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: SEP 07 2007

SRC 06 071 51869

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:

SELF-REPRESENTED

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.

Kevan S. Bowles for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a car repair center. It seeks to employ the beneficiary permanently in the United States as an engine specialist. As required by statute, the petition is accompanied by a Form ETA 750, Part A, but not Part B, Application for Alien Employment Certification, approved by the U.S. Department of Labor.[1] 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 March 14, 2006, 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 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).

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[1] The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(1)(3)(i) require that any Form I-140 petition filed under the preference category of Section 203(b)(3) of the Act be accompanied by a labor certification. The petition should have been rejected by the director since it was submitted without a complete labor certification. If this matter is pursued, a complete labor certification must be submitted.

Here, the Form ETA 750 was accepted on April 30, 2001.[2] The proffered wage as stated on the Form ETA 750 is $12.50 per hour ($26,000.00 per year). The Form ETA 750 states that the position requires three years of experience in the proffered position. According to the labor certificate on the job training will be provided to the applicant.

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, part A, but not Part B, Application for Alien Employment Certification, approved by the U.S. Department of Labor; two pages from the http://sunbiz.org website accessed December 28, 2005 providing corporate information concerning [redacted] compiled unaudited financial statements of the petitioner as of January 31, 2004, February 29, 2004, March 31, 2004, April 30, 2004, May 31, 2004, June 30, 2004, August 31, 2004, September 30, 2004, October 31, 2004, November 30, 2004 and December 31, 2004; the petitioner's general accounting ledger statements for the periods January 1, 2004 to January 31, 2004, February 1, 2004 to February 29, 2004, March 1, 2004 to March 31, 2004, September 1, 2004 to September 30, 2004, October 1, 2004 to October 31, 2004, November 1, 2004 to November 30, 2004, and December 1, 2004 to December 31, 2004; the petitioner's unaudited balance sheet and income statements as of October 31, 2004, November 30, 2004, and December 31, 2004; the petitioner's unaudited financial statements for the period October to December 2003 that includes unaudited balance sheets, income statements and general ledger statements; the petitioner's compiled financial statements for the periods June 30, 2002 to August 31, 2002 that includes unaudited balance sheets, income statements and general ledger statements; the petitioner's compiled financial statements for the periods September 1, 2002 to December 31, 2002 that includes unaudited balance sheets, income statements and general ledger statements; the petitioner's compiled financial statements for the period January 1, 2001 to May 31, 2001 that includes unaudited balance sheets, income statements and general ledger statements; the petitioner's balance sheet and income statements for the period January 1, 2001 to April 30, 2001 along with the petitioner's unaudited general ledger trial balances for the same period; and, the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2000 and 2005.

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 1989 and to currently employ 2 workers and subcontractors. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. There was no Form ETA 750B in the record of proceeding.

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[2] It has been approximately six years since the Application for Alien Employment Certification 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 "... taxes demonstrate low profits, but the main reason is because they do need and depend on the ability to hire ... [the beneficiary] so that jobs given to outside sources can be performed by the mechanics and engine specialists of [redacted]

Accompanying the appeal, the petitioner submits additional evidence that includes the following documents: the petitioner's internally generated income summaries for 2002, 2003, 2004 and 2005; and the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2002, 2003, 2004 and 2005.[4]

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 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, 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 not established that it employed and paid the beneficiary the full proffered wage from the priority 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). 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:

- In 2000,[5] the Form 1120 stated net income of <$987.00>.[6]

[4] Since the priority date is April 30, 2001, because the petitioner failed to submit its tax return for the year 2001, the AAO is unable to determine if the petitioner had the ability to pay the proffered wage based on its net income or net current assets.

[5] Although the tax return for the year 2000 was requested by the director in her request for evidence dated January 14, 2006, such evidence is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

- In 2002, the Form 1120 stated net income of <$29,393.00>.
- In 2003, the Form 1120 stated net income of $81.00.
- In 2004, the Form 1120 stated net income of $1,082.00.
- In 2005, the Form 1120 stated net income of <$17,681.00>.

Since the proffered wage is $26,000.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for years 2000, 2002, 2003, 2004 and 2005.

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.[7] 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 2000 ($2,295.00), 2003 <$2,099.00>and 2005 <$19,892.00>.[8]

Therefore, for the years in which tax returns were submitted including Schedule L information, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner stated in the statement accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

On appeal, the petitioner submitted compiled unaudited financial statements. 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

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

[7] 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.

[8] The petitioner's Schedule L statements from its tax returns for 2002 and 2004 are missing from the evidence submitted. Further, the request for evidence issued January 14, 2006, specifically requested evidence of the petitioner's ability to pay for the period 2000 to 2005 in the form of annual reports, filed U.S. federal tax returns or audited financial statements but the petitioner has failed to provide evidence for tax year 2001. *See* 8 C.F.R. § 103.2(b)(14).

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 accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner asserts on the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date, that is by employing the beneficiary and replacing existing or former subcontractors. The petitioner cites no legal precedent for the contention, and, according to regulation,[9] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Compensation already paid to others is 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. Moreover, there is no evidence that the subcontractor expenses noted by the petitioner on its tax returns involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the subcontractors who performed the duties of the proffered position. If those subcontractors performed other kinds of work, then the beneficiary could not have replaced them.

Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a engine specialist will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Against the projection of 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 projections, even beyond the information presented on appeal.

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.

[9] 8 C.F.R. § 204.5(g)(2).