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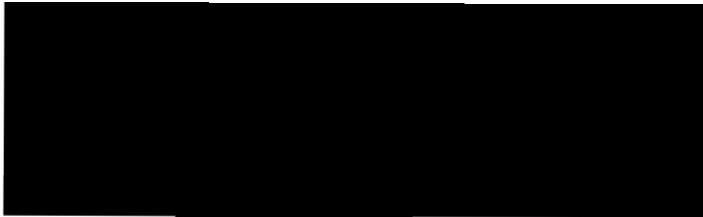
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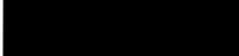
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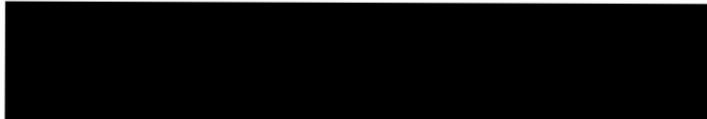
Office: VERMONT SERVICE CENTER

Date: **OCT 31 2006**

EAC 05 020 50296

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:

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, Chief  
Administrative Appeals Office

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

The petitioner is a learning center. It seeks to employ the beneficiary permanently in the United States as an adult education teacher. 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, and that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

As set forth in the director's December 29, 2004 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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 March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$48,235.00 per year. The Form ETA 750 states that the position requires a bachelor's degree in computer science or five years of experience as a computer instructor or consultant and/or college level

education in lieu of a degree, one year of experience in the job offered or one year of experience as a computer consultant, and fluency in the Korean language.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal, the petitioner submits a letter dated January 17, 2005 in support of the appeal, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for fiscal years 2002 and 2003, and the petitioner's previously submitted IRS Form 1120, U.S. Corporation Income Tax Return, for fiscal year 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$444,656.00, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year begins on June 1 and ends on May 31. On the Form ETA 750B, signed by the beneficiary on March 1, 2001, the beneficiary claimed to have worked for the petitioner as a computer instructor from January 2000 to the date he signed the Form ETA 750B.

On appeal, the petitioner asserts that the petitioner's net income and net current assets do not demonstrate the petitioner's complete financial picture. The petitioner states that its total income was \$444,656.00 in 2001, that its assets totaled \$36,153.00 in 2001, and that it paid out \$119,200.00 in salaries in 2001. The petitioner also notes that it had total income of \$342,638.00 in 2002 and \$313,891.00 in 2003, and that it had assets of \$41,166.00 in 2002 and \$35,808.00 in 2003. Thus, the petitioner asserts that it had the continuing ability to pay the proffered wage from the priority date in 2001. The petitioner also asserts that many companies reflect little, if any, income for tax purposes but continue to thrive, and that it is improper to judge a petitioner's ability to pay based solely on its net income and assets.

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, Citizenship and Immigration Services (CIS) 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, CIS 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

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<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).

instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 or subsequently.<sup>2</sup>

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 12, 2004. As of that date, the petitioner's fiscal year 2003 federal income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income for fiscal years 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$1,713.00.
- In 2002, the Form 1120 stated net income of \$3,521.00.
- In 2003, the Form 1120 stated net income of \$1,625.00.

Therefore, for fiscal years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$48,235.00.

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 petitioner's idea that its 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

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<sup>2</sup> Although the beneficiary claimed to have worked for the petitioner as a computer instructor beginning in January 2000, the record lacks any copies of W-2 Forms showing wages paid to the beneficiary, and the record contains no other evidence of the wages paid to the beneficiary by the petitioner. The record therefore lacks evidence that the petitioner was paying the proffered wage during the relevant time period and lacks evidence to determine the amount of any increase which would be necessary to raise the beneficiary's actual wage to the proffered wage during that time period. The AAO therefore must evaluate the petitioner's ability to pay the entire proffered wage as of the priority date and continuing to the present.

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.**<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 fiscal years 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$9,917.00.
- In 2002, the Form 1120 stated net current assets of \$4,169.00.
- In 2003, the Form 1120 stated net current assets of \$14,311.00.

Therefore, for fiscal years 2001, 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage of \$48,235.00.

Thus, 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, the petitioner asserts that the petitioner's net income and net current assets do not demonstrate the petitioner's complete financial picture. The petitioner states that many companies reflect little, if any, income for tax purposes but continue to thrive, and that it is improper to judge a petitioner's ability to pay based solely on its net income and assets. CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's

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<sup>3</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.

reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been doing business since 1997. The petitioner's gross receipts decreased in each relevant year, with gross receipts of \$444,656.00 in fiscal year 2001, \$342,638.00 in fiscal year 2002, and \$313,891.00 in fiscal year 2003. The petitioner employs only two employees and paid minimal salaries and wages in each relevant year.<sup>4</sup> The petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of adult education teacher. In the instant case, item 14 describes the requirements of the proffered position as follows:

|     |                         |                   |
|-----|-------------------------|-------------------|
| 14. | Education               |                   |
|     | Grade School            | blank             |
|     | High School             | blank             |
|     | College                 | 4                 |
|     | College Degree Required | Bachelor's Degree |
|     | Major Field of Study    | Computer Science  |

The applicant must also have one year of experience in the job offered or one year of experience as a computer consultant. The duties of the offered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A requires that the applicant be

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<sup>4</sup> The petitioner paid \$21,200.00 in salaries and wages in fiscal year 2001. The petitioner paid \$20,800.00 in salaries and wages in fiscal year 2002. The petitioner paid \$20,800.00 in salaries and wages in fiscal year 2003.

fluent in the Korean language. Item 15 also states that in lieu of a bachelor's degree, the applicant may have five years of experience as a computer instructor or consultant and/or college level education.

The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he attended the University of Bridgeport from January 1999 to January 2000, that he attended The City College of New York from September 1996 to June 1997, and that he obtained an associate's degree from LaGuardia Community College in June 1996. He does not provide any additional information concerning his education on that form. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from January 2000 to the date he signed the Form ETA 750B, and that he worked as a computer consultant for [REDACTED] Family Group from August 1997 to December 2000. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted a letter dated August 20, 2004 from [REDACTED] Family Group indicating that the beneficiary worked as a computer consultant for [REDACTED] Family Group from August 1997 to December 2000. On appeal, the petitioner submitted the beneficiary's transcripts from the University of Bridgeport, the beneficiary's transcripts from The City College of New York, and the beneficiary's transcripts from LaGuardia Community College indicating that the beneficiary obtained an associate's degree in computer science in 1996. On appeal, the petitioner also submitted a letter dated January 15, 2001 from [REDACTED] World Family Group indicating that the beneficiary worked as a computer consultant for [REDACTED] Family Group from August 1997 to December 2000.

On appeal, the petitioner states that the beneficiary has over three years of experience as a computer consultant and has nearly four years of college level education in computer science. Therefore, the petitioner asserts that the beneficiary is qualified for the proffered job.

The record does not establish that the beneficiary holds a United States baccalaureate degree or a foreign equivalent degree. Pursuant to Item 15 of the ETA 750A, in lieu of a bachelor's degree, the applicant may have five years of experience as a computer instructor or consultant and/or college level education. While the letter from [REDACTED] Family Group indicates that the beneficiary worked as a computer consultant for [REDACTED] World Family Group from August 1997 to December 2000, the letter does not indicate whether the beneficiary was employed in a full-time or part-time capacity.<sup>5</sup> Further, the beneficiary's transcripts indicate that he earned 73 college credit hours at LaGuardia Community College, that he earned 21 college credit hours at The City College of New York, and that he earned 12 college credit hours at University of Bridgeport. The petitioner did not submit a credentials evaluation detailing whether the beneficiary's college credit hours are the equivalent of five years of college level education, or an amount less than five years. Taken together, the evidence does not establish that the beneficiary has five years of experience as a computer instructor or

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<sup>5</sup> On Form ETA 750B, the beneficiary represented that he worked for the petitioner from January 2000 to the date he signed the Form ETA 750B, and that he worked as a computer consultant for [REDACTED] Family Group from August 1997 to December 2000. Therefore, the beneficiary worked for the petitioner and [REDACTED] World Family Group from January 2000 to December 2000. The petitioner provided no evidence to indicate whether the beneficiary's jobs were full-time or part-time. Therefore, the petitioner has not established that the beneficiary has one year of experience in the job offered or one year of experience as a computer consultant as required by Form ETA 750A. See 8 C.F.R. § 204.5(l)(3).

consultant and/or college level education. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.