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U.S. Department of Homeland Security
U.S. Citizenshjip and Immigration Services
Office of Administrative Appeals, MS 2090
Washington DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 15 2009

LIN 07 169 51887

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

The petitioner is an environmental construction firm. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also determined that the petitioner had not established its financial ability to pay the proffered wage and denied the petition on October 17, 2007.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the designation of the wrong visa classification was a simple error. Counsel also contends that the petitioner established its ability to pay the proffered wage.

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l) states in pertinent part:

> (4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the ETA 750 is $23.15 per hour which amounts to $48,152 per year. Part B of the ETA 750, was signed by the beneficiary, but the date of signature is not indicated. At the time of signing, he did not claim to have worked for the petitioner.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on May 18, 2007 indicates that the petitioner was established on March 20, 2000, claims a gross annual income of $3,249,105, a net annual income of $365,289 and currently employs twenty workers. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act.

The director denied the petition in part because the petitioner had failed to establish that it has had the continuing financial ability to pay the proffered wage of $48,152 per year. He determined that while the petitioner established its ability to pay the certified wage in 2001, 2003, 2004, 2005, it had failed to submit any evidence of its ability to pay in 2002 and 2006 and had failed to demonstrate that it continued to have the ability to pay. In support of its ability to pay the proffered wage, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2003, 2004, and 2005 to the underlying record and additionally submitted copies of Form 1120S for 2002 and 2006 on appeal. They indicate that the petitioner files its tax returns on a standard calendar year basis. The returns also contain the following information:

	2001	2002	2003	2004
Net Income[1]	$32,112	$34,758	$456,469	$247,483

[1] 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* (2001-2003) line 17e* (2004-2005) and line 18*(2006) of

Current Assets (Sched. L)	$ 261,182	$247,668	$743,376	$668,942
Current Liabilities (Sched. L)	$ -0-	$ -0-	$ 19,004	$ -0-
Net Current Assets[2]	$ 261,182	$247,668	$724,372	$668,942

	2005	2006
Net Income	$378,817	$ 461,539
Current Assets	$629,821	$1,314,045
Current Liabilities	$ -0-	$ 408,107
Net Current Assets	$629,821	$ 905,938

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay

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Schedule K. *See* Instructions for Form 1120S, 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.). Because the petitioner had additional deductions shown on its Schedule K for 2001, 2002, 2003, 2004 and 2005, the petitioner's net income is found on Schedule K of its tax returns for those years.

[2]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.

the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner may have employed the beneficiary, but no evidence of any actual compensation paid was provided to the record.[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 (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. 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); *River Street Donuts, LLC v. Chertoff,* Slip Copy, 2007 WL 2259105 (D. Mass. 2007).

In this case, the petitioner's 2001 net current assets of $261,182 were sufficient to cover the proffered wage and demonstrate the ability to pay the in that year.

The 2002 net current assets of $247,668 could also cover the certified wage of $48,152 and demonstrate the petitioner's ability to pay in that year.

In 2003, either of the petitioner's net income of $456,469 or its net current assets of $724,372 were more than enough to cover the certified salary and demonstrate the petitioner's ability to pay in that year.

In 2004, either of the petitioner's net income of $247,483 or its net current assets of $668,942 were sufficient to pay the certified salary of $48,152 and demonstrate the petitioner's ability to pay in that year.

Similarly, in 2005 and 2006, either of the amounts reported for net income or net current assets could cover the proffered wage. As shown above, in 2005, the petitioner declared $378,817 and in 2006, its net income was $461,539. Alternatively, net current assets of $629,821 in 2005 and $905,938 in 2006 were far above the funds necessary to cover the proffered salary. The petitioner demonstrated its ability to pay in both of these years. As to this issue, the director's denial is withdrawn.

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[3] On a Form G-325A biographic questionnaire, signed by the beneficiary on April 25, 2007, it was claimed that he has worked for the petitioner since January 1, 2001. The Union Local records show services provided by the beneficiary to the petitioner only in 2004 and 2005.

Citing 8 C.F.R. § 204.5(l), the director also determined that in order to classify the alien as a skilled worker under section 203(b)(3)(A)(i) of the Act, and as requested by the petitioner on the I-140, the certified position as set forth on the ETA 750 must require at least years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position as described on the ETA 750 required at least two years training or experience. In fact, Form ETA 750 does not specify any educational, training or experiential requirements and could only properly be filed as an "other worker."

Counsel submits another I-140 on appeal with a corrected selection of paragraph g (any other worker requiring less than two years of training or experience) and asserts that it should be approved on this basis. The AAO does not concur. The regulation at 8 C.F.R. § 103.2(b)(8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record." It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. Instead, nothing in the foregoing precludes the petitioner from refilling and selecting the proper I-140 category.

Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the petitioner established that the certified position required at least two years training or experience in order to approve the petition for the visa classification designated as a skilled worker.

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.