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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 24 2009

EAC 06 123 51955

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition[1] 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's business is a hotel. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by a draft copy of Form ETA 750, Application for Alien Employment Certification.[2] 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 demonstrated that the appeal was properly filed, timely and made 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 November 7, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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[1] The petitioner has filed multiple employment based petitions for the beneficiary, which were all denied.

[2] The petition must be submitted with the original Application for Alien Employment Certification Form ETA 750 approved by the U.S. Department of Labor (DOL). The draft submitted is not a copy of the labor certification. If this matter is pursued the original labor certification must be submitted. *See* 8 C.F.R. § 204.5(g)(1).

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 DOL 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 January 21, 1997.[3] The proffered wage as stated on the Form ETA 750 is $43,825.00 per year.

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.[4]

Relevant evidence in the record includes a copy of a draft of Form ETA 750, Application for Alien Employment Certification; an "Expert Report of [petitioner's accountant] February 15, 2006;" a Form G-235 prepared by the beneficiary and dated May 24, 2006; a support letter dated March 11, 2006, from the petitioner; and three earning statements from the petitioner to the beneficiary for the time period April 3, 2006, to May 1, 2006.

In the appeal filed in this matter, counsel indicated he would submit a brief and/or evidence to the AAO within 30 days. On November 28, 2008, the AAO requested the brief and/or evidence. On December 3, 2008, counsel replied that none would be submitted.

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 1992 and to currently employ 28 workers. No tax returns were submitted in this matter. The petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were

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[3] It has been twelve 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." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

[4] The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

$105,944.35 and $2,034,987.78.00 respectively. On the Form ETA 750 signed by the beneficiary on January 2, 1997, the beneficiary did claim to have worked for the petitioner since January 1992.[5]

On appeal, counsel asserts that that the director ignored the evidence submitted and the AAO decisions[6] cited by the petitioner's accountant in support of his contentions.

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, U.S. Citizenship and Immigration Services (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 (BIA 1967).

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 the full proffered wage from the priority date.

Counsel submitted three earning statements from the petitioner to the beneficiary for the time period April 3, 2006, to May 1, 2006, stating a bi-monthly payment of $1,500.00. The three pay statements are insufficient evidence to determine if the petitioner paid the beneficiary the full proffered wage from the priority date.

The petitioner has not submitted its corporate tax returns.[7]

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[8] copies

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[5] According to the Form G-235 prepared and signed by the beneficiary under penalty of perjury, the beneficiary stated that he began his employment as an accountant with the petitioner on January 1993.

[6] Counsel refers to decisions issued by the AAO but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

[7] The petitioner submitted the first page only of its 1999 federal Form 1120 corporate tax return. The petitioner stated on Line 28 net income loss of <$287,072.00> for that year.

of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel submitted an "Expert Report of [petitioner's accountant] February 15, 2006, In Re: [the petitioner], [the beneficiary]." The report was prepared by the petitioner's accountant who in his introduction stated in the 45 page report "we have been requested to evaluate the Petitioner's ability to pay the wage proffered to Beneficiary [according to regulation]."

Documents contained in the report are the petition, a draft copy of the labor certification, correspondence dated December 10, 2001, from the petitioner's accountant; "Ability to Pay Proffered Wage Calculations" spread sheet, page one of the petitioner's 1999 Form 1120 tax return, various pages from the petitioner's financial statements from accountants' review reports;[9] and the petitioner's realty appraisal reports.[10]

Although the accountant references the regulation at 8 C.F.R. § 204.5(g)(2), the report submitted contains no federal tax returns, annual reports, or audited financial statements. There is no additional evidence from the petitioner such as audited profit/loss statements, bank account records or personnel records.

The accountant has prepared various calculations of the petitioner's ability to pay for years 1997 through 2004, such as in "Table 1" by adding depreciation expense and end-of-year cash. There are no figures, income tax returns or calculations provided but the table is made up of notations stating either the petitioner "passed" or "failed" for years 1997 through 2004 under various tests (which are not defined by the accountant) in five categories. Without federal tax returns, annual reports, or audited financial statements, the AAO has no way of determining the truth or falsity of the accountant's notations of "pass" or "fail."

However, the accountant's assertion that the petitioner's depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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[8] 8 C.F.R. § 204.5(g)(2).

[9] 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.

[10] Although the report listed as exhibits the beneficiary's social security earnings history statement and the beneficiary's W-2 statement for 2004, they were not included as exhibits and are not in the record.

> Plaintiffs also contend that 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. Therefore the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

Further net assets must be balanced by net liabilities for an accurate picture of the petitioner's finances. 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.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule would be included with, as in this instance the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

The accountant asserts that in one of the seven years examined, the petitioner wrote off two loan receivable balances that were deemed uncollectible and reported as bad debt expense on the petitioner's 1999 Form 1120 tax return. Since the return was not provided, the accountant's statement is not supported by independent objective evidence in the record. According to the accountant's reasoning, this is a non-cash expense and together with depreciation and cash on hand at the end of the year, he asserts all these items are assets to off-set the petitioner's net income loss of <$287,072.00> for that year. Expenses will increase the petitioner's liabilities and will not improve its overall financial position. USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In a similar fashion, the petitioner's accountant then discusses "funds available through unused borrowing capacity," a line of credit facility for 2004 and 2005, and commercial loans outstanding as evidence of the petitioner's ability to pay the proffered wage. In "Table 4" the accountant has prepared calculations composed of six items, the appraised value of property owned by the

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[11] 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.

petitioner, an established loan to value ratio (assumed to be 75%), a derived borrowing capacity which is the appraised value multiplied by 75%, lines of credit, and long term debt which when added together equal "additional funds available." Counsel has not submitted evidence that the above calculation is permitted by regulation, the Act, or by case precedent.

By implication the petitioner's accountant is contending that the petitioner has or will convert its real estate assets to cash by borrowing against its equity, and have sufficient cash reserves to pay the proffered wage. There is no evidence submitted that this additional cash infusion was made, and it is apparent that the funds were not available from the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In a similar fashion, and, *inter alia* combining the items mentioned above, the petitioner's accountant has summarized his assertions in "Table 5." He has concluded that "during five out of the eight years [1997-2004 inclusive]" the petitioner has demonstrated its ability to pay the proffered wage. Assuming for the sake of argument that this statement is correct, the petition must be denied since the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent residence.

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.