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**U.S. Citizenship
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Services**

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FILE: WAC 03 030 50792 Office: CALIFORNIA SERVICE CENTER Date: FEB 14 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:

SELF-REPRESENTED

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a veterinary hospital. It seeks to employ the beneficiary in the United States as a veterinary technician. As required by statute, the Application for Alien Employment Certification, Form ETA 750, bearing the approval of the Department of Labor, accompanied the petition. The director determined that the petitioner had not responded to his request for additional evidence (RFE) and therefore had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on, Jan. 8, 2001, the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submitted additional evidence but no legal memorandum.

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 granting 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 Jan. 8, 2001. The proffered wage as stated on the amended Form ETA 750 is \$13.43 per hour, which equals \$27,934.40 per year. On the petition itself, the petitioner stated that it was established in 1978 and now employs 12 workers.

On April 2, 2003, the California Service Center sent the petitioner an RFE asking for documentation for the years 2001 to the present as it pertains to the petitioner's ability to pay. The request specified that the evidence should include the petitioner's tax returns for 2001 and 2002, audited financial statements or the company's annual financial reports; tax documentation, including all schedules and tables; the beneficiary's W-2 Forms for 2001 to the date of the request; the last four quarters of the state quarterly wage report; a resume or letter of entry requirements; evidence of the beneficiary's experience; and copies of current business licenses. The RFE set a June 25, 2003 for a response.

On April 11, 2003, the petitioner responded by submitting only some of the documents requested – four quarterly state wage reports listing all employees and the beneficiary's W-2 Forms for 2001 and 2002. Missing from the documents sent was proof of the petitioner's ability to pay "in the form of copies of annual reports, copies of completed & signed federal tax returns, or audited financial statements."

Some of those missing documents would follow in a second submission under cover of a letter dated June 12, 2003, including:

- A letter from the beneficiary's former employer praising his work as a full-time veterinary technician from October 1991 to January 1994, as claimed in the ETA-750;
- The petitioner's first-quarter employer's federal tax return for 2003; and
- The petitioner's federal corporate income tax returns for 2000 and 2001.

Prior to the second submission, the director issued his decision denying the petition, stating that the petitioner had failed to supply the requested evidence and had further not established, under 8 C.F.R. § 204.5(g)(2), its continuing ability to pay the proffered wage starting from the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) authorizes the director to request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the years specified. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Further, 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 Obaighena*, 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.

Taken together, the petitioner's two submissions – first before the decision and then on appeal – appear on their face to meet the demands of the RFE. However, evidence sent in response to an RFE must be submitted together at one time rather than in two separate submissions, a requirement explicitly stated in 8 C.F.R. § 103.2(b)(11), which the RFE cites. The regulation states:

Submission of evidence in response to a Service request. All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

As stated, the RFE makes explicit reference to the regulation and explains that, failing “to submit ALL evidence requested at one time may result in the denial of your petition.”

While the foregoing paragraphs provide sufficient bases for dismissal of the instant appeal, the AAO will analyze the evidence to show that, even if the petitioner's responses to the RFE were deemed timely, the

evidence taken altogether would not move the AAO to alter its decision affirming the director's denial of the petition and dismissing the appeal.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) examines whether the petitioner has already employed the beneficiary. 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 question is whether the petitioner employed and paid the beneficiary before the priority date, Jan. 8, 2001. Prior to that date the petitioner maintains he was employing the beneficiary as a veterinary technician. The record includes the beneficiary's W-2 Wage and Tax Statement for 2001, which would appear to verify such prior employment.

Based upon the beneficiary's yearly pay of \$23,069 during the petitioner's 2001 tax year, the petitioner, *prima facie*, paid the beneficiary an hourly wage of \$11.09, \$2.34 an hour less than the proffered wage of \$13.43 per hour. For the petitioner's 2002 tax year, the petitioner the beneficiary's pay increased to \$12.36 an hour, still \$1.07-an-hour less than the proffered wage. Spread over a year, the petitioner's wage gap would total about \$2,600.

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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, the argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The 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. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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 petitioner's Form 1120 Corporate tax returns further reflect the following:

	Fiscal 2000	Fiscal 2001
Net income	\$35,601	\$1,159
Current Assets	\$65,166	\$26,986
Current Liabilities	\$75,266	\$39,341
Net current Assets	-\$10,100	-\$12,355

The foregoing establishes that the petitioner had the ability to pay the proffered wage from net income for fiscal year 2000 but not for fiscal 2001. In neither year is the petitioner able to establish its ability to pay from net current assets.

As previously stated, 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 [boldface added].** Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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. The petition is denied.

¹ 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.