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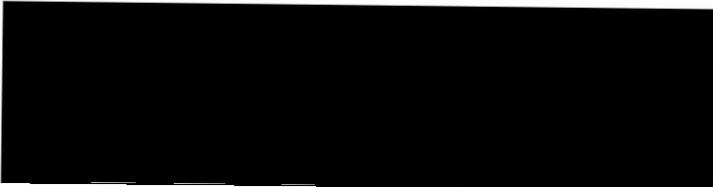
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File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **AUG 09 2007**
LIN-05-211-52210

In re: Petitioner: [Redacted]
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:



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 computer consulting business, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 2, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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 professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

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 continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

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).

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 April 27, 2001. The proffered wage as stated on Form ETA 750 is \$60,000.00 per year, based on 40 hour work week. The labor certification was approved on April 14, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 29, 2005. On the I-140, the petitioner listed the following information: date established: August 2, 1986; gross annual income: see attached; net annual income: see attached; current number of employees: three.

On August 29, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: proof that the beneficiary complied with National Security Entry-Exit Registration System ("NSEERS") registration;² and to submit additional evidence related to the petitioner's ability to pay the proffered wage, including evidence beyond the petitioner's federal tax returns, and copies of any and all paystubs issued to the beneficiary in 2005. The petitioner responded.³ Following consideration of the petitioner's response, on March 2, 2006, the director denied the petition as the petitioner 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.

² NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 CFR § 264.1(f)(2). The NSEERS requirement was expanded to include other groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate "call-in groups." Lebanon, the beneficiary's country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security ("DHS") suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* <http://www.ice.gov/pi/specialregisration/index.htm>, accessed April 5, 2007.

³ The petitioner asserts in response to the NSEERS issue that the beneficiary entered the U.S. without inspection in 1999, and is eligible for 245(i) adjustment. As the beneficiary entered without inspection, counsel contends that the beneficiary is not a "nonimmigrant," and would not be subject to registration. Further, counsel provides that the registration requirements were discontinued, and the beneficiary's registration, or lack thereof, would not be relevant to the I-140's approval. Counsel further cites to HQOCC 70/6.22/04, Memorandum for William R. Yates, Associate Director for Operations from [REDACTED] Chief Counsel, Legal Opinion: Effect of failure to comply with NSEERS requirements, or other evidence of inadmissibility or deportability, on the adjudication of visa petitions, dated October 14, 2004, which provides that "an alien's willful and unexcused failure to comply with NSEERS, or any other ground of inadmissibility or deportability would not justify the denial of a visa petition filed on the alien's behalf."

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 provided the following evidence of payment to the beneficiary:

<u>Year</u>	<u>1099 Income</u>
2004	\$34,000
2003	\$22,000
2002	\$18,100

The petitioner also provided paystubs dated September 30, 2005, October 31, 2005, November 30, 2005, December 31, 2005, January 31, 2006, and February 28, 2006 all in the amount of \$5,000.⁴ The paystubs reflect payment for 160 hours of work, so that the petitioner appears to pay the beneficiary on a monthly basis. The Forms 1099 and paystubs alone would be insufficient to establish the petitioner's ability to pay the proffered wage from the priority date of April 2001 until the beneficiary obtains permanent residence. The petitioner must demonstrate that it can pay the full proffered wage in 2001, and that it can pay the difference between the wages paid and the proffered wage in 2002, 2003, 2004, and 2005.

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 so its net income is found on line 21:

⁴ The petitioner additionally provided a copy of the beneficiary's bank statement, which reflected a deposit in the amount of \$3472.95, the amount paid to the beneficiary after applicable taxes were taken out of his pay.

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$11,869
2003	\$6,844
2002	\$18,860
2001	\$12,805

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to the petitioner's net income.

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	\$4,640
2003	\$5,259
2002	\$19,202
2001	\$6,991

Following this analysis, the petitioner's federal tax returns show 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, even if the wages paid to the beneficiary were added to the petitioner's net current assets.

On appeal, counsel asserts that the petitioner can pay the proffered wage and provides that the beneficiary is currently being paid the proffered wage, and this would be sufficient to show the petitioner's ability to pay.⁵ Counsel cites the specific language used in the RFE: "the petitioner may still be able to show that it can meet this requirement [ability to pay] if it is currently paying the alien at least the proffered wage. Therefore, the petitioner is requested to submit copies of all pay vouchers issued by it to the alien beneficiary thus far in 2005." Counsel contends that as the petitioner is presently paying the beneficiary the proffered wage, that this, in accordance with the RFE language, shows that the petitioner has the ability to pay the proffered wage.

Counsel further cites to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo) in support of this premise. The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

⁵ Counsel additionally provides that the beneficiary was only recently granted authorization to work in the U.S. The relevance of this is unclear as we note that the petitioner submitted Forms 1099 reflecting that the beneficiary has been paid from the year 2002 onward. Further, the petitioner provides that the beneficiary is "245(i) eligible." See 8 C.F.R. § 245.10, which allows for adjustment of status for certain grandfathered aliens who meet specified conditions, upon payment of an additional fee.

Counsel again contends that the petitioner is now employing the beneficiary and, therefore, can demonstrate its ability to pay. Although the petitioner may now be employing and paying the beneficiary the proffered wage, the May 4 Yates Memo does not negate the petitioner's regulatory requirement to show that it can pay the beneficiary the proffered wage from the priority date of April 2001 to the time that the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has provided checks from only a few months in 2005 and 2006, not since April 2001. Further, with respect to the RFE language, in reviewing the petitioner's net income, and net current assets, as well as the wages paid to the beneficiary in combination with the petitioner's net income, the petitioner was not able to demonstrate its ability to pay the beneficiary the proffered wage. Therefore, the director sought additional evidence related to the petitioner's ability to pay and requested any paystubs as proof of payment. Whether the petitioner was presently paying the beneficiary would be an element taken into consideration in determining the petitioner's ability to pay, in combination with the petitioner's net income and net current assets. However, a review of the three years from the year 2001 onward would not demonstrate the petitioner's ability to pay the proffered wage.

Counsel provides that the CIS decision states "that the only way a petitioner can establish its ability to pay if its relying on the third prong cited above is if the petitioner was paying the beneficiary the proffered wage prior to the filing of the I-140 petition." Further, counsel argues that "this interpretation does not take into consideration the thousands of applicants for adjustment of status which are based on section 245(i) of the Immigration & Nationality Act where the beneficiary's [sic] of the I-140 petitions do not have authorization to be employed."

Counsel misinterprets the director's decision. The director's decision should not be interpreted that a petitioner can only demonstrate its ability to pay the proffered wage through proof of prior employment from the priority date. As set forth in the Yates Memo, proof that the petitioner has paid the beneficiary the proffered wage is one way to demonstrate the petitioner's ability to pay. Further, as noted in the RFE, the director considered, and CIS will consider, the petitioner's net income or net current assets, separately and/or in combination with wages paid to the beneficiary to determine whether the petitioner has the ability to pay the proffered wage.

On appeal, the petitioner resubmitted paystubs for the same dates as listed above showing payment in the amount of \$5,000 per month, which have already been considered.

The petitioner additionally submitted a letter from the petitioner's accountant, dated March 30, 2006, which provided:

We have been requested to write to you regarding our relationship with [the petitioner] and [redacted]. In the past the companies have loaned funds to each other as needed since certain contracts would span several months and in the initial phase some of the contracts cash flow would be delayed. At other times funds were loaned to [redacted] since [the petitioner] was in an excess cash position and this was more cost effective than using a credit line.

Attached to the accountant's letter was a letter verifying that \$ [redacted] had an account in good standing since January 12, 2006, with a bank balance of \$14,888.77.

The relationship, if any, of [redacted] to the petitioner is unclear. Further, a corporation is a separate and distinct legal entity from its owners and shareholders. The assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered

wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” Therefore, the funds of [REDACTED] a corporation separate and apart from the petitioner, cannot be used to demonstrate the petitioner’s ability to pay the proffered wage.

The petitioner additionally submitted a letter from the petitioner’s bank. The letter, dated March 24, 2006, reflected that the petitioner had a business account with the bank since May 5, 1999, and had a current balance of \$22,844.98. First, we note that bank statements, or bank account information, 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 letter 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. The bank letter would reflect the amount that the petitioner had in its account as of March 24, 2006, and would not demonstrate the petitioner’s ability to pay from April 2001 to the present.

The petitioner additionally submitted an unaudited profit and loss statement for the time period March 1, 2005 to March 30, 2006, as well as an unaudited profit and loss statement for the time period January 1 to December 12, 2005. The profit and loss statement for the time period January 1 through December 12, 2005 lists that the petitioner had net income in the amount of \$29,623.71. The profit and loss statement for March 1, 2005 through March 30, 2006 lists the petitioner’s net income as \$229,141.52. We note that the March 2005 to March 2006 statement is abbreviated and is less extensive than the January to December 2005 statement. Additionally, the time period of the two statements overlap. The reason for this is unclear. Further, 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 statements submitted with the petition are not persuasive evidence. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, we note that records reflect the petitioner has sponsored a second individual for permanent residence. The petitioner would need to demonstrate that it could pay the proffered wage for both beneficiaries. As the petitioner has not demonstrated its ability to pay the proffered wage for the instant beneficiary, it would be unable to demonstrate its ability to pay for both.

Accordingly, based on the foregoing, 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.