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

PUBLIC COPY

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[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 18 2007
WAC-06-117-50534

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 ("director"), denied the immigrant visa petition.[1] The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be sustained.

The petitioner is in the business of communications engineering, and seeks to employ the beneficiary permanently in the United States as an industrial engineer ("Optoelectronics Packaging 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 1, 2006 decision, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

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).[2]

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 worker or 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 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

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[1] The petitioner initially filed its petition with the California Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

[2] 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).

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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on December 12, 2002. The proffered wage as stated on Form ETA 750 is $74,000 per year based on a 40 hour work week. The labor certification was approved on July 7, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 2, 2006. The petitioner represented the following information on the I-140 petition: date established: 2000; gross annual income: $52 million; net annual income: not listed; and current number of employees: 25.

On April 27, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional documentation regarding the petitioner's ability to pay, including the petitioner's federal tax returns and all schedules for the years 2002, 2003, 2004, and 2005. Further, the RFE requested that the petitioner provide Forms W-2 if the petitioner employed the beneficiary. The RFE additionally requested that the petitioner submit an educational evaluation to demonstrate that the beneficiary's education was equivalent to a U.S. Bachelor's degree as required on the certified Form ETA 750.[3] The petitioner responded. Following review, the director denied the petition on July 1, 2006 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner 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 October 24, 2002, the beneficiary listed that he has been employed with the petitioner since December 2001. The petitioner provided the following W-2 Forms as evidence that it employed the beneficiary:

Year	W-2 Wages Paid	Remainder amount required to show ability to pay
2005	$74,813.30	paid $813 above proffered wage
2004	$67,827.42	$6,172.59
2003	$61,194.36	$12,805.64
2002	$60,996.00	$13,004
2001	employed by different entity	$74,000

Based on the wages paid, the petitioner can demonstrate its ability to pay in 2005, but the wages paid in each other year are less than the proffered wage. The petitioner must demonstrate that it can pay the difference between the proffered wage and the wages paid in the other years, and that it can pay the full proffered wage in 2001. Accordingly, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payment alone.

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

[3] The petitioner provided an evaluation that the beneficiary completed a four-year program of education, which resulted in the attainment of a bachelor's degree in the field of engineering physics, and was the equivalent of a U.S. Bachelor's degree. The beneficiary's education met the requirements as listed on the certified Form ETA 750.

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 the Citizenship and Immigration Services ("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)
2004	-$12,397,096
2003	-$11,201,724
2002	-$10,088,686
2001	not provided

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.

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.[4] 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
2004	$3,837,491
2003	$10,342,239
2002	$6,476,379
2001	not provided

Based on the petitioner's net current assets, the petitioner can demonstrate its ability to pay the proffered wage in each of the foregoing years where tax returns were provided. We note that the director's decision had discussed net current assets, but appears to have miscalculated the totals.

[4]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.

This would leave only the petitioner's ability to pay in 2001 unaccounted for. While the petitioner did not provide its 2001 federal tax return, the petitioner did submit audited financial statements for the years ending December 31, 2002 and 2001, December 2003 and 2002, as well as from incorporation, February 25, 2000 to December 31, 2002, and December 31, 2003. Petitioners are allowed to submit audited financial statements to show a petitioner's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2).

The audited financial statement shows that the petitioner had $17,513,273 available in the form of cash and cash equivalents at the end of the year for the year ending December 31, 2001.

Further, we note that the petitioner's tax returns exhibit the following amounts in salaries paid:

Tax year	Salaries paid
2004	$5,082,920
2003	$4,412,226
2002	$3,289,217
2001	not provided

On appeal, counsel provides that CIS misstated financial information from the tax returns, and that the petitioner's tax returns would show that the petitioner has the ability to pay the proffered wage. We agree.

Further, counsel provides that the petitioner is a development stage company, and, therefore, does not show consistent profits. Instead, the petitioner invests its money into research and operations.

We note that the petitioner's tax returns do not reflect any gross receipts, which would appear to reflect the petitioner's development stage status. However, the petitioner can demonstrate its ability to pay based on its net current assets. A review of the company's website shows that received Series 3 Funding in the amount of $23 million in March 2007. *See* http://www.xponetinc.com/news/index.asp, accessed September 13, 2007.

Accordingly, based on the foregoing, the petitioner has overcome the basis for the petition's denial and has established its ability to pay the beneficiary the proffered. 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 been met.

ORDER: The appeal is sustained. The petition is approved.