U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 27 2007

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IN RE: Petitioner: [redacted]
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:

[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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and development corporation. It seeks to employ the beneficiary[1] permanently in the United States as a computer programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

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.

As set forth in the director's denial dated , the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications

[1] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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).

Here, the Form ETA 750 was accepted on March 12, 2001.[2] The proffered wage as stated on the Form ETA 750 is $60,000.00 per year.

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.[3]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with a new Part 750B for the beneficiary herein; a letter from the petitioner dated October 25, 2004; CIS Forms I-797A; U.S. Internal Revenue Service Form 1120 tax returns for 2002, 2003, 2004 and 2005; an accountant's compilation report for the period ended May 31, 2005; 11 bank account statements for portions of 2004 and 2005; a Wage and Tax Statement (W-2) issued to the beneficiary from another employer; an earnings statement from the petitioner; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

As a preface to the following discussion, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in and to currently employ workers. According to the tax returns in the record, the petitioner's fiscal year is not based on a calendar year, but it begins July 1st and ends June 30th of each reporting year. On the Form ETA 750B, signed by the beneficiary on October 25, 2004, the beneficiary did not claim to have worked for the petitioner.

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[2] It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[3] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

On appeal, the petitioner asserts that the petitioner's payment of wages to its employees from 2001 to present, as well as the total gross earnings of the petitioner for the period 2001 to 2004 both evidence the ability to pay the proffered wage.

Further, counsel states that when petitioners employ the beneficiary at the offered wage that this is evidence of the ability to pay the proffered wage, and, cites non-precedent AAO cases as well as a reference found in "NSC Liaison Questions" in support of this proposition.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate it has established its continuing ability to pay the proffered wage beginning on the priority date. An earnings statement for the pay period June 15, 2005 to June 30, 2005 was initially submitted into evidence. For the period June 15, 2005 to June 30, 2005, the petitioner paid the beneficiary $4,000.00 that is also the "gross pay year to date." Counsel urges Citizenship and Immigration Services (CIS) and the AAO to consider the wage rate paid for 15 days as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

Upon review of a record of proceeding the AAO may make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, the record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage. In this instance a 15 day period, four years after the priority date is insufficient evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contention does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth above. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is March 12, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005 when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in years 2001 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Accompanying the appeal, counsel submits a legal statement filed September 19, 2005, and additional evidence that includes copies of the following documents: 12 Employer's Quarterly State reports of wages paid to each employee from September 30, 2001 to June 30, 2005; approximately 73 Automatic Data Processing copies of "Annual Statement of Deposits and Filings;" the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2000, 2001, 2002, and 2004; and, approximately 35 earnings statements of an employee who is not the beneficiary.

Counsel has introduced the earnings of another worker as evidence of the petitioner's ability to pay the proffered wage. Although counsel has not expressly indicated, it appears that the beneficiary was employed after that other worker resigned. Counsel asserts that the other worker's wages paid since 2001 are evidence of the petitioner's ability to pay the proffered wage. In general, wages already paid to others are not available to prove the ability to

pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.[4] Actually, since the petitioner had employed this other worker, from the priority date, should the petitioner have also employed the beneficiary, then, in that case that would have been an additional wage expense. Further, since no tax return was submitted for 2005, it is not provided that with the resignation of the other worker, sufficient funds would have been available to employ the beneficiary at the same former wage rate.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). *See also* 8 CFR § 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, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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 instant case, the petitioner has established that it employed and paid the beneficiary. An earnings statement for the pay period June 15, 2005 to June 30, 2005 was initially submitted into evidence. For the period June 15, 2005 to June 30, 2005, the petitioner paid the beneficiary $4,000.00 that is also the "gross pay year to date."

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, without consideration of depreciation or other expenses. 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).

Counsel contends that the total gross earnings of the petitioner for the period 2001 to 2004 evidence the ability to pay the proffered wage. Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

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[4] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

- In tax year 2000,[5] the Form 1120 stated net income[6] of $38,728.00.
- In tax year 2001, the Form 1120 stated net income of $28,693.00.
- In tax year 2002, the Form 1120 stated a loss of <$24,590.00>.[7]
- In tax year 2003, the Form 1120 stated a loss of <$2,272.00>.
- In tax year 2004, the Form 1120 stated net income of $11,548.00.

Since the proffered wage is $60,000.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for tax years 2000, 2001, 2002, 2003 and 2004.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 during tax years 2000, 2001, 2002, 2003 and 2004 were $1,951.00, $27,131.00, <$490.00>, $1,371.00 and $2,710.00.

Therefore, since the proffered wage was $60,000.00 per year, the petitioner did not have sufficient net current assets to pay the proffered wage for the years for which tax returns were submitted.

Counsel refers to a decision issued by the AAO concerning the "ability to pay and actual payments made to the beneficiary for a 15 day period according to the record of proceeding, but does not provide published citations. 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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[5] Again, the tax reporting year is 2000/2001.

[6] IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, which will be referred to as net income in these proceedings.

[7] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

[8] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.