

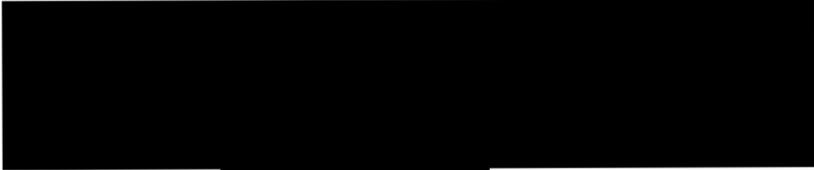
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JAN 29 2008**
WAC 06 030 52695

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development, consulting and training firm. It seeks to employ the beneficiary permanently in the United States as programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), has been provided. The director determined that the petitioner had not established its continuing ability to pay the proffered wage from the priority date onwards. The director denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner had established its continuing financial ability to pay the proffered wage.

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 or seasonal 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 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).

The regulation at 8 C.F.R. § 204.5(g)(2) also 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases,

additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 17, 2003.² The proffered wage is stated as \$100,734.40 per year.

On the ETA 750B, signed by the beneficiary on March 31, 2003, the beneficiary claims that he has worked for the petitioner since November 2002.

With the petition, and in support of its ability to pay the proffered wage, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation. The return reflects that the petitioner files its tax returns on a calendar year basis. The return contains the following information:

	2004
Gross Receipts or Sales	\$ 1,765,514
Salaries and Wages	\$ 207,652
Net Income ³	-\$ 2,247
Current Assets (Schedule L)	\$ 18,949
Current Liabilities (Schedule L)	\$ 33,966
Net Current Assets	-\$ 15,017

As shown above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.⁴ Besides net income, and

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

³For the purpose of this analysis, 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. Here, a combined total is shown on line 17e of Schedule K for 2004 and a subsequently submitted 2005 return. The combined total is shown on line 23 of a subsequently submitted 2003 return.

⁴ 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

as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible readily available resource out of which a proffered wage may be paid. As reflected on a corporate tax return the company's year-end current assets and current liabilities are shown on Schedule L. Current assets are found on lines 1(d) through 6(d) and current liabilities are specified on lines 16(d) through 18(d). If the petitioner's year-end 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.

The director issued a request for evidence on May 5, 2006, advising the petitioner that the 2004 tax return failed to demonstrate the ability to pay the certified salary and that the priority date was unknown as the labor certification had not been submitted with the petition. The director requested that the petitioner provide copies of all Wages and Tax Statements (W-2s) or Miscellaneous Income, (Form 1099s), issued to the beneficiary showing compensation paid if he was employed by the petitioner and to also submit the 2005 federal income tax return along with corresponding W-2s or Form 1099s.

In response, the petitioner responded that the original labor certification had originally accompanied the petition which had been filed with the California Service Center. The petitioner provided copies of amended federal income tax returns for 2003 and 2004 prepared on July 8 and July 9, 2006 respectively, and signed by the petitioner's president on July 12, 2006. A copy of an unsigned 2005 tax return was also provided. These returns reflected the following:

	2003	2004	2005
Gross Receipts or Sales	\$1,324,396	\$ 1,765,514	\$1,242,000
Salaries and Wages	\$ 158,323	\$ 207,652	\$ 208,417
Net Income	-\$ 33,537	-\$ 2,247	\$ 1,586
Current Assets (Schedule L)	\$ 243,169	\$ 178,808	\$ 689,513
Current Liabilities (Schedule L)	\$ 40,425	\$ 33,966	\$ 41,928
Net Current Assets	\$ 202,744	\$ 144,842	\$ 647,585

Copies of W-2s issued to the beneficiary were also supplied by the petitioner. The following wages were paid to the beneficiary:

		Difference from proffered wage of \$100,734.40
2003	\$49,835.50	(\$50,898.90)
2004	\$59,117.50	(\$41,616.90)
2005	\$74,174.10	(26,560.30)

The director denied the petition on October 13, 2006. In the denial, the director indicated she would not consider the 2003 and 2004 amended returns as credible evidence of the ability to pay the proffered wage as they were not amended until after the request for evidence was made. The director observed that the figures

expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

for Schedule L had changed so as to reflect an ability to pay the proffered wage based on the petitioner's net current assets. The director also observed that the petitioner had filed 43 I-129 and I-140 petitions and that the ability to pay multiple beneficiaries had not been established.

On appeal, the petitioner submitted copies of online Internal Revenue Service (IRS) downloads of its originally submitted 2003 and 2004 federal income tax returns. A note at the top of page 1 of these copies indicates that duplicate /amended returns are available. The petitioner also submitted copies of postal receipts that it claims are evidence that the amended returns were sent to the IRS on July 12, 2006, as well as an IRS Form 8821, Tax Information Authorization authorizing CIS to obtain copies of its tax returns for 2003, 2004, and 2005. The petitioner additionally submitted a chart purporting to show its active I-140 petitions as well as copies of other W-2s issued to other workers in 2005.⁵

Along with the other documents, counsel submits a letter signed by Narender Ramarapu, the petitioner's president, who asserts that the director should have considered the amended returns as evidence of the petitioner's ability to pay the proffered wage, because they were amended not for immigration purposes, but because of accounting errors. The president also states that only three petitions for permanent residency⁶ are being pursued, including the beneficiary's and requests reconsideration of the denial of the petition.

The petitioner failed to provide actual evidence from the IRS that the amended returns were filed as represented and failed to provide copies of W-2s of all beneficiaries and information relative to the proffered wages pertinent to those beneficiaries that it was sponsoring during the 2003 and 2004 periods, so that it could be determined based on those figures how many beneficiaries it would have the ability to pay taking into consideration the amount of compensation already paid to those workers. In such a case, the AAO is disinclined to reverse the director's decision based on the documentation contained in the record and will not remand the case to ask the director to continue to adjudicate this petition based on the petitioner's election to amend its 2003 and 2004 tax returns after the director's request for evidence. The AAO does not find the president's explanation as to the reason for the timing of these amendments to be entirely credible given the number of I-129 (nonimmigrant visa petitions) and I-140 petitions that it has filed. 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)). 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. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Without competent, independent documentary evidence of the actual amended tax returns supporting the petitioner's submissions to the record subsequent to the director's request for evidence, as well as a specific explanation of the reasons underlying the election to amend the returns, the AAO will not reverse the director's decision concluding that the petitioner had not its ability to pay the proffered wage based on the returns submitted to the record.

We note that in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or

⁵ It is observed that except for the president, none of the employees represented on the W-2s were paid salaries equal to the level of the proffered wage.

⁶ This is understood as referring to I-140 petitions.

greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If either its net income or net current assets can cover the shortfall between the actual wages paid and the proffered salary, a petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer for that period. In this case, as reflected by the W-2s, the shortfall between the amounts paid to the beneficiary and the proffered wage in 2003, 2004 and 2005 was (\$50,898.900), (\$41,616.90), and (\$26,560.30), respectively.

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the 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. "[CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (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, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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. If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets.

In the instant case, the petitioner's net income as shown on its original and amended tax returns reflects that it reported -\$33,537 in 2003, -\$2,247 in 2004 and \$1,586 in 2005. None of these amounts was adequate to establish the ability to pay the proffered wage. As shown on the original 2004 tax return, its net current assets of -\$15,017 failed to cover the proffered wage. However, as reported on the subsequently amended 2003 and 2004 tax returns and on the 2005 tax return, its net current assets increased substantially and could cover the shortfalls between the certified salary and the amount of actual wages paid to the beneficiary. As noted above, however, until the actual amended tax returns are shown to have been filed with the IRS for 2003 and 2004, as well as for 2005, are submitted along with an accompanying explanation, the circumstances do not support a finding that the petitioner has demonstrated its continuing ability to pay the certified salary through its net current assets or its net income.

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.