

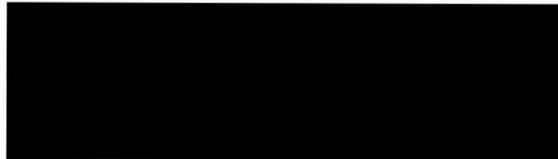
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**U.S. Citizenship
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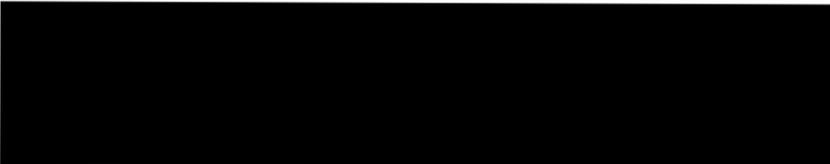


File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 18 2007
WAC-05-201-52270

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, California 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 an electrical works business, and seeks to employ the beneficiary permanently in the United States as an electrical repairer (“Electrician”). 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 August 10, 2006 decision, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary 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).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 an immigrant visa 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 the 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 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 January 3, 2003. The proffered wage as stated on Form ETA 750 is \$13.20 per hour, based on a 40 hour work week, which is equivalent to \$27,456 per year. The labor certification was approved on March 3, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on June 30, 2005. The petitioner represented the following information on the I-140 Petition: date established: September 17, 1998; gross annual income: not listed; net annual income: not listed; and current number of employees: six.

On August 15, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional documentation regarding the petitioner's ability to pay for the years 2003 to the present in the form of either federal tax returns, audited financial statements, or annual reports. Further, the RFE requested that the petitioner provide Forms W-2 if the petitioner employed the beneficiary. The petitioner responded. Following review, the director denied the petition on August 10, 2006 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed 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. 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 12, 2002, the beneficiary did not list that he was employed with the petitioner. The petitioner indicated in its response to the RFE that the petitioner had employed the beneficiary since March 2005 after approval of the labor certification, and, therefore, did not have W-2 statements to provide. The petitioner did submit copies of paychecks to the beneficiary from July 28, 2005 to October 15, 2005 showing payments to the beneficiary in the amount of \$1,200 for a two week time period, with the exception of two checks (dated September 20, 2005 and August 19, 2005) in the amounts of \$600.² Additionally, on appeal, the petitioner submitted further evidence of pay in the form the beneficiary's 2005 Form 1099 in the amount of \$22,250.00, and payroll checks for the time period from February 19, 2006 to August 20, 2006. The checks show that the beneficiary was paid \$1,200 for the two-week pay periods.

Wages paid to the beneficiary will be considered as partial payment of the proffered wage. The petitioner must show that it can pay the full proffered wage in 2003, and 2004, and the difference between the proffered wage, and the wages paid in 2005, and 2006. Accordingly, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payment alone.

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

² The checks for this time period were written on company checks, rather than payroll checks. It is unclear whether the \$1200 includes taxes taken out for wages. Further, we note that the check copies provided do not demonstrate that the checks were actually cashed, which would exhibit actual payment to the beneficiary.

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. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	-\$10,852
2004	\$9,430
2003	\$10,202

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.

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.³ 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 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.

In the case at hand, however, we are unable to calculate the petitioner's net current assets. Pursuant to IRS instructions for Form 1120, a corporation with total receipts (line 1a plus lines 4 through 10 on page 1, *See* http://www.irs.gov/instructions/i1120_a/ch02.html as of 4/10/2007) and total assets at the end of the tax year or less than \$250,000 are not required to complete Schedules L, M-1, and M-2, if the "yes" box is checked on Schedule K, question 13. The petitioner's tax returns reflect that the petitioner's total receipts and total assets are less than \$250,000 for the years in question, and, therefore, the petitioner does not need to complete Schedule L. Therefore, the petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets.

The petitioner additionally provided a letter from the Wells Fargo Bank that as of October 28, 2005, the petitioner had \$41,721.45 in its account. On appeal, the petitioner also provided a print out of its Wells Fargo Bank account statement dated September 30, 2006, which showed that the petitioner had \$67,555.50 in a "Business Market Rate Savings" account. The statement reflects that the petitioner's beginning balance was \$67,500.00 as of August 31, 2006, and that it earned \$55.50 in interest for the month. However, the statement also shows the year to date interest as \$55.50 so that it would appear that the account was only opened in August 2006. Accordingly, the bank statement would show funds that the petitioner had available in August 2006, and would not show the petitioner's continued ability to pay the proffered wage from 2003 to the present.

³According 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.

Bank statements, and funds in bank accounts 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 a fundamental point, the petitioner's tax returns are usually 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. However, in the case at hand, as noted in the director's decision, we cannot assess the petitioner's cash assets against its liabilities. As the petitioner was not required to complete Schedule L, we have no information regarding the petitioner's liabilities, which are usually listed on the petitioner's tax returns.

On appeal, counsel provides that the petitioner started its business in 1998, and that the owner was the only employee until 2003. Based on the cyclical nature of the business, and as the company was just starting out, the petitioner relied on the work of contract labor, and reported the wages on Forms 1099.

Counsel provides that the beneficiary was self-employed in 2003 and 2004, so that the petitioner cannot demonstrate its ability to pay based on prior wages, but that the petitioner's tax returns reflect payment of "costs of labor" in 2003 in the amount of \$37,715, and had gross receipts of \$182,588.00. In 2004, the petitioner's tax return reflects payment of \$60,808 in costs of labor, and had gross receipts of \$213,158. Its 2005 return reflects costs of labor in the amount of \$84,648, and \$249,399 in gross receipts.

Counsel cites to AAU *EAC 94 173 52830*, 1995 WL 1796440, and *EAC 02 036 54542*, 2004 WL 3457107 (INS) in support and asserts that in those cases, the Associate Commissioner considered the petitioner's gross receipts and wages paid as cost of labor in consideration of the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, the petitioner provided a letter from its accountant, which provides that the petitioner records wages paid under costs of labor.

Regarding gross receipts, as noted above in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income is the proper figure for consideration.

Regarding wages paid to contract laborers, generally wages paid to others cannot be used to show the petitioner's ability to pay the proffered wage. Counsel asserts that the petitioner's payment of wages to contract labor would evidence the petitioner's ability to pay the proffered wage. He attached Forms 1099 for the year 2005 in support. Two individuals paid as contract laborers in 2005 appear on the petitioner's 2006 payroll. It is not clear when these workers started working, if they were employed in 2003, and 2004, or that the workers have been terminated. Further, in 2005, as noted above, the beneficiary had already begun working for the petitioner, so that the beneficiary would not be replacing those workers, but rather employed in addition to those workers. Accordingly, the petitioner has not established that the funds listed on the petitioner's tax returns for 2003, 2004, or 2005 would constitute wages available to pay other workers. Further, the petitioner has not adequately documented that the contract laborers performed the same job duties as those set forth in the Form ETA 750. The petitioner has not adequately documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.⁴

⁴ In any further proceedings, the petitioner would need to provide adequate documentation that the beneficiary would replace a worker who performed the same duties. The petitioner would further need to

Accordingly, 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.

document specific wages paid to the laborer for each year, and that the contract laborer was no longer employed for the petitioner.