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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE:

[REDACTED]  
SRC 07 022 50765

Office: TEXAS SERVICE CENTER

Date: **MAY 07 2009**

IN RE:

Petitioner:

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:

[REDACTED]

**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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an engineering consulting company. It seeks to employ the beneficiary permanently in the United States as a machinist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 and 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.

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 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 DOL. *See* 8 C.F.R. § 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 DOL 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$21.52 per hour (\$44,761.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal, counsel submits copies of the Form W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for the years 2001 and 2006; copies of the Form 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary for the years 2001, 2005 and 2006; and a letter from [REDACTED]. Other evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for the years 2000 through 2004; unaudited financial statements; a letter from [REDACTED] and copies of pay stubs showing wages paid to the beneficiary in 2003, 2004 and 2006.

On the I-140 petition the petitioner claimed to have been established in 1975 and to currently have 65 employees. The petitioner listed its gross annual income as \$11,308,000.00 and its net annual income as \$617,000.00. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

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, U.S. Citizenship and Immigration Services (USCIS) 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 record shows that the petitioner paid the beneficiary as follows in the years 2001 through 2006:

<u>Year</u>	<u>Wages Paid</u>
2001	\$17,231.00 <sup>2</sup>

<sup>1</sup> 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).

<sup>2</sup> This is the combined total of the amounts shown on the W-2 wage and Tax Statement (\$10,431.00) and the 1099-MISC, Miscellaneous Income (\$6,800.00).

2002	Information not provided
2003	Inconsistent information provided <sup>3</sup>
2004	\$32,380.25
2005	\$44,807.44 <sup>4</sup>
2006	\$44,813.81 <sup>5</sup>

The petitioner has established that it paid wages to the beneficiary in excess of the proffered wage in 2005 and 2006. The petitioner has not established that it paid the beneficiary the proffered wage in 2001, 2002, 2003 or 2004. The petitioner must establish that it had the ability to pay the beneficiary the difference between the proffered wage in 2001 and 2004: \$27,530.00 in 2001 and \$12,380.75 in 2004. The petitioner must establish that it had the ability to pay the full proffered wage in 2002 and 2003.

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, USCIS 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). For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 through 2004 as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$156,771.00.
- In 2002, the Form 1120 stated net income of -\$196,003.00.
- In 2003, the Form 1120 stated net income of -\$190,987.00.
- In 2004, the Form 1120 stated net income of -\$191,643.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, or 2004.

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<sup>3</sup> The record contains a W-2 wage and Tax Statement issued by the petitioner to the beneficiary for the year 2003 which does not list any wages paid to the beneficiary for 2003. However, the record also contains copies of pay stubs purportedly showing that the petitioner paid the beneficiary \$28,970.40 in 2003. The petitioner has not provided any evidence to resolve this inconsistency. As stated in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988): "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

<sup>4</sup> This is the combined total of the amounts shown on the W-2 wage and Tax Statement (\$41,607.44) and the 1099-MISC, Miscellaneous Income (\$3,200.00).

<sup>5</sup> This is the combined total of the amounts shown on the W-2 wage and Tax Statement (\$43,113.81) and the 1099-MISC, Miscellaneous Income (\$1,700.00).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> 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. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2001 through 2004 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$113,289.00.
- In 2002, the Form 1120 stated net current assets of \$625,104.00.
- In 2003, the Form 1120 stated net current assets of \$653,874.00.
- In 2004, the Form 1120 stated net current assets of \$926,868.00.

The petitioner has established that it had sufficient net current assets to pay the proffered wage in 2002, 2003 and 2004. The petitioner has not established that it had sufficient net current assets to pay the proffered wage in 2001.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2001 through wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that there is another way to determine the petitioner's ability to pay the proffered wage. Specifically, counsel notes that the petitioner's tax returns are based on a fiscal year that runs from September 1 to August 31. Counsel states that in order to correctly analyze the petitioner's ability to pay the proffered wage for 2001, both the 2000 tax return (which covers the period from September 1, 2000 to August 31, 2001) and the 2001 tax return (which covers the period from September 1, 2001 to August 31, 2002) must be considered. However, counsel has not provided any evidence which apportions the petitioner's net income and/or net current assets to establish that the petitioner had the ability to pay the proffered wage in calendar-year 2001. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, it is noted that the petitioner's 2000 income tax return shows net income of -\$477,273.00 and net current assets of -\$143,501.00. Thus it does not appear that the petitioner could establish its ability to pay the proffered wage even if the 2000 and 2001 returns were considered together.

Counsel also states that because the ETA 750 was accepted for processing by the DOL on April 30, 2001, the proffered wage should be prorated to \$29,840.67 in 2001, and the petitioner should only be required to show its ability to pay this amount rather than the full proffered wage. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the

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<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel also refers to a letter from [REDACTED] dated February 9, 2007. Mr. [REDACTED] states in the letter that his opinion is based on financial statements for the fiscal years ended August 31, 2000, August 31, 2001, and August 31, 2002, as well as the petitioner's corporate income tax returns for the years 2001 through 2005. The record contains copies of the financial statements upon which [REDACTED] based his opinion. The accountant's report accompanying those financial statements makes clear that they are reviewed statements, as opposed to audited statements. 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. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Even aside from the issue of relying on unaudited financial statements, [REDACTED] letter fails to establish the petitioner's ability to pay the proffered wage. First, [REDACTED] considers the petitioner's net income "before charges for depreciation." However, USCIS will not add depreciation back into the petitioner's income in determining the ability to pay the proffered wage. Depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. As noted above, courts have already rejected the argument that depreciation should be added back to net income in determining a petitioner's ability to pay the proffered wage. See, e.g., *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989).

[REDACTED] also states that the petitioner had "extraordinary losses" in 2001 due to the fact that the petitioner "decided to close down Zycor, Inc." The only evidence in the record regarding the closing of Zycor, Inc. and its effect on the petitioner is a statement in Note L of the unaudited financial statements. As noted above, the unsupported representations of management made in unaudited financial statements are not reliable evidence.<sup>7</sup>

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<sup>7</sup> Even if the AAO were to assume that the information regarding Zycor, Inc. is accurate, it would not establish the petitioner's ability to pay the proffered wage. According to Note L of the unaudited financial statement, the closing of Zycor, Inc. contributed \$179,161.00 to petitioner's net loss in 2001. However, according to the unaudited financial statement, the petitioner's total net loss for 2001 was \$434,393.00. Thus,

██████████ further states that the petitioner's profitability was negatively affected by the terrorist attacks of September 11, 2001. However, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. As stated above, 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. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is also noted that the petitioner's gross receipts increased each year from 2001 to 2003, which calls into question counsel's claim that the petitioner suffered from a depressed business climate following September 11, 2001.

also states that the personal assets of the petitioner's sole shareholder can be considered in determining the petitioner's ability to pay the proffered wage. However, because 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).

Finally, ██████████ notes that the proffered wage represents less than 1 percent of the total wages paid by the petitioner, and that the petitioner has always met its obligations to pay its employees' wages throughout its history. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, when an entity's ability to pay is marginal or borderline, USCIS will consider the overall magnitude of the entity's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was established in 1975 and currently has 65 employees. The petitioner's gross income averaged more than \$9,000,000 each year from 2000 to 2004. The petitioner paid an average of more than \$500,000 in salaries and wages, and an average of more than \$500,000 in officer compensation from 2000 to 2004. Assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The evidence submitted establishes 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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even without the loss from the closing of Zycor, Inc. the petitioner still would have had a net loss of \$255,232.00 and would have been unable to establish its ability to pay the proffered wage based on the figures from the unaudited financial statement.