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FILE:

EAC 04 141 52136

Office: VERMONT SERVICE CENTER

Date: **SEP 28 2006**

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 computer consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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.

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 13, 2004 denial, the single issue in this case is 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.

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 November 4, 2003.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$77,500.00 per year. The Form ETA 750 states that the position requires a bachelor degree or its

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<sup>1</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner,

equivalent in computer science, engineering or a related field and two years of experience in the job offered or in a related field described at Part 15 of the Form ETA 750A.

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>2</sup> On appeal, counsel submits a brief, the petitioner's IRS 1120S, U.S. Income Tax Return for an S Corporation, for 2003, the petitioner's bank statements for November and December of 2003, February through May of 2004 and July through December of 2004, and the beneficiary's paystubs issued by the petitioner for May through August of 2004 and October through December of 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.<sup>3</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 6, 2004, the beneficiary claimed to have worked for the petitioner as a senior programmer analyst from April 2004 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the petitioner did not file its 2003 federal tax return with the I-140 petition because the petitioner's tax return was not yet due at the time it filed the petition. Counsel also asserts that since the priority date is November 4, 2003, the petitioner must only demonstrate that it had the ability to pay two months of the proffered wage in 2003. Counsel also states that the petitioner's bank statements evidence a balance of \$76,000.00 in November, 2003. Further, counsel states that the balances in the petitioner's bank account exceeded \$100,000.00 for each month in 2004 and that the petitioner needs only a balance of \$6,459.00 each month to pay the proffered wage. Finally, counsel states that the beneficiary has been working for the petitioner since April 2004.

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 determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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

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Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</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).

<sup>3</sup> The record contains the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002. Evidence preceding the priority date in 2003 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's paystubs for 2004 show compensation received from the petitioner of \$38,594.50. Therefore, for the years 2003 and 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2004. Since the proffered wage is \$77,500.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$38,905.50 in 2004.<sup>4</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).

The record before the director closed on April 8, 2004. As of that date, the petitioner's 2003 federal income tax return was due, but was not provided.<sup>5</sup> However, the petitioner provided its 2003 tax return on appeal. The petitioner's 2003 tax return stated net income<sup>6</sup> of \$47,898.00. Therefore, for the year 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$77,500.00.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> 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 petitioner's 2003 tax return stated end-of-year net current assets of \$16,405.00. Therefore, for the year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage of \$77,500.00.

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<sup>4</sup> This office notes that the record does not contain the petitioner's 2004 federal income tax return. Therefore, the petitioner's net income and net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 2004.

<sup>5</sup> On appeal, counsel states that the petitioner's 2003 federal income tax return was due on April 15, 2004. However, an S corporation must file Form 1120S by the 15<sup>th</sup> day of the 3<sup>rd</sup> month after the end of its tax year. Therefore, since the petitioner is a calendar year filer, the petitioner's 2003 federal income tax return was due on March 15, 2004. *Corporations*, I.R.S. Pub. No. 542, at 5 (2006).

<sup>6</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional income shown on its Schedule K for 2003, the petitioner's net income is found on line 23 of Schedule K of its tax return.

<sup>7</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.<sup>8</sup>

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the petitioner's bank statements evidence the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The petitioner's bank statements evidence an ending monthly balance of \$76,078.11 in November, 2003. Therefore, the November, 2003 bank statement does not show a balance greater than the annual proffered wage of \$77,500.00, nor do the succeeding months show monthly increases in balances by at least the amount of the monthly proffered wage.<sup>9</sup> Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's 2003 bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets. The petitioner's bank statements therefore fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

Further, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or

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<sup>8</sup> CIS electronic records show that the petitioner filed dozens of other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of the other petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

<sup>9</sup> The petitioner's bank statements for January 2004 and June 2004 were not provided by the petitioner.

payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence for the last two months of 2003.

Counsel'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 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.