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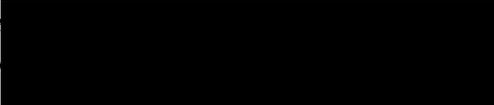
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JUN 01 2004



FILE: LIN-03-048-52654 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer programming and consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst at an annual salary of \$61,000. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, the petitioner submits the Forms W-2 it issued to the beneficiary in 2000, 2001 and 2002. We note that these forms were specifically requested in the director's request for additional documentation dated March 9, 2003. The petitioner did not include these forms in his response.

On review, the AAO agrees with the decision of the director. The record before the director did not establish that the petitioner had the ability to pay the beneficiary the proffered wage. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to skilled workers and professionals.

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 priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's filing date is August 20, 2001. The beneficiary's salary as stated on the labor certification is \$61,000 annually.

With the original petition, the petitioner submitted its tax returns for 2000 and 2001. The petitioner asserted that

the beneficiary's salary is included in the petitioner's expenses for 2001. The petitioner also argued that the petitioner's average daily balance of \$67,139.74 in August 2001 was sufficient to pay the proffered wage. On March 19, 2003, the director requested evidence that the petitioner had the ability to pay the beneficiary's salary as of the filing date and that it continued to have this ability. The director specifically stated: "If the petitioner has employed the beneficiary, please submit legible copies of all Forms W-2 issued by the petitioner to the beneficiary."

In response, the petitioner resubmitted its 2000 and 2001 tax returns and submitted its 2001 bank statements and unaudited balance sheets and income statements for 2000, 2001, 2002 and 2003. The petitioner did not submit any evidence that it had been paying the beneficiary, although it continued to claim that it had done so.

As stated by the director, the petitioner's 2000 tax return is not relevant to its ability to pay the beneficiary the proffered wage as of August 20, 2001. The petitioner's Form 1120 U.S. Corporation Income Tax Returns for the tax years ending 2001 and 2002 (submitted on appeal) contain the following information:

	2001	2002
Officer compensation	\$39,859	\$101,313
Net income (loss)	(\$7,694)	\$0
Current assets	\$21,726	\$25,085
Current liabilities	\$0	\$280

The unaudited financial statements provide:

	2001	2002	March 2003
Net ordinary income (loss)	(\$4,437)	\$5,513	\$4,640 (for January through March)
Current assets	\$232,340	\$24,575	\$52,001
Current liabilities	\$0	(\$2,743.83)	\$0

The bank statements for 2001 reflect balances between \$14,026 and \$71,684 in the La Salle Bank account during January 2001 through July 2001, balances between \$13,748 and \$62,717 in the Old Kent Bank account during July 2001 through August 2001, and balances between \$18,297 and \$46,883 in the Fifth Third Bank account during September 2001 through the end of November 2001.

The director noted the petitioner's net loss as stated on its 2001 tax return, that the bank statements ended in November 2001, that the financial statements were unaudited, and that the petitioner had failed to submit the required Forms W-2. Consequently, the director denied the petition.

On appeal, counsel asserts that the petitioner has employed the beneficiary since July 1, 1999, that the affidavits of Certified Public Accountant [REDACTED] and the petitioner's officer [REDACTED] support the unaudited financial statements, and that the director should have accepted the attestation of the petitioner's president that it was paying the beneficiary. The petitioner submits the Forms W-2 the petitioner issued to the beneficiary.

Mr. [REDACTED] asserts that cash basis taxpaying companies almost always reflect no income because profits are distributed to the owners to avoid double taxation. Mr. [REDACTED] averages the petitioner's net income at \$145,502 for the years 2000, 2001 and 2002. Mr. [REDACTED] is not persuasive. The distributed profits in 2001 were only \$39,859, well below the proffered wage. While Mr. [REDACTED] notes the petitioner's high assets according to the 2001 balance sheet, we note that the current assets for 2001 on the unaudited balance sheet are inconsistent with the current assets reflected on the petitioner's 2001 tax return. It is incumbent upon 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, 591-92 (BIA 1988). Mr. [REDACTED] assertion that the financial statements are accurate does not overcome this inconsistency. The bank statements are not persuasive as the petitioner's cash has already been taken into consideration as part of its net current assets.

Finally, we acknowledge that the petitioner initially submitted a statement from [REDACTED] the petitioner's president, affirming that the petitioner employed the beneficiary in 2001. This statement, which does not specify the wages paid to the beneficiary and is unsupported by documentation such as Forms W-2, is insufficient. It remains, the director specifically asked for the Forms W-2 the petitioner issued to the beneficiary. The petitioner failed to submit those forms. While the petitioner now submits those forms on appeal, we decline to consider them for the reasons stated at the top of this decision.

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 sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.