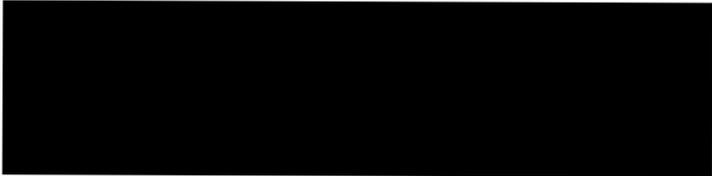




U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent unwarranted
invasion of personal privacy

PUBLIC COPY



BE

File: LIN-05-186-50064 Office: NEBRASKA SERVICE CENTER Date: **AUG 09 2007**

In re: Petitioner:
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:



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, Nebraska Service Center (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a commercial and offset printing business, which specializes in Gujarati, Hindi and English languages. It seeks to employ the beneficiary permanently in the United States as a graphic designer (“Typesetter and Graphic Designer”). 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 March 4, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence. Further, the director denied the petition as the petitioner listed a wage on the I-140 Petition, which was substantially less than the proffered wage as certified on Form ETA 750.

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.¹

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 C.F.R. § 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 petitioner must demonstrate this ability at the time the priority date is established and

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). 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).

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 March 29, 2001.² The proffered wage as stated on Form ETA 750 is \$42,600.00 per year, based on 40 hour work week. The labor certification was approved on March 19, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on May 26, 2005. On the I-140, the petitioner listed the following information: date established: October 31, 1983; gross annual income: \$177,879.00; net annual income: \$31,065.00; current number of employees: two; and wages per week: \$615.00, equivalent to \$31,980 per year.³

On June 21, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: the original Form ETA 750 Parts A and B (the petitioner initially submitted a copy of only Form ETA 750A), as well as an explanation regarding where the original ETA 750A and B forms were, and documentation related to filings for the initial beneficiary; to submit additional evidence related to the petitioner's ability to pay in the form of federal tax returns, audited financial statements, or annual reports, as well as any W-2 Forms issued to the beneficiary if the petitioner employed him. The petitioner responded.⁴ Following consideration of the petitioner's response, on March 4, 2006, the director denied the petition as the petitioner

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. § 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the **implementation of the Immigration Act of 1990 (IMMACT 90)**. DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The petitioner listed a wage on the I-140 Petition, which was less than the certified wage listed on Form ETA 750 of \$42,600.00 per year. The petitioner must pay the wage listed on the certified Form ETA 750. We will address this issue further below.

⁴ In the petitioner's response, it provided the original Form ETA 750A and B, but failed to provide Form ETA 750 Part B completed for and signed by the substituted beneficiary, which is material to establishing the beneficiary's qualifications. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, as well as for failure to pay the proffered wage listed on Form ETA 750A. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner’s ability to pay based on information in the record and then consider the petitioner’s additional arguments on appeal. First, in determining the petitioner’s ability to pay the proffered wage during a given period, 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. In the case at hand, the petitioner did not provide any evidence, or assert that it has employed the beneficiary. Further, the petitioner failed to provide Form ETA 750B for the beneficiary, which would list the substituted beneficiary’s employment history, and whether the petitioner presently employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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 record demonstrates that the petitioner is an S corporation. 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. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists only income from its business and will take the income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$37,590
2003	\$1,109
2002	-\$34,064
2001	-\$27,566

The petitioner’s net income would not allow for payment of the beneficiary’s proffered wage in any of the above years.

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. 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.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$27,163
2003	-\$9,927
2002	-\$14,742
2001	-\$678

Following this analysis, the petitioner's federal tax returns shows that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well.

The petitioner additionally submitted six bank statements: for the following dates: December 31, 2001; January 31, 2002; December 31, 2002; January 31, 2003; January 31, 2004; and December 31, 2004. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

If we examined the statements, the statements showed significant variation in the petitioner's account. The statements reflected a low balance of \$6,919.44 (as of January 31, 2002), and a high balance of \$30,478.42 (as of January 31, 2004). Additionally, five or six statements alone would not demonstrate the petitioner's ability to pay from March 2001 to the present, but rather would represent only the amount that the petitioner had in its account as of the statement dates submitted.

The petitioner additionally submitted an unaudited income statement and balance sheet for the time period ending December 31, 2004. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement submitted with the petition is not persuasive evidence. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also submitted copies of the owner's W-2 statements, which showed wages paid to the owner in the amounts of: 2002: \$24,000; 2003: \$23,000; and 2004: \$36,000. Counsel asserts that with the

beneficiary's employment, the owner "would be freed to attend to other businesses and his pay would go to the new employee." The petitioner, however, did not provide any statement that the owner would or could allow his or her wages to be used to pay the proffered wage, or demonstrate that the owner had other businesses or income through which the owner could support him or herself. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the director denied the petition as the wage that the petitioner offered on Form I-140 was substantially less than the wage offered on the certified Form ETA 750, and cited 20 C.F.R. § 656.40(i) in support that "no prevailing wage determination for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, state, or local law."

The certified Form ETA 750 listed the proffered wage as \$42,600. The petitioner listed the wage on Form I-140 as \$31,980 per year, which constituted an offer less than the certified wage.

In response to the RFE request for the petitioner to demonstrate that it could pay the proffered wage, counsel submitted a copy of a State workforce agency ("SWA") wage obtained, dated August 10, 2005, that the wage for the position would be \$26,312 based on a "level 1" wage, and not the \$42,600 listed on the Form ETA 750. Counsel requested the wage as "based on my experience I thought the minimum wage level determined by the department was bit [sic] higher than normal for the position in its industry." Counsel requested that CIS "evaluate the Petitioner's financial documents and make its decision in light of the revised minimum wage."

The director noted that the Form ETA 750 provided for a wage of \$42,600, and the petitioner could not now make a material change to the petition, and lower the wage. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).⁵

On appeal, the petitioner provides that "it is without any doubt that a mistake has been made by either the petitioner's previous counsel, or the Labor Department, or both on the wage determination." Counsel continues, that he conducted wage research himself, and obtained a prevailing wage determination from the Department of Labor, dated August 10, 2005, that the wage for the position would be \$26,312, and not the \$42,600 listed on the Form ETA 750. Further, counsel provides:

Notwithstanding the foregoing, my client understands that [CIS] can only go by a wage certified by the Labor Department. As such, the petitioner is requesting that it be given an opportunity to have the Labor Department certify the wage based on the correct prevailing

⁵ Additionally, counsel has provided wage data for the position obtained in 2005, which reflected the prevailing wage in the year 2005. The labor certification was filed in 2001, so that the wage would be determined based on 2001 wage data. The Foreign Labor Certification wage data indicates that the prevailing wage for a graphic designer in Chicago, IL in 2001 at level one was: \$29,806; and for level two: \$47,798. See <http://www.flcdatacenter.com/OesArchiveResults.aspx?area=1600&code=27-1024.00&year=1&source=1> (accessed July 5, 2007).

wage as determined by the Illinois Department of Employment Security. The petitioner has already begun the labor certification process pursuant to the Regulation under PERM 28 [sic], and expects to receive a new certification based on the correct and more reasonable wage level.

Counsel resubmitted the copy of the State workforce agency (“SWA”) wage obtained, dated August 2005, which listed the position as a level 1, with a pay rate of \$26,312.

The wage listed on Form ETA 750 is \$42,600. The wage is part of the job offer completed and signed by the petitioner. The wage was the initial wage listed on the form; the Form ETA 750 does not reflect that DOL required the petitioner to increase the wage, or change the wage. DOL accepted and certified that wage as the prevailing wage rate while it supervised the petitioner’s test of the U.S. labor market. Whether counsel believes the wage is more than it should be is irrelevant. As the Form ETA 750 was certified at this wage, the petitioner cannot now change the terms of the ETA 750 offer, and pay the beneficiary less because it believes the wage to be too high, or in error.⁶ This is the wage that the petitioner offered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).⁷ A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The present decision is without prejudice to the petitioner filing a new petition.

Counsel has provided no further evidence or documentation on appeal to demonstrate that the petitioner can pay the proffered wage.

Accordingly, based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.

⁶ Even if we were to accept counsel’s argument that the wage should be lower, the petitioner would still be unable to demonstrate its ability to pay the proffered wage in 2001, 2002, or 2003.

⁷ Additionally, counsel has provided a wage for the year 2005. The labor certification was filed in 2001, and the wage would be determined based on the wage data for 2001. The Foreign Labor Certification wage date indicates that the prevailing wage for a graphic designer in Chicago, IL in 2001 at level one was: \$29,806; and for level two: \$47,798. *See* <http://www.flcdatacenter.com/OesArchiveResults.aspx?area=1600&code=27-1024.00&year=1&source=1> (accessed July 5, 2007).