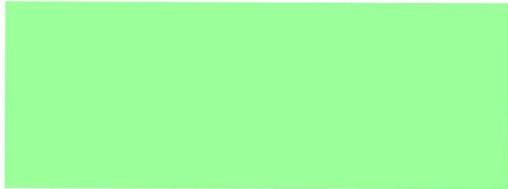


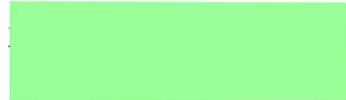


U.S. Citizenship
and Immigration
Services

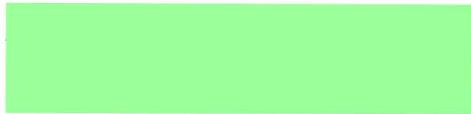
(b)(6)



DATE: JUN 14 2013 Office: NEBRASKA SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). The AAO granted a subsequently filed motion and reaffirmed the director's denial of the petition. The petitioner has now filed motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted. The petition will remain denied.

The petitioner is a food manufacturer. The petitioner seeks to classify the beneficiary as an accountant. 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, and the AAO dismissed the appeal and the subsequent motion to reopen.

On motion, the petitioner has submitted copies of its tax returns for 2009 and 2010, a statement by the petitioner's president, copies of promissory notes, a summary of Forms 941 from 2004 through 2010, Employer's Quarterly Federal Tax Returns, and documents relating to a business merger regarding the formation of the petitioner's business. The AAO finds that this constitutes new facts and/or evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motion is granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history and case precedent will be made only as necessary.

As set forth in the director's April 22, 2008 denial, and the AAO's August 16, 2010 and March 20, 2012 decisions, the issue in this case is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The AAO dismissed the appeal, specifically addressing the evidence submitted by the petitioner and explaining why the petition could not be approved. On first motion, counsel asserted that the additional evidence submitted with the motion was sufficient to overcome the AAO's prior decision dismissing the appeal. In the decision dismissing the motion, the AAO addressed counsel's assertions and the evidence submitted, and explained the various shortcomings that resulted in the AAO's decision. On first motion, counsel put forth similar claims and the petitioner submitted IRS Form 1120X, showing that amendments were made to the petitioner's Forms 1120 corporate tax return for 2004, 2005, 2006, and 2007. Nevertheless, the AAO dismissed the petitioner's motion, pointing out that an amended tax return prepared years after the claimed transactions and subsequent to the director's denial of the petition raises questions regarding the truth of the facts asserted. *See Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

Although the AAO denied the petitioner's first motion to reopen, it was determined that the petitioner had demonstrated its ability to pay the proffered wage for 2007, but had failed to establish its ability to pay the proffered wage for 2004, 2005, and 2006. Therefore, on motion the issue is whether or not the petitioner has established its ability to pay the proffered wage in

2004, 2005, 2006. The AAO further determined that the petitioner had filed multiple immigrant petitions.¹

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), also 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 either 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 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 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 May 14, 2004. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour based upon a 40 hour work week (\$38,188.80 per year). The Form ETA 750 states that the position requires a four-year bachelor's degree in accounting.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner indicates that it was established in 1997 and that it currently employs 40 workers. On the Form ETA 750, signed by the beneficiary on February 24, 2004, 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 a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that

¹ The AAO finds that the petitioner has demonstrated on motion that it does not have multiple immigrant petitions pending that would affect its ability to pay the proffered wage. Therefore, this issue is withdrawn.

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, United States 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. 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. 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.² 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 record of proceeding contains copies of IRS Forms W-2 and the petitioner's tax returns as listed below:

- In 2004, the Form W-2 stated total wages of \$23,350.00 (a deficiency of \$14,838.80).
- In 2004, the Form 1120 stated net income of -\$53,014.00.
- In 2004, the Form 1120 stated net current assets of -\$99,970.00.

- In 2005, the Form W-2 stated total wages of \$25,525.00 (a deficiency of \$12,663.80).
- In 2005, the Form 1120 stated net income of -\$4,813.00.
- In 2005, the Form 1120 stated net current assets of -\$158,449.00.

- In 2006, the Form W-2 stated total wages of \$28,854.00 (a deficiency of \$9,334.80).
- In 2006, the Form 1120 stated net income of -\$174,097.00.
- In 2006, the Form 1120 stated net current assets of -\$343,524.00.

- In 2009, the Form 1120 stated net income of \$22,656.00.
- In 2009, the Form 1120 stated net current assets of \$84,652.00.

²According 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.

- In 2010, the Form 1120 stated net income of \$102,320.00.
- In 2010, the Form 1120 stated net current assets of \$213,667.00.

The evidence demonstrates that for the year 2009, the petitioner had sufficient net current assets to pay the proffered wage. The evidence demonstrates that for the year 2010, the petitioner had sufficient net income and net current assets to pay the proffered wage. For the years 2004, 2005, and 2006, however, it did not have sufficient net income or net current assets to pay the difference between the wage paid and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

On appeal, counsel asserted that the director erred in not properly taking into account the totality of circumstances and assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. Counsel asserted on first motion that the petitioner's tax returns have been amended to reflect that loans acquired from its sister companies to purchase equipment and machines for plant automation were initially recorded as current liabilities but have been reclassified as long-term liabilities because such loans remained outstanding for several years; thus demonstrating current asset amounts sufficient to pay the proffered wage in 2004, 2005, and 2006. Counsel currently reasserts that the director and the AAO erred in failing to properly take into account the totality of the circumstances in assessing the petitioner's ability to pay the proffered wage. Counsel also asserts that the petitioner's tax returns were amended to reflect the reclassification of its current liabilities to long-term liabilities because they remained unpaid beyond the normal accounting period of one year; and that there was no negative intent in amending the tax returns.

The record contains the petitioner's Forms 1120 for tax years 2004, 2005, and 2006. The record also contains the petitioner's accompanying Forms 1120X for 2004, 2005, and 2006. The Forms 1120X, Amended U.S. Corporation Income Tax Returns for 2004, 2005, and 2006 are signed by the petitioner's president and dated May 6, 2008.³ The petitioner submitted four U.S. Postal Certified Mail Receipts stamp dated May 8, 2008. The petitioner also submitted a confirmation letter from the Internal Revenue Service (IRS) dated August 30, 2010 which acknowledges receipt of request to amend the petitioner's 2004, 2005, and 2006 tax returns.⁴ In the Forms 1120X, it is indicated that changes were made to Schedules L, reclassifying a portion of current liabilities to long-term liabilities. In an accompanying letter submitted with the current motion signed by the petitioner's president, she stated that on May 4, 2008 she was

³ It was only after the visa petition was denied by the director on April 22, 2008 that the petitioner submitted amended federal tax returns showing a decrease in its liabilities for 2004, 2005, and 2006, which are the years the petitioner failed to establish its ability to pay the proffered wage.

⁴ Although the petitioner submitted a Form 1120X for the 2007 tax year, the IRS did not acknowledge receipt of the amended tax return.

advised by [REDACTED] of the need to correct the accounting postings of the loans from "Current Liabilities" to "Long Term Liabilities" because they were unpaid beyond the normal accounting cycle of one year. She further stated that the petitioner experienced a temporary financial setback as a result of a merger followed by a series of business development initiatives that resulted in the petitioner borrowing in the years 2004, 2005, and 2006. The AAO finds that the merger and business development initiatives as described by the petitioner do not constitute the occurrence of any uncharacteristic business expenditures or losses.

As evidence on motion, the petitioner submitted copies of the following promissory notes written on its company's letterhead and signed by the petitioner's representative:

- A promissory note dated August 31, 2004 in the amount of \$135,000.00 with a yearly rate of 12% interest on any unpaid balance, and made payable to [REDACTED] (the lender), indicating the petitioner's promise to pay \$1,400.00 in "weekly" installments on the 30th day of each month and continuing until the principal is paid in full.
- A promissory note dated December 1, 2005 in the amount of \$50,250.00 with a yearly rate of 12% interest on any unpaid balance, and made payable to [REDACTED] indicating the petitioner's promise to pay \$1,751.00 in "monthly" installments on the 14th day of each month continuing until the principal is paid in full.
- A promissory note dated December 27, 2006 in the amount of \$80,600.00 with a yearly rate of 12% interest on any unpaid balance, and made payable to [REDACTED] (the lender), indicating the petitioner's promise to pay \$3,510.00 in "monthly" installments on the 21th day of each month and continuing until the principal is paid in full.

Although the promissory notes appear to be authentic, the AAO notes that they are not notarized and do not appear to have been witnessed by a third party or a representative of the lender. 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)).

The original classifications, including the corresponding amounts, and the amendments made to the petitioner's tax returns are illustrated in the table below:

Original Current Liability	2004	2005	2006
Temporary Loans [REDACTED]	\$135,000.00	\$180,250.00	
Temporary Loan [REDACTED]			\$80,600.00
Amended Other Liability	2004	2005	2006
Notes Payable TL [REDACTED]	\$135,000.00	\$180,250.00	
Notes Payable TL [REDACTED]			\$80,600.00

As noted above, the petitioner's net current assets are the difference between its current assets and current liabilities. 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, and 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. With regard to the petitioner's original tax returns for tax year 2004, it listed its current liabilities on Schedule L, Line 18, as \$611,259.00, and in its amended tax return, listed \$357,217.00 (a difference of \$254,042.00) on Line 18. On the petitioner's original tax returns for tax year 2005, it listed its current liabilities on Schedule L, Line 18, as \$624,807.00, and in its amended tax return, listed \$302,515.00 (a difference of \$322,292.00) on Line 18. On the petitioner's original tax returns for tax year 2006, it listed its current liabilities on Schedule L, Line 18, as \$1,027,674.00, and in its amended tax return, listed \$591,676.00 (a difference of \$435,998.00) on Line 18. The figures that appear on the petitioner's amended tax returns significantly changed the petitioner's net current asset amounts for the 2004, 2005, and 2006 tax years. As is noted in this decision, such significant decreases in the petitioner's current liabilities and significant increases in the petitioner's net current assets raise questions as to the veracity of the amended tax returns.

Counsel asserts on motion that USCIS should not question the amended tax returns submitted to the IRS on behalf of the petitioner when the IRS has accepted them and infers that such documents should supersede the petitioner's previous tax returns. Counsel further asserts that the petitioner's tax returns for 2004, 2005, and 2006 were amended to reflect the change of loans listed in the current liabilities column on its tax return to the long-term column because they remained unpaid beyond the normal accounting period of one year. Contrary to counsel's claims, the petitioner's 2004, 2005, and 2006 tax returns were amended to reflect loans that it had incurred in those respective years, thus they did not remain unpaid beyond the normal accounting period of one year.

The AAO views the petitioner's change or subsequent amendment of its tax returns as questionable, specifically with regard to the significant decreases in the petitioner's current liabilities; and therefore, significant increase in its net current assets based upon the reallocation of liabilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Like a delayed birth certificate, the amended tax returns years after the claimed transaction and subsequent to the director's denial raise questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

Counsel and the petitioner's representative stated that the current liabilities at Schedule L Line 18 were reclassified as long-term liabilities at Schedule L Line 21 (other liabilities) because they

remained unpaid beyond the normal accounting period of one year, however, the petitioner's tax returns for 2003 through 2007 show that it characterized "Temporary loan-PFT" as a current liability, and from 2005 through 2009 it characterized "Temporary loan-CAT" as a current liability. In addition, although other temporary loans listed by the petitioner such as "Temporary loan-A1 Freshmeat," "Temporary loan-Travel Fund," and "Temporary loan-DT" remained unpaid beyond the normal accounting period of one year, they continued to be characterized as by the petitioner as current liabilities. These factors raise questions as to the veracity of the petitioner's amended tax returns. Furthermore, the inconsistencies and contradictions cast doubt on the petitioner's proof. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel refers to two decisions issued by the AAO in which the AAO overturned the service center's denial and sustained the appeal, finding that the petitioner had established its ability to pay the proffered wage. Counsel has provided a copy of the two decisions, but has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions, other than stating that the petitioner's longevity, gross receipts and wages paid were similar to the other two petitioner's. However, as has been previously stated, the deficiencies in the petitioner's evidence are not cured by its submission of the amended tax returns. Further, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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).

Therefore, the amended tax returns and the purported reclassification of the petitioner's loans and notes payable do not constitute persuasive evidence of the petitioner's ability to pay the proffered wage in 2004, 2005, and 2006.

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 AAO's prior decision, dated March 20, 2012, with respect to the issue of the petitioner's ability to pay the proffered wage, is affirmed. The petition remains denied.