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

U.S. Citizenship and Immigration Services

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File: WAC-04-080-53786 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2008

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 lists that its business is in the "professional floor specialist" field and seeks to employ the beneficiary permanently in the United States as a carpet installer ("Custom Floor Covering Layer").[1] As required by statute, 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 February 11, 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.[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 skilled worker. 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 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's tax return identifies that it provides "janitorial services." Further, quarterly wage reports submitted to the state workforce agency identify the employer's full business name as [redacted] Inc." No further information was submitted to evidence that the petitioner's business relates to custom flooring as opposed to "janitorial services."

[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 April 5, 2001. The proffered wage as stated on Form ETA 750 for the position of a custom floor covering layer is $18.83 per hour, 40 hours per week, which is equivalent to $39,166.40 per year. The labor certification was approved on October 7, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on January 29, 2004.

The petitioner listed the following information related the petitioning entity: established: 1990; gross annual income: $2,001,240; net annual income: not listed; and current number of employees: 103; beneficiary's salary: $753.20 per week.

On November 15, 2004, the Service Center issued a Notice of Intent to Deny ("NOID"), which noted that the petitioner had not submitted any documentation related to the petitioner's ability to pay. Further, the NOID raised the issue that the petitioner had filed multiple petitions since the year 2002, four of which were approved in 2002, and four additional petitions were pending. The Service Center requested that the petitioner submit evidence to demonstrate its ability to pay all the petitioned for wages. The NOID requested that the petitioner submit: a list of petitions and proof of ability to pay for petitions filed from 2001 to 2003, as well as a list of approved petitioned for beneficiaries and whether they remained employed; the petitioner's state quarterly Employment Development Department (EDD) Wage Reports; and additional evidence to support the beneficiary's claimed foreign work experience.

The petitioner submitted federal tax returns for the years 2001, 2002, and 2003, as well as quarterly EDD Reports for the dates September 30, 2003 through June 30, 2004, and a list of employees with I-140 petitions filed, and approved. Following review of the response, the director found that the petitioner had not demonstrated its continuing ability to pay the proffered wage, and denied the case. The petitioner appealed.

Examining the information on appeal, we shall review the petitioner's ability to pay based on wages paid, net income, and net current assets, and then consider the petitioner's additional arguments raised. Regarding the petitioner's ability to pay, first, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary does not list that he was employed with the petitioner. The Quarterly EDD reports further do not reflect that the beneficiary has been paid. A list that the petitioner submitted to CIS shows that Hugo Sanchez is "still working," however, the petitioner has not identified the beneficiary's date of hire, and further, the petitioner has not submitted any documentation to demonstrate wage payment to the beneficiary.

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. 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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $39,166.40 per year from the priority date. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Line 21 indicates ordinary income as follows:

Tax year	Net income or (loss)
2003	$142,800
2002	-$54,263
2001	$93,121

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in the year 2002 based on the above. And while the net income would allow for payment of the individual beneficiary's wages in 2001, and 2003, the petitioner's net income would not provide sufficient income to pay the proffered wages for all the sponsored beneficiaries in either 2001, or 2003.[3]

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 on the Forms 1120S. 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 evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due. The petitioner's federal tax returns demonstrate the following in net current assets:

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[3] On appeal, the petitioner indicates that each petitioned for beneficiary would be paid a proffered wage of $39,166.40. The company's net income in 2003 would allow for payment of the proffered wage to 3.6 beneficiaries, but not all the petitioned for beneficiaries. Similarly, in 2001, based on the net income, the petitioner would only be able to demonstrate payment to 2.37 beneficiaries. These numbers would be increased by the partial wage payments to each beneficiary noted on appeal. However, official verifiable documentation of the beneficiaries' wage payments was not provided for the years 2001 and 2002. Regardless of amounts paid, the petitioner would not be able to document that it could pay all the beneficiaries the proffered wages in the year 2002 in particular, based on the petitioner's negative net income, negative net current assets, and estimated partial wage payment.

[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.

Tax year	Net current assets
2003	-$190,766
2002	-$40,734
2001	-$100,258

Following this second analysis, the petitioner's federal tax returns show that the petitioner lacks the ability to pay the required wage in any year under the net current assets test.

On appeal, the petitioner notes that the payment of salaries utilizes a large part of the revenue generated from the petitioner's gross receipts. Further, the petitioner notes that the "volume of [redacted]. services orders [sic] increased strongly [during the years 2001, 2002, and 2003]. Since the alien workers whose petitions were approved could not attend the high increase of orders themselves, the company had to hire extra temporary employees to complete the orders on time. This measure taken by the company originated that the budget planned to cover the proffered wage for each of the petitioned for workers had to be spend [sic] to pay the wages of the temporary personnel." Critically, the petitioner continues "the six petitioned for workers were informed that the company needed to hire temporary employees to help with the completion of orders. They were also informed that **the company had to take the measure of paying them a portion of the proffered wage so that the company could be able to pay for the extra help . . . based in this understanding [sic], the petitioned for workers . . . agreed to receive a portion of the proffered wage per annum. Each of them signed an agreement with [redacted]. to receive the unpaid proffered wages as future payment."** [Emphasis added]. The petitioner lists six workers, four of whom were identified as having an approved I-140 petition,[5] who had agreed to "reduced wages," and presented a chart displaying the wages paid, and the proffered wage remaining unpaid for each year from 2001, 2002, and 2003. The petitioner additionally stated that it would provide the specified employees' W-2 Forms upon request.

First, we note that according to DOL, "the prevailing wage rate is defined as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment." *See* "Foreign Labor Certification, Prevailing Wage Determinations for Nonagricultural Programs, Frequently Asked Questions," August 1, 2005, http:/www/workforcesecurity.doleta.gov/foreign.wages.asp. Further, DOL as background provides, "the Immigration and Nationality Act (INA) requires that the hiring of a foreign worker will not adversely affect the wages and working conditions of U.S. workers working in the occupation in the area of intended employment. To comply with the statute, the Department's regulations require the wages offered to a foreign worker must be the prevailing wage rate for the occupational classification in the area of employment." *See* DOL FAQ's *supra.*

Wage requirements were put in place to protect U.S. workers from employers hiring workers at lower wages levels. The labor certification wage requirements also serve to benefit foreign workers and ensure that they are paid the market rate for the occupation in the intended area of employment. Wages are established by the petitioner submitting wage information, a job description, including requirements, hours, and location of employment to the state wage agency, which assesses the wage rate to be paid. The amount of the assessed proffered wage is then listed on the labor certification, and the DOL certifies the application at that wage

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[5] We note that the fact that CIS has approved other immigrant petitions that the petitioner filed on behalf of other beneficiaries is not binding on the AAO to approve the instant petition. If the prior immigrant petitions were approved based on the same record, the approvals would have been in error. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). *See also, Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

level. The petitioner is then required to pay the proffered wage at the time the beneficiary obtains permanent residence. As noted above in 8 C.F.R. § 204.5(g)(2), prior to I-140 petition approval, the petitioner must demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

In the information submitted, the petitioner has admitted that it does not have the ability to pay six of the petitioned for workers. Further, although the petitioner is not required to pay the proffered wage to the beneficiary until the time that the beneficiary obtains permanent residence, it would be a violation of the spirit of the policies and statutory provisions, as well as a circumvention of DOL and CIS intent to ask the beneficiary to agree to accept a wage lower than the proffered wage, even if the petitioner intends to pay the wage in the future.

The petitioner has submitted no further information to demonstrate its ability to pay the proffered wage, and based on the foregoing, has admitted its inability to pay the beneficiary, as well as six of its other petitioned for beneficiary's the proffered wage.

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.