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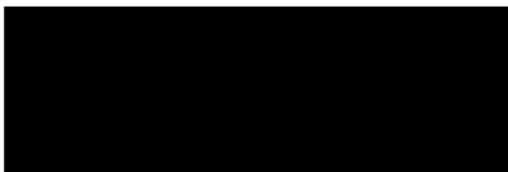
U.S. Department of Homeland Security
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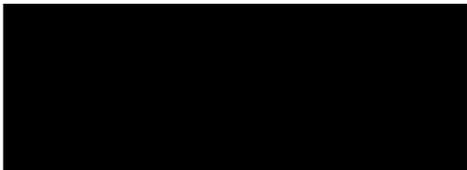
Office: VERMONT SERVICE CENTER

Date: MAR 29 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a martial arts academy, and seeks to employ the beneficiary permanently in the United States as an instructor, physical ("Taekwondo Master"). The petition filed was submitted with a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).¹ As set forth in the director's June 1, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

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.²

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. 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 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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 CFR § 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

¹ We note that the petitioner is required to submit an original certified Form ETA 750 with the I-140 Petition; however, in the case at hand, the petitioner previously filed an I-140 on behalf of the beneficiary. The original certified ETA 750 was submitted with the prior filing, and accordingly is part of the earlier record.

² 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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on December 19, 1997. The proffered wage as stated on Form ETA 750 is \$34,326 per year. The labor certification was approved on January 26, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on November 14, 2003.³ Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1996; gross annual income: not listed; net annual income: not listed; and current number of employees: 2.

On July 16, 2004, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay, and the submission of the petitioner's federal tax returns for the years 1997, 1998, 1999, 2002, and 2003 as well as of the beneficiary's Forms W-2 if the petitioner employed the beneficiary. The petitioner responded to the RFE. Following review, the director denied the petition on June 1, 2005. Counsel appealed⁴ and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. Regarding the petitioner's ability to pay, first, 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. On Form ETA 750B, signed by the beneficiary on December 5, 1997, the beneficiary did not list that he was employed with the petitioner. In response to the RFE, the petitioner's prior representative responded that the beneficiary had never been employed with the petitioner since he had not been granted work authorization. The director noted in his decision that the petitioner submitted W-2 statements with its initial I-140 filing as proof that the beneficiary was previously employed, and further, that the beneficiary had listed on Form G-325, filed with his I-485 Adjustment of Status application, that he was employed with the petitioner from April 1998 to July 2001. The W-2 statements submitted with the petitioner's initial filing showed wage payments in the following amounts:

<u>Year</u>	<u>Amount Paid</u>
2001	\$11,711.40
2000	\$23,422.80
1999	\$23,453.28
1998	\$15,655.52

The W-2 statements would exhibit partial payment of the proffered wage to the beneficiary. However, as the proffered wage is \$34,326, the petitioner cannot establish its ability to pay the beneficiary from the priority date of 1997 until the beneficiary reaches permanent residence based on prior wage payments alone. The petitioner must show that it can pay the difference between the wages paid and the proffered wage.

³ On May 5, 2002, the petitioner filed an I-140 on the beneficiary's behalf for the same position based on the same underlying Form ETA 750. That petition was denied on July 9, 2003 for failure to demonstrate the petitioner's ability to pay the proffered wage.

⁴ A different attorney took over the petitioner's representation on appeal.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. For the years 2000 to 2004, the petitioner submitted Form 1120-A Short Form Tax returns, so that Line 24 of the Form 1120-A demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$1,208 ⁵
2003	\$5,009
2002	\$4,582
2001	\$9,025
2000	\$8,308

For the years 1997 to 1999, the petitioner submitted Form 1120. Line 28 reflects the following:

<u>Tax year</u>	<u>Net income or (loss)</u>
1999	\$1,587
1998	\$2,492
1997	-\$305

Based on the above, 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.⁶ 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, or, if filed on Form 1120-A, on Part III. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be

⁵ On appeal, counsel submitted the petitioner's 2002, 2003, and 2004 federal tax returns, which may not have been available at the time of filing the I-140 petition.

⁶According 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.

able to pay the proffered wage out of those net current assets, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2001 ⁷	\$7,080
2000	\$771
1999	\$915
1998	-\$3,707
1997	\$3,788

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets in 2001 or 2002 either.

On appeal, counsel contends that the petitioner did not understand the RFE request related to the beneficiary's W-2 statements, as the petitioner was not represented by counsel.⁸ Further, present counsel cites that the petitioner's tax returns exhibited the following amounts in gross income: 1997: \$107,153; 1998: \$136,840; 1999: \$173,464; 2000: \$171,052; 2001: \$182,127; 2002: \$174,455; 2003: \$190,284; 2004: \$203,609. Counsel contends that the petitioner's business demonstrates continually increasing gross income. While the petitioner's gross income may have increased, as noted above, the petitioner's net income, and not its gross income is the proper figure for consideration. *See 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, rather than the petitioner's gross income. We have examined the petitioner's net income above, and based on the petitioner's tax returns, the petitioner's net income is deficient in every year.

Counsel additionally notes that the petitioner's tax return reflects that it paid the following wages: 1997: \$35,815; 1998: \$38,853; 1999: \$50,531; 2000: \$57,708; 2001: \$46,268; 2002: \$11,744; 2003: \$20,427; and 2004: \$61,953. In general, wages already paid to others would not serve to prove that the petitioner is able to pay the beneficiary the proffered wage. Counsel further lists the amounts that the petitioner paid to the beneficiary exhibited by the W-2 Forms submitted. We have addressed the W-2 Forms above, which standing alone, or combined with the petitioner's net income, or net current assets, are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Counsel also provides that the "petitioner has been and is willing to contribute its income on the beneficiary wage [sic] by deducting other expenses." Counsel does not specify what other expenses the petitioner would

⁷ The petitioner's tax returns for the years 2002, 2003, or 2004 do not contain Schedule L, and further do not contain a completed Part III, Balance Sheets per Books." Therefore, we are unable to calculate the petitioner's net current assets for the foregoing years. A corporation with total receipts (line 1a plus lines 4 through 10 on page 1) and total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L, M-1, and M-2 (Parts III and IV, Form 1120-A) if the "Yes" box on Schedule K, question 13 (Part II, question 7, Form 1120-A) is checked. *See IRS.gov Instructions for Forms 1120 and 1120-A.* Further, for the years 2000 and 2001, the petitioner's net current assets were determined from Part III of Form 1120-A; for the years 1997 to 1999, the petitioner's net current assets were calculated from the petitioner's Schedule L.

⁸ The petitioner's RFE response was submitted by a "representative" from the Fellowship Education Center.

deduct, and the net result of any deduction.⁹ Further, CIS will consider net income or net current assets to demonstrate the petitioner's ability to pay. It is unlikely that the petitioner's hypothetical deduction would be an acceptable method to demonstrate that the petitioner has the ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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.

⁹ We note that the petitioner submitted the owner's individual Form 1040 tax return with the I-140 filing. The petitioner is a C Corporation. A corporation is a separate and distinct legal entity from its owners and shareholders. Shareholder assets, or assets 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." Accordingly, the individual Forms 1040 of the petitioner's shareholder are not relevant, and cannot be used to show the petitioner's ability to pay the proffered wage.