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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 05 053 50361

Office: TEXAS SERVICE CENTER

Date: JUL 16 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, 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 software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer/analyst. 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 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 November 23, 2005 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.

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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 Labor. See 8 CFR § 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 February 5, 2003. The proffered wage as stated on the Form ETA 750 is \$72,000 per year. The Form ETA 750 states that the position requires four years of college education,

a bachelor's degree in computer science/engineering, or a closely related field, and two years of work experience in the proffered position, or two years as a software engineer, systems analyst.

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 Counsel did not submit any evidence on appeal, but submits a new statement. Other relevant evidence in the record includes the petitioner's tax return, Form 1120S, for tax year 2003, as well as the petitioner's amended tax returns for tax years 2003 and 2004. The record also contains a letter dated November 1, 2005, from [REDACTED] who identifies himself as a licensed certified public accountant in Columbus, Ohio.²

In his letter, [REDACTED] stated that the federal tax returns distorted the financial picture of the petitioner because the petition did not reflect an accrual basis balance.. [REDACTED] stated that the petitioner had previously calculated its taxable income on a cash basis rather than on an accrual basis and identified the petitioner's net income as being identified on Line 1, of Schedule M of the tax return, rather than line 21 on the first page of Form 1120S. [REDACTED] explained that the petitioner's 2003 and 2004 federal tax returns were amended and now utilized the hybrid method of accounting to have consistent information between the accrual basis accounting and cash basis accounting. Based on the accrual basis of tax reporting, [REDACTED] determined that the petitioner had net income of \$96,016 in tax year 2003 and \$114,533 in tax year 2004. He also identified the petitioner's net current assets as \$108,070 in tax year 2003 and \$305,411 in tax year 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ thirteen workers.³ According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 7, 2004, the beneficiary did not claim to have worked for the petitioner.⁴

On appeal, counsel asserts that based on the petitioner's net income in tax year 2003, the petitioner had established its ability to pay the proffered wage of \$72,000. Counsel references an interoffice Citizenship and Immigration Services (CIS) memorandum written by William Yates (The Yates memo) that discusses three alternative methods of establishing the petitioner's ability to pay the proffered wage.⁵ Counsel also refers to

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).

² The state of Ohio licensing center indicates that [REDACTED] CPA license expired on December 31, 2005. *See* <https://license.ohio.gov/lookup/default.asp>. (Available as of April 12, 2007.)

³ Despite the petitioner's claim of thirteen workers, CIS records reflect that the petitioner has filed over 125 I-129a and I-140 cases.

⁴ The instant beneficiary was substituted for [REDACTED], the beneficiary listed on the original Form ETA 750. The beneficiary has subsequently been approved on May 6, 2006, as the beneficiary for an I-140 petition filed by Web Yoga, Inc, Dayton, Ohio.

⁵ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

analysis of the accrual basis of accounting and why it was appropriate to amend and refile the petitioner's tax returns for 2003 and 2004. Counsel notes that based on the petitioner's net or ordinary income and its net current assets for tax year 2003, it has met two of the three possible prongs identified in the Yates memo to measure whether the petitioner has established its ability to pay a proffered wage.

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, CIS 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Both counsel and [REDACTED] refer to the Yates memo which refers to the beneficiary's wages and the petitioner's net income and net current assets as the three criteria by which CIS adjudicators can evaluate the petitioner's ability to pay the proffered wage. The AAO consistently adjudicates appeals in accordance with the Yates memorandum, and will do so in these proceedings in its examination of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 during any relevant timeframe including the period from the priority date in 2003 or subsequently.

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, without consideration of depreciation or other expenses. 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). 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 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 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. [CIS] 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* at 537.

Counsel, the director, and [REDACTED] refer to the petitioner's amended tax returns for 2003 and 2004 submitted in response to the director's request for further evidence. The petitioner originally only submitted its tax return for 2003 with the initial petition. In his decision, the director stated that the original and amended return for tax year 2003 differed and the record was not clear which tax return was correct. The director also noted that the addition of income under the heading "less allowance for bad debts" on the petitioner's amended Schedule L, of its amended 2003 tax return. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

The AAO has examined the petitioner's original tax return for tax year 2003 and examined the petitioner's amended tax returns for 2003 and 2004, submitted in response to the director's Notice of Intent to Deny (NOID) dated October 11, 2005. The AAO views the petitioner's change of accounting practices and the subsequent amended tax returns as questionable, specifically with regard to the significant increases in the petitioner's net current assets based on the changed accounting procedures and reallocation of assets. 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). It is also noted that the IRS requires Form 3115 to be filed when changing overall accounting methods, or the accounting treatment of any item. The record does not reflect that the petitioner filed any such document. These factors raise questions as to the veracity of the petitioner's amended tax returns. Further, because the petitioner amended its returns in the middle of proceedings, CIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. The amended returns submitted by the petitioner simply indicate that they were received by the IRS. The returns are not certified copies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus the AAO will give no weight to the amended tax returns submitted to the record, and CIS will examine the version of the petitioner's tax return that was initially submitted.

For purposes of these proceedings, the AAO will examine the original 1120S tax return for tax year 2003 submitted with the initial petition. For illustrative purposes only, the AAO will examine the amended tax return for tax year 2004 in examining the petitioner's ability to pay the proffered wage..

First, it is noted that the AAO does not consider line 1, Schedule M in its deliberations with regard to petitioners' net income, as suggested by [REDACTED] and counsel. 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 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) 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.). Because the petitioner had additional interest income, and investment interest, shown on its Schedule K for 2003, the petitioner's net income for tax year 2003 is found on Schedule K of its tax return.

The original 2003 tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$72,000 per year from the priority date:

- In 2003, the Form 1120 stated a net income⁶ of \$85,266.

Therefore, for the priority year 2003, the petitioner did have sufficient net income to pay the proffered wage.⁷ With regard to tax year 2004, as stated previously, the AAO gives no weight to the amended tax returns submitted to the record. However, for illustrative purposes, the AAO notes that the petitioner's Schedule K, in its tax return for 2004 does not reflect any additional credits, deductions or adjustments, and thus, the petitioner's net income is identified on line 21, ordinary business income (loss) as \$5,324. This net income, even if the AAO had accepted the petitioner's amended tax returns, would not be sufficient to pay the beneficiary's entire proffered wage of \$72,000, in 2004.

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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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, CIS 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 assets⁸ and current liabilities.⁸ 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. As stated previously, the AAO gives no weight to the petitioner's amended tax return for tax year 2004. However, for illustrative purposes,

⁷ However, this office notes that the petitioner has submitted multiple I-140 petitions for multiple beneficiaries, many of which have been pending during the time period relevant to the instant petition. In this case, the petitioner would have to demonstrate its ability to pay the wages of all beneficiaries as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

⁸ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the AAO notes that, with regard to the record, the petitioner's submission of its amended 2004 tax return is the first submission of 2004 tax records. Thus, the AAO cannot determine what changes were made to the original 1120S form as it existed at the time of filing the instant petition. With regard to the changes in the petitioner's original 2003 tax return and the amended tax return, as correctly noted by the director, the petitioner increased line 2 B of Schedule L, "less allowance for bad debts" from "0" to "\$130,946." On line 16 of Schedule L, accounts payable, the petitioner eliminated a liability of \$1,500. On Schedule M-1, the petitioner's net income identified as \$96,016, was lowered by \$10,750, based on tax-exempt interest to \$85,266.⁹ The AAO will examine whether the petitioner's net current assets identified on the amended 2004 tax return would have established the petitioner's ability to pay the proffered wage in tax year 2004. In its amended tax return for 2004, the petitioner listed \$240,241, on Schedule L, line 2B, as less allowance for bad debts. With regard to net current assets, the amended tax return indicates that the petitioner's net current assets during 2004 were \$305,411. This figure would have been sufficient to pay the proffered wage of \$72,000.

However, as noted previously, the petitioner's amended tax returns are given no weight in these proceedings. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that 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 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.

⁹ This figure is the same figure identified on line 23, of the petitioner's original Schedule K, and utilized by the AAO to identify the petitioner's net income for tax year 2003.