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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] SRC-04-112-52639 Office: TEXAS SERVICE CENTER Date: APR 2 6 2007

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 Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The petitioner is a biological and agricultural consulting business and seeks to employ the beneficiary permanently in the United States as a supervisor for horticultural and specialty farming ("Horticultural-Specialty (Root Air-Pruning) Farming Supervisor"). 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 April 7, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains 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 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 skilled worker. 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 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:

> *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

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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).

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 September 30, 2002. The proffered wage as stated on Form ETA 750 for the position of a horticultural farming supervisor is $42,000 per year based on a 40 hour work week. The labor certification was approved on October 25, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on March 11, 2004. On the I-140, the petitioner listed the following information: date established: February 24, 1996; gross annual income: $82,454; net annual income: -$18,245; and current number of employees: 2.[2]

On January 22, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to provide: evidence of the petitioner's ability to pay in the form of annual reports, federal tax returns, or audited financial statements; the beneficiary's W-2 Form for the last year, along with paystubs for the last three months; and a current employment letter attesting to the employer's offer of continued employment.

On March 30, 2005, the petitioner responded to the RFE and provided the petitioner's federal tax returns for the years 2003, and 2004; a current employment letter; the beneficiary's paystubs for the last three months; and a letter from the petitioner's president. On April 7, 2005, the case was denied based on the director's determination that the petitioner had not established that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on the record and then consider the petitioner's additional arguments 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.

In the case at hand, on Form ETA 750B, signed by the beneficiary on September 16, 2002, the beneficiary listed that she has been employed with the petitioner since August 1999 as an International Trade and Commerce Specialist. The petitioner submitted paystubs for the months ending January, February and March 2005 exhibiting payments to the beneficiary in the amounts of $3,500 each. The petitioner also submitted a 2002 W-2 Form exhibiting payment to the beneficiary in the amount of $5,250. Additionally, counsel submitted pay records to show that the beneficiary had been paid by the petitioner's foreign parent abroad, [redacted] who counsel provides owns 90% of the petitioner. The wage record submitted for 2002 shows payment to the beneficiary in Chinese currency in the amount of 288,050 Yuan, which would be equivalent to $35,000 (based on the currency rate equivalency provided by the petitioner of $1 equivalent to 8.23 Yuan.[3]). If the wages paid in the U.S. were added, this would be equivalent to $40,250. The wage records for 2003, and 2004 shows payment to the beneficiary in Chinese currency in the amount of 345,660 Yuan, which the petitioner provides translates to $42,000. We note that the petitioner did not provide any documentation to evidence the currency conversion rate.

Form I-140 shows that the beneficiary held L-1 status. The petitioner provides that while the beneficiary spent most of her time in China in 2002, 2003, and 2004, she has returned to the U.S. and will be placed back

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[2] We note that the ETA 750A lists that the beneficiary will supervise four employees.

[3] The petitioner listed the same currency equivalency for all three years.

on the U.S. payroll. By way of explanation, the petitioner provides that in 2003, the beneficiary was sent to several provinces in China to introduce air-pruning technologies for the petitioner, and to deliver confidential drawings. In 2003 and 2004, the beneficiary also supervised air-pruning and cotton production in the Hubei Province in China. The petitioner provides that while the beneficiary spent most of her time in China in 2002, 2003, and 2004, she has returned to the U.S. and will be placed back on the U.S. payroll.

Based on the foregoing, the petitioner would not be able to establish its ability to pay from wages paid by the U.S. entity alone. Whether assets of the foreign company should be considered in determining the petitioner's ability to pay, will be addressed below.

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 structured as 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.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). For the year 2004, the petitioner's Schedule K shows additional income, so that the net income is taken from Schedule K. For the year 2003, the petitioner's income is solely from business, and Line 21 shows the following income:

Tax year	Net income or (loss)
2004	-$30,863
2003	-$8,758
2002	not submitted[4]

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

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[4] The petitioner did not submit its 2002 federal tax return, which based on the priority date of September 30, 2002 would be relevant to determining the petitioner's ability to pay.

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 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.

In the case at hand, however, we are unable to calculate the petitioner's net current assets. Pursuant to IRS instructions for Form 1120S, a corporation with total receipts (line 1a plus lines 4 through 10 on page 1, *See* page 19 of IRS instructions) and total assets at the end of the tax year or less than $250,000 are not required to complete Schedules L, M-1, and M-2, if the "yes" box is checked on Schedule B, question 9.

We additionally note the following from the petitioner's tax returns:

Tax year	Gross Receipts	Wages Paid
2004	$0	$10,000
2003	$0	$30,000

The petitioner additionally submitted the following documents for the foreign parent company: 2004 Accounting Statement with Balance Sheet, Statement of Loss and Gain; and 2003 Accounting Statement with Balance Sheet, Statement of Loss and Gain. The 2004 Statement of Loss and Gain listed net profit of 10,298,311.50 Yuan, which counsel provided a currency conversion dated March 31, 2005 (from http://www.xe.com/ucc) to show its U.S. dollar value of $1,244,283.35. The 2003 Statement of Loss and Gain listed a net profit of 11,465,910.27 Yuan, equivalent to $1,385,357.33 in U.S. dollars (the currency conversion for 2003 figures is also dated March 31, 2005 from http://www.xe.com/ucc).

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The statements submitted did not contain an accompanying accountant's report to detail how the statements were prepared, and the documentation did not contain any evidence that the statements were audited. As such, the statements would represent the unsupported representations of management, which are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel contends that the petitioner can pay the proffered wage based on the assets of the foreign parent company. Counsel provides that the petitioner is 90% owned by [redacted] and 10% owned by the petitioner's president. Counsel further provides that the foreign parent has been in business since 1990, and has assets of approximately $7.25 million. Further, the foreign parent has been responsible for paying the beneficiary's salary, and will subsidize the petitioner to guarantee payment of the beneficiary's salary. In support, counsel cites to *In Re X,* EAC942495187 (Eastern Service Center, November 3, 1995), where the AAO provided, "when assessing the financial capability of the prospective United States employer to pay the

proffered wage, the assets of the foreign parent company must be considered. There is nothing in the Act or the regulations which preclude the petitioner from establishing its ability to pay through its parent."[5]

Counsel, however has not provided documentation to evidence her assertions. 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). 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)).

We note that in *In Re:* EAC9604153027, (VSC June 24, 1997), the AAO found that "absent sufficient documentary evidence such as stock certificates, articles of incorporation, by-laws, the . . . annual report of the corporate group, etc., the petitioner has not established that a relationship exists" between the petitioner and the foreign parent. In the present case, the petitioner has provided only an informal corporate organization chart, which lists that the petitioner is related to the foreign company, but has not provided any official documentary evidence to exhibit the present relationship between the two companies.

In another case where the AAO considered the assets of the foreign parent, *In Re:* EAC9719752397, (VSC April 2, 1998), the AAO accepted that the annual report of the parent company can be used to represent the financial resources of the petitioner. Further, the beneficiary's services were to be rendered to and controlled by the petitioning entity. Here, the petitioner has not provided an annual report, or other regulatory prescribed evidence for the foreign parent.

Additionally, *In Re:* EAC9719752397 provides that, "When assessing the financial capacity of the prospective United States employer (petitioning entity), to pay the proffered wage, the U.S. and its foreign parent organization must be analyzed as a whole." In reviewing the U.S. entity, and the foreign parent as a whole, based on the federal tax returns submitted, the U.S. company does not appear to sell or produce anything, and does not appear to be more than a shell corporation.[6] Further, the petitioner has not established by documentation its relationship to the parent, and the asserted parent has not provided an annual report, or audited financial statement. Additionally, we note that none of the AAO decisions referenced are binding precedent. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Accordingly, 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. 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.

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[5] The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

[6] Corporate records available at: http:www.secretary.state.nc.us/corporations/Corp.aspx?Pitemld=4734720 accessed as of April 9, 2007 exhibit that the petitioner's status is "current-active," and is registered as a "domestic" corporation.

ORDER: The appeal is dismissed.