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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 22 2009

WAC 06 058 50377

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.

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 preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a bilingual dental assistant (English/Farsi). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2002 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 February 1, 2007 denial, 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. The AAO further in this proceeding will address another issue with regard to the beneficiary's qualifications based on the requirements of the Form ETA 750 for a bilingual (English/Farsi) employee.

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 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 the [U.S. Citizenship and Immigration Service (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 January 10, 2002. The proffered wage as stated on the Form ETA 750 is $15.50 per hour, or $32,240 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.[1]

In response to the director's Request for Evidence (RFE) dated October 23, 2006, the petitioner submitted its IRS Forms 1120S, U.S. Income tax Return for an S Corporation, for tax years 2002 to 2005, with attachments and schedules. The record also contains copies of the petitioner's documentation for California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the last quarter of tax year 2004 and the first two quarters of 2005. This documentation indicates the petitioner had between eight and ten employees during these quarters to whom the petitioner paid wages or compensation. The petitioner also submitted a copy of its unaudited Profit and Loss Statement for January through November 2006 signed by its certified public accountant.

On appeal, counsel states that when Congress enacted 8 C.F.R. §§ 205.2 and 204.5(g)(2), the intent was that a both a labor certification and a I-140 petition could be filed all within one year, and not within the six or seven years, the length of time that the present petition has now been in the process.[2] Counsel states that Congress recently proposed a change to the law that eliminates specific reference to the petitioner's ability to pay and replacing this reference to statutory requirement that the petitioner establish its bona fides as a U.S. employer and the viability of the proffered position. Counsel notes that the petitioner had been in business since January 18, 1998 both as a corporation and a sole proprietorship and has paid employees during this period of time.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on January 18, 1998, and to currently employ ten workers. The petitioner did not indicate its gross annual income or net annual income on

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[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).

[2] The AAO notes that the petitioner filed a previous I-140 petition on the beneficiary's behalf based on the same Form ETA 750 position, which has contributed to the length of processing. The prior petition was denied as the petitioner failed to establish its ability to pay the proffered wage.

the I-140 petition. On the Form ETA 750, signed by the beneficiary on January 7, 2002, the beneficiary did not claim to have worked with 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 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 RFE, counsel submitted the petitioner's unaudited Profit and Loss Statement for January to November 2006 to the record. 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 comments further on the provision of further documentation of the petitioner's ability to pay the proffered wage in tax year 2006 below.

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. The petitioner did not submit any evidence to establish any wages paid to the beneficiary and the beneficiary did not claim any employment with the petitioner during the relevant period of time. Thus, the petitioner has to establish its ability to pay the entire proffered wage of $32,240 as of the 2002 priority date and through 2005 based on its net income or net current assets.[3]

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

[3] The record closed as of the petitioner's response to the director's RFE dated January 7, 2007. At this time, the petitioner's Form 1120S for 2006 would not have been available. Therefore the AAO will not comment further on the petitioner's ability to pay the proffered wage in tax year 2006.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $32,240 per year from the priority date:

- In 2002, the Form 1120S stated a net income[4] of -$45,874.

[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. The AAO notes that only in tax year 2004 did the petitioner in the instant petition have an additional deduction that reduced the petitioner's actual net income in that year. Thus, the petitioner's net income for tax year 2004 is identified on line 17e, of Schedule K. For the remaining tax years, the petitioner's net income is found on line 21, of the Form 1120S.

- In 2003, the Form 1120S stated a net income of $21,523.
- In 2004, the Form 1120S stated a net income of $60,647.
- In 2005, the Form 1120S stated a net income of $74,114.

For tax years 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage. However, the petitioner had sufficient net income in tax years 2004 and 2005 to pay the proffered wage of $32,240. Thus the petitioner has established its ability to pay the proffered wage in these two tax years.

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, including real property that counsel asserts should be considered. 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.[5] 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.

- The petitioner's net current assets during 2002 were $13,608.
- The petitioner's net current assets during 2003 were -$702.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage of $32,240.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner has 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 years 2004 and 2005.

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[5]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.

Counsel on appeal refers to a proposed change in the USCIS regulations that would have allowed for the overall analysis of the petitioner's present financial viability to determine the petitioner's ability to pay the proffered wages, rather than the current analysis of the petitioner's ability to pay proffered wages as of priority dates that were established years prior to the submission of the I-140 petition. The AAO notes that no such regulatory change has occurred at the time of this proceeding, and the petitioner and the AAO are both bound to the interpretation of the current regulations.

Counsel's remarks with regard to prospective regulatory changes cannot be concluded to outweigh the present regulation at 8 C.R.F. § 204.5(g)(2) that mandates a petitioner establish its ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residency. The evidence presented in the tax returns as submitted by the petitioner 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 AAO also finds that the petitioner failed to adequately document that the beneficiary has the required experience for the position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as 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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
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> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements

> for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The Form ETA 750 identified the proffered position as dental assistant, bilingual (Farsi/English), and required two years of experience in the proffered position. On Section 13 Part A, the petitioner stated that the individual performing the duties of the position would spend approximately 65 per cent of work time utilizing the Farsi language orally and in writing.

The petitioner also submitted two letters of work verification for the beneficiary. The first letter, written by [redacted], states that the beneficiary "cooperated" with the doctor's office as a dental assistant from 1993 to 1999. While the beneficiary lists this employment on Part B of the ETA Form 750, the AAO notes that the letter of work experience does not provide the actual city and country of the beneficiary's employment, and does not provide any detail as to the beneficiary's duties as a dental assistant, or the full-time or part-time nature of her work. The second letter of work verification, written by [redacted], is dated October 27, 2005. In his letter [redacted] stated that the beneficiary had been employed by him as a dental assistant on a full-time basis since April 4, 2000. [redacted] also described the beneficiary's duties with regard to preparing medical histories of the patients, and preparing tools required for treatment, among other duties.

The AAO finds the first letter of work verification lacks detail as to the beneficiary's actual work duties, and the actual place of her employment. With regard to the second letter of work verification, the beneficiary signed the ETA Form 750 in 2002, and thus, could have included her employment with [redacted] in the ETA Form 750. However, the beneficiary did not include this employment on the ETA Form 750.[6] Thus, the AAO cannot use the experience described in Dr. [redacted] letter to establish that the beneficiary has the requisite two years of full-time employment as a dental assistant. Finally, the AAO notes that the proffered position is for a bilingual (Farsi/English) dental assistant. While the record reflects that the primary language to be used in the proffered position with the petitioner's Farsi-speaking clients would be Farsi, the record reflects no evidence of the beneficiary's prior work as a bilingual dental assistant, utilizing both English and Farsi in such work. Thus, the petitioner has not provided a sufficiently detailed letter of work verification to corroborate the claimed work experience on the Form ETA 750, and in addition, has not provided any corroboration that the beneficiary has worked previously as a bilingual Farsi/English dental assistant. Accordingly, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

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[6] *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. Additionally the letter would not document two years of experience as the priority date is January 10, 2002, and the beneficiary would have to demonstrate that she had the full two years of work experience before this date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.