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

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PUBLIC COPY

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 29 2007
EAC-05-072-50218

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

The petitioner is a software development and computer consultancy company, and seeks to employ the beneficiary permanently in the United States as a software engineer. 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 July 18, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

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 professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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

[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).

> 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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on February 28, 2002. The proffered wage as stated on Form ETA 750 is $93,371 per year. The labor certification was approved on September 28, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on December 30, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1999; gross annual income: $115,092; net annual income: not listed; and current number of employees: 2.

On March 30, 2005, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay for the years 2002, 2003, and 2004, as well as of the beneficiary's Forms W-2. The petitioner responded to the RFE. Following review, the director denied the petition on July 18, 2005. Counsel appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on February 13, 2002, the beneficiary listed that he was employed with the petitioner from April 2001 to the present (date of signature). The petitioner submitted the following W-2 statements:

Year	Amount Paid
2004	$44,528.00
2003	$44,621.00
2002	$37,692.00

The W-2 statements would exhibit partial payment of the proffered wage to the beneficiary. However, as the proffered wage is $93,371 per year, the petitioner cannot establish its ability to pay the beneficiary from the priority date of 2002 until the beneficiary reaches permanent residence based on prior wage payments alone, and would be deficient by the following amounts: 2004: deficient $48,843; 2003: deficient $49,110; and 2002: deficient $55,679. The petitioner must show that it can pay the difference between the wages paid and the proffered wage.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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 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. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

Tax year	Net income or (loss)
2003	$5,311[2]
2002	$4,094

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to the petitioner's net income.

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.[3] 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, or, if filed on Form 1120-A, on Part III. 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, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2003	-$11,923
2002	$4,381

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets in 2002 or 2003 either.

The petitioner also submitted its bank statements for the time period ending January 31, 2002 to November 30, 2004. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120 Schedule L and included in net current assets analysis above. The petitioner did not provide evidence to show

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[2] The petitioner files its tax returns based on a tax year, which begins on October 1, and ends on September 30; for example, the petitioner's 2003 federal tax return would cover the time period October 1, 2003, to September 30, 2004. Accordingly, the petitioner's 2004 tax return, year ending September 30, 2005, was not available at the time of filing the appeal. We further note that based on the February 28, 2002 priority date, that the petitioner should have submitted its 2001 federal tax return, since the petitioner's 2001 tax year would encompass part of the calendar year 2002, from January to October 2002. The petitioner would be required to demonstrate that it could pay the proffered wage in 2002, the year of the priority date.

[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.

that the funds listed in the bank statements represent funds beyond those listed on the petitioner's Forms 1120 federal tax returns.

If we were to examine the bank statements, the statements reflect a low balance of $8,717 as of February 27, 2004 and a high balance of $29,063 as of January 31, 2003, with significant variance in the other months, and days in between. The petitioner additionally submitted a letter from Bank of America[4] dated May 16, 2005, which provided that the petitioner had an account with Bank of America opened on January 23, 2003, and had a current balance of $66,870, and a balance of $16,154 for the preceding six months. As noted above, the petitioner did not provide any evidence to show that the amounts listed on the bank statements represent funds not accounted for on Schedule L of the petitioner's Forms 1120 tax returns.

The petitioner additionally submitted an accountant "reviewed" balance sheet, statement of income and retained earnings for the six month time period preceding March 31, 2005. The statement showed that the petitioner's total assets equaled the petitioner's liabilities of $96,842. 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 accountant's report that accompanied those financial statements makes clear that they are reviewed statements, and the representations of management, as opposed to audited statements. As such, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence to demonstrate that the petitioner can pay the proffered wage.

On appeal, counsel contends that the petitioner can demonstrate its ability to pay based on the petitioner's federal income taxes submitted, the petitioner's bank statements for the years 2002, 2003, and 2004, the petitioner's balance sheet, and the beneficiary's W-2 Forms.

As demonstrated above, the wages paid to the beneficiary were insufficient standing alone or combined with the petitioner's net income or net current assets to pay the beneficiary the proffered wage. The balance sheet was not audited in accordance with the regulations, and the petitioner did not demonstrate that funds listed on the bank statements represented funds in addition to the cash listed on the petitioner's tax return. Further, CIS records reflect that the petitioner has filed an I-140 petition for a second beneficiary. The petitioner would be required to demonstrate its ability to pay for all sponsored individuals. Based on the petitioner's net income, net current assets, and other information supplied, it is not clear that the petitioner can pay the proffered wage for either one, or both sponsored individuals.

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.

ORDER: The appeal is dismissed.

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[4] Based on the statements provided it would appear that one of the banks the petitioner had an account with became the Bank of America, or merged with Bank of America, so that the funds referenced in the Bank of America letter are not separate funds than those listed in the bank statements.