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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 09 2006

EAC-04-215-53477

IN RE: Petitioner:
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:

[redacted]

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 preference 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 auto body shop that seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). As set forth in the March 21, 2005, denial, the director denied the case on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1].

The record shows that the appeal is properly and timely filed, 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.

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 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 shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on February 5, 2001. The proffered wage as stated on the Form ETA 750 is $873 per week, 40 hours per week, for an

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[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).

annual salary of $45,396 per year. The labor certification was approved on September 16, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on July 15, 2004. On the I-140, counsel listed the following information related the petitioning entity: date established: November 27, 1991; gross annual income: $2,547,391; net annual income: not listed; and current number of employees: 2.

On November 12, 2004, the Service Center issued a Request for Evidence ("RFE") for the petitioner to provide additional evidence related to the petitioner's ability to pay, and specifically requested: the petitioner's 2001, 2002, and 2003 U.S. federal income tax returns; and for the petitioner to provide the beneficiary's W-2 statements if the petitioner employed the beneficiary. The petitioner submitted the company's requested tax returns in response.

On March 21, 2005, the director denied the case based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed to the AAO.

We will examine the petitioner's ability to pay based on standards enumerated and then consider the petitioner's additional arguments on appeal. The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services ("CIS") requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages.

First, in determining the petitioner's ability to pay the proffered wage during a given period, 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 750B, signed by the beneficiary on January 20, 2001, the beneficiary listed that he was employed with the petitioner from December 2000 to the present (or until the date signed, January 20, 2001). However, the petitioner did not provide any W-2 forms, pay stubs, or any evidence or prior payment to the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage based on prior wage payment to 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 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 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. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $45,396 per year from the priority date:

Tax year	Net income or (loss)
2003	$13,384
2002	-$19,650
2001	$15,624

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage in any year.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets were as follows:

Year	Amount
2003	$21,154
2002	$12,762
2001	$36,893

As demonstrated above, the petitioner did not have sufficient net current assets in any year to pay the beneficiary the proffered wage.

On appeal, counsel contends that, "In its decision the Service abused its discretion by disregarding explanations of ability to pay the prevailing wage submitted on or around February 3, 2005." In examining the materials that the petitioner submitted in response to the RFE, the petitioner's president provided a letter adding projected income to the petitioner's reported total income based on "a new business line of automotive transmission repairs," which when added to the total income, according to the petitioner, would demonstrate the petitioner's ability to pay the proffered wage. As the president's letter makes clear, the additional income is an estimate based on projected revenue streams, rather than actual revenue generated.

Future or past projected earnings are both insufficient to show the petitioner's ability to pay the proffered wage. Prior case law has addressed this issue. Regarding projected future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states: "I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and

[2]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.

projections." Similarly, it would be inequitable for the petitioner to "look back" and estimate what the petitioner's income would have been, had the petitioner added a certain line to its business.[3] A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). *See also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts).

This was the only argument raised in the petitioner's letter response to the RFE. The petitioner additionally submitted its tax returns in response to the RFE, which we have analyzed above.

Based on the foregoing, we find that the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. The petitioner cannot demonstrate this ability through: (1) prior wage payment; (2) positive net income; or (3) sufficient net current assets in the amount of the proffered wage. Accordingly, the petition was properly denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[3] Further, we note that the petitioner did not provide any business plans, or audited projections to demonstrate the reliability of the petitioner's estimated revenue generation from the new business line. Although, we also note that such evidence would be similarly speculative, such evidence might indicate how the petitioner derived the estimated numbers.