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

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 07 027 53254 Office: NEBRASKA SERVICE CENTER Date: MAY 12 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:

[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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a kitchen manager. As required by statute, the petition is accompanied by an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner, through counsel, submits additional information asserting that the petitioner's ability to pay the proffered wage has been established.

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).

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) also provides 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 either 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 [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date of the petition is the date the Form ETA 750, Application for Alien Employment Certification was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). Here, that date is August 8, 2003. The beneficiary's salary as stated on the labor certification is $3,000, annualized to $36,000. Part B of the ETA 750, signed by the beneficiary on July 21, 2003, indicates that he has worked for the petitioner since

March 2002.

Part 5 of the visa petition, filed on November 6, 2006, claims that the petitioner was established on February 8, 1999, has nineteen employees, and reports a gross annual income of $612,149 and a net annual income of -$15,288.

The petitioner also provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2004 and 2005. The 2004 tax return indicates that the petitioner was incorporated on June 29, 2004. The return indicates that it covers the period from June 29, 2004 to December 31, 2004. The 2005 tax return indicates that it represents the calendar year of 2005. The tax returns contain the following information:

	2004	2005
Net income[1]	-$ 2,376	-$ 15,288
Current Assets (Sched. L)	$ 30,799	$ 27,578
Current Liabilities (Sched. L)	$ 82,794	$102,234
Net current assets	- $ 51,995	-$ 74,656

On item(s) 5 and 7 of Schedule K of both returns, it is indicated that the petitioner was 100% owned by a foreign person or entity. As an attached statement to the 2004 tax return, it is stated that on July 1, 2004, the petitioner received restaurant property and other fixed assets from [redacted] in exchange for stock.

As additional evidence of its ability to pay in this case, the petitioner submitted copies of the beneficiary's Wage and Tax Statements (W-2s) for 2003, 2004 and 2005. The amounts appearing on the W-2s are:

2003	$26,400
2004	$12,100
2005	$26,400

It must be noted that the 2003 W-2 appears to have been issued by '[redacted]." The name appearing on the ETA 750 is [redacted] This name is different from the visa petitioner's name, [redacted]" Moreover, the employer identification number is not the same as the one used in the tax returns and an additional name and tax number has been typed in as [redacted] as a payor. Therefore we will not consider this W-2 because the record does not clearly establish that the suggested predecessor in interest of [redacted] or [redacted] became the corporate visa petitioner. Additionally, no income tax return or audited financial statement from 2003 was submitted. It is noted that if a employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See Matter*

[1] For the purpose of this review, net income will be found on line 28, page one of the petitioner's Form 1120 (taxable income before net operating loss deduction and special deductions).

of United Investment Group, Int. Dec. 2990 (Comm. 1985). In *Matter of United Investment Group,* the original employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired. Conversely, if a successorship-in-interest has occurred, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

There are two W-2s for 2004. One is for $14,300 issued by individually to the beneficiary and the other was issued by the visa petitioner for $12,100. As noted above, absent evidence establishing the circumstances of the change of entities from the ETA 750 petitioner to the visa petitioner, only the one W-2 will be considered.

As noted in the above table, besides net income, the corporate tax returns show the petitioner's current assets and current liabilities on Schedule L. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the tax year. Besides net income, CIS will consider net current assets as an alternative method of reviewing a petitioner's ability to pay the proffered salary because it reflects a petitioner's liquidity during a given period. It represents cash or cash equivalent assets that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Current assets are listed on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a petitioner's net current assets exceed the proffered wage during a designated period, it is deemed to have demonstrated its ability to pay during that period of time.

On July 3, 2007, the director requested additional evidence of the petitioner's continuing ability to pay the proffered wage as of August 8, 2003, advising the petitioner that such evidence may include audited profit/loss statements and U.S. tax returns. The director further instructed the petitioner to submit copies of its U.S. tax returns for 2006, as well as copies of the beneficiary's 2006 W-2.

In response, the petitioner provided a copy of its 2006 corporate tax return. It reflects:

	2006
Net income	$ 7,988
Current Assets (Sched. L)	$ 58,140
Current Liabilities (Sched. L)	$118,894
Net current assets	- $ 60,754

The petitioner additionally submitted a copy of the beneficiary's 2006 W-2 reflecting that the petitioner paid him $26,400 in wages. The petitioner also provided copies of checks issued to the beneficiary for $1,000 from September 2006 to April 2007, and from June to July 2007 as payment for apartment rental, which counsel asserts in his transmittal letter should be included as part of the wages paid to the beneficiary.

The director denied the petition, concluding that the petitioner had failed to establish its continuing ability to pay the beneficiary's proffered salary. The director noted the level of wages paid to the beneficiary and concluded that neither the petitioner's net income, nor its net current assets was sufficient to cover the beneficiary's proposed salary of $36,000 per year.

On appeal, counsel submits copies of previously submitted tax returns as well as copies of the checks for apartment rental that were previously provided except they now show that they have been negotiated. Counsel asserts that petitioner has paid more than the beneficiary's proffered salary because his compensation included payment of the apartment rental. Counsel also asserts that the petitioner's net assets have been greater than the proffered wage and therefore the petitioner's ability to pay the proffered wage has been established.

Counsel's assertions are not persuasive. It is noted that he cites no legal authority obliging CIS to include such rental expenses paid as part of the beneficiary's wages. CIS will not consider such expenses, shown to be paid in various months of 2006 and 2007 as part of the beneficiary's compensation paid by the petitioner. The proposed salary on an approved labor certification is expressed as U.S. currency as payment for performing the certified job and not as a formula including the value of other expenses paid on behalf of a beneficiary. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. §656.40 (2003). Additionally, the regulation at 20 C.F.R. § 656.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis." Moreover, as noted above, no record of such monies paid by the petitioner is reported as compensation or as any other kind of income on the beneficiary's W-2s.

In examining the petitioner's ability to pay the proffered salary, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage.

In this case, as noted above, the record indicates that the visa petitioner paid the beneficiary $12,100 in 2004 and $26,400 in 2005 and 2006. The difference between these amounts and the proffered wage is $23,900 in 2004 and $9,600 in 2005 and 2006.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*; *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007). 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.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. Total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets as part of the petitioner's total assets such as the petitioner's building or equipment, as suggested to be considered on appeal, 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, a petitioner's current assets must logically be balanced by the petitioner's current liabilities Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. In this regard, on appeal, counsel's calculation of total assets minus current liabilities is not persuasive.

In this matter, the petitioner has not established its ability to pay the proffered wage in 2003, because it has not submitted the documentation required by the regulation at 8 C.F.R. § 204.5(g)(2) consisting of an income tax return, audited financial statement or annual report. As the record does not clearly establish that the visa petitioner was a successor-in-interest to employer named on the ETA 750 or to the individual, [redacted], the W-2 for 2003 will not be considered. Even if it were considered, the $9,600 difference between the W-2 and the proffered wage was not shown to have been covered by net income or net current assets reflected on a federal tax return or audited financial statement.

In 2004, neither the petitioner's net income of -$2,376, nor its net current assets of -$51,995 could cover the $23,900 shortfall between the proffered wage of $36,000 and the wages paid by the petitioner to the beneficiary. The petitioner's ability to pay the certified salary has not been demonstrated in this year.

The $9,600 shortfall between the beneficiary's actual wages of $26,400 paid in 2005 and the proffered wage of $36,000 cannot be covered by either the petitioner's net income of -$15,288, nor the -$74,656 in net current assets. The petitioner's ability to pay the proffered wage has not been established for this year.

Similarly in 2006, neither the petitioner's net income of $7,988 nor its net current assets of -$60,754 was sufficient to cover the $9,600 shortfall between the proffered wage and the actual wages paid to the beneficiary or demonstrate the petitioner's ability to pay the proffered wage in this year.

Based on the evidence contained in the record and after consideration of the assertions and evidence presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

Beyond the decision of the director, it is noted that that the only officer listed in Schedule E of the petitioner's corporate tax returns for 2004 and 2005 is the beneficiary. No officers are listed in Schedule E of the 2006 tax

return. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Further investigation may be merited in view of these facts, including consultation with DOL if future employment-based petitions are filed involving this petitioner and beneficiary.

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