demonstrated the ability to pay the proffered wage because neither its net income of -\$8,249 nor its net current assets of -\$2,424 was enough to cover the certified salary of \$38,272.

For 2001, neither the petitioner's net income of -\$6,763 nor its net current assets of -\$341 was sufficient to pay the proffered wage. The petitioner has not established its ability to pay for this year.

In 2002, the petitioner's net income of -\$3,874 has not established its ability to pay for this year. As noted above, evidence demonstrating the ability to pay the proffered wage in 2003 and 2004 was not provided.

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

December 22, 1995. 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 as part of the beneficiary's application to register permanent residency or adjust status, and on behalf of the beneficiary, [REDACTED] filed an Affidavit of Support under Section 213A of the Act (Form I-864). He signed it on May 10, 2004. Every section was completed except for Part 2 establishing the sponsor's basis for filing the affidavit and the area for former counsel's signature. As indicated on Part 2 of Form I-824 the sponsor may be someone who has filed an alien worker petition on behalf of the intending immigrant and who is related to the immigrant or who holds an ownership interest of at least 5% of the entity which filed the visa petition on behalf of the alien worker and is related to the intending immigrant. See 8 C.F.R. § 213.a.2(a)(2)(i)(C). Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although this decision has been decided on other grounds, the observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this beneficiary.

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.