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FILE: EAC 02 275 53086 Office: VERMONT SERVICE CENTER Date: AUG 10 2005

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a photographic laboratory. It seeks to employ the beneficiary permanently in the United States as a photo-lab supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

On appeal, current counsel submits additional evidence and asserts that the petitioner has established its 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 nature, for which qualified workers are not available in the United States.

The regulation at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 26, 2001. The proffered wage as stated on the amended Form ETA 750 appears to be \$30.10¹ per hour, which amounts to \$62,608 per annum. On the Form ETA 750B, signed by the beneficiary on March 19, 2001, the beneficiary claims to have worked for the petitioner since February 2000.

On Part 5 of the petition, the petitioner claims to have been established in 1989, have a gross annual income of \$182,337, and to currently employ two workers.

¹ The basic wage amount and overtime rate were amended on the ETA 750 by the DOL. The basic wage rate is not perfectly legible and could be \$30.15. However, the basic wage amount of \$30.10 used by the director is consistent with the overtime rate given on the ETA 750. The petitioner does not dispute the amount.

In support of its ability to pay the proffered wage of \$62,608 per year, the petitioner initially submitted a copy of its Form 1120S, U. S. Income Tax Return for an S Corporation for the year 2000. It shows that the petitioner uses a standard calendar year to file its taxes and in 2000, declared ordinary income of -\$11,065.² Schedule L of the tax return reflects that the petitioner had \$37,007 in current assets and \$13,649 in current liabilities, resulting in \$23,358 in net current assets. Besides net income, Citizenship and Immigration Services (CIS) will consider *net current assets* as an alternative method of examining a petitioner's continuing ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporate petitioner's year-end current assets and current liabilities may be found on line(s) 1 through 6 and line(s) 16 through 18, of Schedule L of a corporate tax return. Net current assets represent a measure of a petitioner's liquidity during a given period and an alternate resource out of which to pay a proffered wage. If a 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.

On July 2, 2003, the director requested additional evidence pertinent to the petitioner's financial ability to pay the proposed wage offer beginning on the priority date and continuing until beneficiary obtains lawful permanent residence. The director advised the petitioner to provide either copies of annual reports, federal tax returns, or audited financial statements. The director specifically instructed the petitioner to provide evidence for 2001 consisting of either a federal tax return or an annual report. The director also specifically requested the petitioner to provide a copy of the beneficiary's Wage and Tax Statement (W-2) if it employed the beneficiary in 2001.

In response to the director's request, former counsel supplied a copy of the petitioner's 2001 corporate tax return. It reflects that the petitioner reported \$14,134 in ordinary income. Schedule L indicates that the petitioner had \$42,338 in current assets and \$10,418 in current liabilities, yielding \$31,920 in net current assets. It is unclear why the director did not specifically request, nor why the petitioner failed to provide any documentation related to the year 2002.

Examining the petitioner's net income and net current assets as presented on the petitioner's 2001 tax return, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage date and denied the petition on January 7, 2004. The director also noted that the petitioner had failed to provide a copy of the beneficiary's 2001 W-2.

On appeal, current counsel provides a copy of a 2001 W-2 issued to the beneficiary. It shows that the beneficiary was paid \$10,296 in wages, representing all but \$328 declared as salaries and wages on the petitioner's corporate 2001 federal tax return. Counsel also provides a copy of the petitioner's 2001 tax return and copies of the petitioner's bank statements from February 2001 through December 2001. Counsel describes these documents as

² For purposes of this review, the petitioner's ordinary income reported on line 21 of its federal tax return will be treated as its net taxable income.

³ 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 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.

new evidence to be considered on appeal. As the 2001 tax return was earlier provided to the record, it is not new evidence.

The AAO will not consider the beneficiary's 2001 W-2 provided for the first time on appeal. As noted above, the director specifically requested this documentation from the petitioner when she issued the request for additional evidence on July 2, 2003. 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). Former counsel failed to provide this documentation and failed to offer any explanation except commenting that certain matters were beyond the scope of CIS' authority. 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. 74 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted W-2 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 this document characterized as new evidence submitted on appeal.

On appeal, counsel asserts that the director used incorrect numbers and/or an incorrect tax return in referring to the petitioner's current assets and current liabilities. Although the director failed to refer specifically to the petitioner's 2001 net current assets of \$31,920 as the difference between current assets and current liabilities, she correctly calculated the current assets based on line(s) 1 through 6 and current liabilities from line(s) 16 through 18 of Schedule L of the 2001 tax return. The \$68,572 in total assets referred to by counsel and listed on line 15 of Schedule L refers to the total of both short and longer-term assets. As noted above, CIS examines a petitioner's shorter-term current assets balanced against current liabilities because they represent a more appropriate measure of a readily available cash or cash equivalent resource out of which a proffered wage could be paid. It is noted that a petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. For these reasons, besides net income, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel also proposes that the balances showing on the petitioner's 2001 bank statements as well as wages paid to the beneficiary, officer compensation of \$36,000 on line 7 of the 2001 tax return added back to the net profit of \$14,134 provides sufficient funds to establish the petitioner's ability to pay the proffered wage of \$62,608. Counsel cites no binding authority to use such method in determining the petitioner's ability to pay the alien beneficiary's wage offer.

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 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, for the reasons given above, the AAO will not consider the beneficiary's 2001 W-2.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also 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. [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)) and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Texas 1989); 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). Relying only upon the petitioner's gross income is misplaced. Similarly, showing that the petitioner paid wages in excess of the proffered wage or has already paid out officer compensation or already taken other elective expenses at a specified level is not persuasive. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

In this case, the petitioner's 2001 tax return reflects that neither the net income of \$14,134, nor the net current assets of \$31,920 was enough to cover the proffered salary of \$62,608.

Regarding the copies of the petitioner's 2001 bank statements, it is noted that while the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the required documentation specified at 8 C.F.R. § 204.5(g)(2) consisting of federal tax returns, annual reports, or audited financial statements, is inapplicable or otherwise portrays an inaccurate financial picture of the petitioner. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the period covered by the 2001 tax return somehow show additional available funds that would not be reflected on the return.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. Based upon a review of the evidence contained in the underlying record and on appeal, the AAO concludes that the petitioner has failed to persuasively establish that it has had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that the certified position described on the ETA 750 is that of a photo-lab supervisor. Item 14 on the ETA 750 specifies that the alien beneficiary must have two years of experience in the job offered. This experience must be obtained as of the visa priority date. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In this case, the only employer's letter submitted in support of the alien's pertinent qualifying experience refers to the alien beneficiary's experience as a lab technician at Fuji Lab. It fails to describe any supervisory position held by the beneficiary. As such, it does not provide sufficient evidence that the beneficiary possessed the necessary qualifying work experience as required by the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis of denial. 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.