U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 23 2008

SRC 06 800 21293

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tool manufacturing business. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a machinist (CNC machine set-up and operator). The director determined that the petitioner had not submitted any of the evidence regulatorily described at 8 C.F.R. § 204.5(g)(2) to the record with regard to the petitioner's ability to pay the proffered wage. The director accordingly denied the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. Counsel submitted the appeal to the record on February 20, 2007. On appeal, counsel stated that the petitioner disagreed with the director's determination with regard to its ability to pay the proffered wage and would submit copies of the petitioner's corporate income tax returns and other financial documentation as evidence of the petitioner's financial standing. Counsel stated that he would submit a brief and/or evidence to the Administrative Appeals Office (AAO) within 30 days. Counsel dated the appeal February 19, 2007. The AAO received no further materials from counsel.

On October 17, 2008, the AAO faxed counsel at the address noted on the Form G-28 with regard to any appeal materials that might have been sent to the AAO. This fax noted that the AAO had not received any further correspondence from the petitioner, and the AAO was requesting a copy of any additional evidence or a brief be sent to the AAO within five business days, along with evidence of the date it was originally filed with the AAO. On October 24, 2008, counsel submits further evidence.

As set forth in the director's January 18, 2007 denial, the primary 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 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. . . . In appropriate cases,

> additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [United States Citizenship and Immigration Services (USCIS)].

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).

Here, the Form ETA 750 was accepted on March 27, 2005. The proffered wage as stated on the Form ETA 750 is $16.68 an hour or $34,694.40 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered, or two years as a machinist.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1].

On appeal, counsel submits a statement and copies of the petitioner's incomplete Forms 1120, U.S. Corporation Income Tax Return, for tax years 2005, 2006, and 2007. The record also contains copies of the petitioner's income statement and balance sheet for the eight months ending February 28, 2006; for the six months ending March 31, 2005; and for the six months ending December 31, 2005. The petitioner also submitted copies of the petitioner's Forms 941, IRS Form 941, Employer's Quarterly Federal Tax Form, for the first and second quarter of tax year 2005.

The AAO notes that the petitioner's 2005 Form 1120 was prepared on August 27, 2006, prior to the petitioner's response to the director's NOID dated November 29, 2006.[2] Neither the petitioner nor counsel provides any clarification as to why this document was not submitted to the record previously. The AAO notes that the purpose of the director's Notice of Intent to Deny (NOID) was to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Specifically,

---

[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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The petitioner's 2005 Form 1120 has a handwritten note on the document that states "mailed September 6, 2006." This date is also prior to the director's denial dated January 18, 2007.

the director requested that the petitioner submit copies of its federal tax returns, annual reports or audited financial statements. In response the petitioner submitted unaudited balance and income statements and DE 941 forms that the director determined were not sufficient evidence to establish the petitioner's ability to pay the proffered wage.

The petitioner provided no explanation in its response to the director's NOID why it did not submit its 2005 tax return. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the petitioner's Form 1120 for tax year 2005 submitted on appeal. Further, even if we were to consider the petitioner's 2005 tax return, the petitioner failed to submit a complete copy, including all relevant schedules and attachments.

The dates of preparation for the remaining tax returns submitted on appeal are September 13, 2007, and August 15, 2008. The petitioner files its tax return from July 1 of one year to June 30 of the following year.[3] Thus, the petitioner's tax return for tax year 2007 runs from July 1, 2007 to June 30, 2008. As the petitioner's tax returns for tax years 2006 and 2007 were not available at the time of the petitioner's response to the director's NOID, the returns are viewed as new evidence, and are accepted into the record on appeal.

On appeal, counsel states that most of the documentation submitted on appeal was previously submitted to the AAO. Counsel states that he also was submitting a copy of the petitioner's 2007 Form 1120 that was not originally forwarded due to time constraints. Counsel notes that the petitioner's income tax returns clearly indicate that the petitioner has had and continues to have the ability to pay the proffered wage.

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 October 5, 1982, to have a gross annual income of $5,800,000, and to currently employ 53 workers. On the Form ETA 750B, signed by the beneficiary on March 25, 2005, the beneficiary did not claim to have worked for the petitioner.

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

[3] Therefore to establish the petitioner's ability to pay the proffered wage from March 2005, the petitioner would need to submit its 2004 federal tax return.

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, USCIS 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 (Reg. Comm. 1967).

In response to the director's NOID, the petitioner submitted copies of its unaudited financial reports. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The AAO does accept the petitioner's Forms 941 for 2005 as evidence of salaries paid to other employees by the petitioner; however, they do not establish the petitioner's ability to pay the beneficiary's wages. Documents, such as Forms 941 can provide little evidentiary weight in these proceedings without any documents described at 8 C.F.R. § 204.5(g)(2) submitted to the record.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 during the relevant period of time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2005 to 2007.[4]

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, USCIS 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

[4] It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's NOID dated January 3, 2007. At this time, the petitioner's 2005 income tax return would have been available, while the petitioner's 2006 and 2007 tax returns would not have been available. Since the petitioner has submitted its tax returns for 2006 and 2007, the AAO will comment on them if applicable. The AAO notes that in order to examine the petitioner's ability to pay the proffered wage as of the March 2005 priority year, the petitioner would have had to also submit its 2004 tax return, which is not found in the record.

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 and wage expense 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.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537.

As stated previously, the AAO does not accept the petitioner's 2005 tax return submitted to the record on appeal.[5] Thus the petitioner cannot establish its ability to pay the proffered wage as of the 2005 priority date based on its net income for tax year 2005. The petitioner's tax returns for tax years 2006 and 2007 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $34,694.40 per year from the priority date:

- In 2006, the Form 1120 stated a net income[6] of $17,032.
- In 2007, the Form 1120 stated a net income of $59,428.

Therefore, for the year 2007, the petitioner had sufficient net income to pay the proffered wage. However, the petitioner cannot establish its ability to pay the proffered wage based on its net income as of the March 27, 2005 priority date since it failed to provide its 2004 tax return. Further, the

[5] For illustrative purposes only, the AAO notes that the petitioner's net income for tax year 2005 is $34,909, sufficient to pay the proffered wage of $34,694.40.

[6] The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

petitioner cannot establish its ability to pay for tax year 2005, as it failed to submit its entire 2005 tax return in response to the director's NOID. Additionally, the petitioner has not established that it has sufficient net income to pay the proffered wage based on its net income in tax year 2006.

If the net income the petitioner demonstrates it had available during that 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, USCIS 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, USCIS 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. 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. As stated previously, the petitioner's tax returns submitted on appeal for tax years 2006 and 2007 are incomplete. In particular, they do not contain their respective Schedules L. Thus the petitioner cannot establish its ability to pay the proffered wage in tax year 2006 based on its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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, except for tax year 2007. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had 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.

---

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