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U.S. Citizenship  
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FILE: [REDACTED]  
SRC-04-200-51451

Office: TEXAS SERVICE CENTER

Date: MAR 29 2007

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's May 25, 2005 denial, 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.

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 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 U.S. Department of Labor. 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The instant petition is for a substituted beneficiary.<sup>1</sup> Here, the original Form ETA 750 was accepted on September 2, 2003.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$58,000 per year. The Form ETA

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<sup>1</sup> 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, 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> This office notes that the record lacks an original form ETA 750B for the original beneficiary. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(1)(3)(i) require that any form I-140 petition filed under the

750 states that the position requires six (6) years of experience in the related occupation of IT occupation, computer programmer, systems analyst, etc. The I-140 petition was submitted on July 15, 2004. On the petition, the petitioner claimed to have been established in 2000, however, it did not provide information about the gross annual income, net annual income or current number of employees. With the approved labor certification, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on May 12, 2003, the beneficiary did not claim to have worked for the petitioner.

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>3</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2003 and 2004, financial statements for 2002 through 2004, Form 941 employer's quarterly federal tax return for all four quarters of 2004, and W-3 and W-2 forms issued by the petitioner in 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner's tax returns for 2003 and 2004 establish its ability to pay these years since its net current assets for these years were sufficient to pay the proffered wage.

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 instant case, the petitioner submitted its Form 941, W-3 and W-2 forms for 2004. However, none of the documents shows that the petitioner employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards.

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

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preference category of Section 203(b)(3) of the Act be accompanied by a labor certification.

<sup>3</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).

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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 the 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.

(Emphasis in original.) *Chi-Feng* at 537.

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. 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.<sup>4</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 record of proceeding contains the petitioner's tax returns for 2003 and 2004. However, the petitioner submitted two different versions of its 2003 tax return. With the initial filing of the petition, the petitioner submitted the incomplete copies of its Form 1120 U.S. Corporation Income Tax Return for 2003 which was

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<sup>4</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.

prepared by [REDACTED] Services and signed by the preparer on February 22, 2003. The petitioner did not explain how the preparer could prepare the petitioner's 2003 tax return for the period from January 1, 2003 to December 31, 2003 on February 22, 2003. It casts doubt on reliability of the submitted tax return for 2003. This version of the tax return indicates that it is an initial return, that the petitioner's net income was \$13,047, and its Schedule L was blank. On appeal counsel submits another version of the petitioner's 2003 tax return. The second version was signed by the president of the petitioner on January 5, 2004 and prepared without any assistance from professional tax preparers. The new copy of the 2003 tax return states that the petitioner's net income was \$15,637 and the completed Schedule L shows net current assets of \$136,689. It was not submitted as an amended tax return, nor did it indicate whether the tax return was amended. Neither version of the 2003 tax return bears any Internal Revenue Service (IRS) stamps or other evidence of IRS filing copies.<sup>5</sup> Without such objective evidence, the AAO cannot determine which version is the one actually filed with IRS. The inconsistencies also cast doubt that at least one of the versions is fraudulent. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on 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. *Id.* at 592. Therefore, the tax returns submitted cannot be considered as primary regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage in 2003 and 2004.

The record of proceeding contains copies of the petitioner's financial statements for 2002 through 2004 (although 2002 financial statements are not necessarily dispositive in this case since the priority date is September 2, 2003). The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements although they are stamped as "audited financial statements". Unaudited financial statements are not persuasive evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner must submit its audited financial statements with an accountant's report expressly indicating that an audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. In addition, the submitted unaudited financial statements provide inconsistent information with the tax returns discussed above. Counsel did not submit any independent objective evidence to resolve the inconsistencies. It is incumbent on 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. *Id.* Therefore, the AAO cannot accept the submitted financial statement as primary evidence in determining the petitioner's ability to pay the proffered wage, and thus the petitioner failed to establish its ability to pay the proffered wage as of the priority date to the present with the unaudited financial statements.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as

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<sup>5</sup> If the tax returns submitted on appeal are the petitioner's amended tax returns, CIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

of the priority date through an examination of wages paid to the beneficiary, its net income, or its net current assets with its tax returns, audited financial statements or other regulatory-prescribed evidence.<sup>6</sup>

Beyond the director's decision and assertions on appeal, the AAO will discuss whether the petitioner demonstrated that the beneficiary possessed the qualifying experience prior to the priority date. 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*, 299 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).

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).

The certified Form ETA 750 in the instant case states that the position of computer programmer requires six (6) years of experience in the related occupation such as IT occupation, computer programmer, systems analyst, etc.

The petitioner must 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 U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains no experience letter from the beneficiary's former or current employer(s) verifying that the beneficiary possessed the qualifications as required by the Form ETA 750. Further, the beneficiary's qualifications are not supported by the Form ETA 750B. On the Form ETA 750B, signed by the beneficiary on May 12, 2003, the beneficiary set forth his work experience as an "Assistant Operations Manager" with [REDACTED], a computer retail business, in Karachi, Pakistan from May 1996 to May 1997, and as a "Sales/Marketing Representative" with [REDACTED], a small business management company, in Karachi, Pakistan from March 1995 to May 1996. It is doubtful whether the experience as an assistant operations manager in a computer retail business and as a sales/marketing representative in a small business management company qualifies as the required experience in IT occupation, computer programmer or systems analyst. The record indicates that the beneficiary was born on November 13, 1978, and therefore, he was 16 years old when he started his employment as a sales/marketing representative with [REDACTED].

<sup>6</sup> This office notes that the petitioner's corporate status was administratively dissolved/revoked in the State of Georgia on July 9, 2005. See [REDACTED] (accessed on March 13, 2007).



Corporation. It casts questions on the reliability of the beneficiary's statements on the Form ETA 750B. Furthermore, two years of experience as an assistant operation manager and a sales/marketing representative does not meet the qualifying six years of experience in IT occupation, computer programmer or systems analyst as required by the labor certification application. The petitioner failed to demonstrate that the beneficiary possessed the required six years of experience prior to the priority date with regulatory-prescribed evidence.

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