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**U.S. Citizenship
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Services**

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SEP 14 2007

FILE:

WAC-96-195-51917

Office: CALIFORNIA SERVICE CENTER

Date:

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 employment-based preference visa petition was initially approved by the Director, California Service Center. Based on the result of a permanent residence interview at the Los Angeles District Office, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) because the record did not include a response to the NOIR. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a chicken processing/distributing/exporting company. It seeks to employ the beneficiary permanently in the United States as a warehouse 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 found that the record did not include a response to the NOIR, and thus the grounds of revocation had not been overcome. The director revoked the approval of 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 April 20, 2006 NOR, the single issue in this case is whether or not the petitioner has overcome the grounds of revocation in the director's NOIR dated November 5, 2005.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [Citizenship and Immigration Services (CIS)] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

On appeal counsel asserts that the petitioner did not have the opportunity to submit any evidence to overcome the grounds of revocation because it did not receive the NOIR. The record shows that on November 5, 2005, the director issued the NOIR and mailed it to the petitioner's counsel at [REDACTED]. The record shows that the NOIR was returned "undeliverable as address unable to forward." On appeal, counsel submits a copy of his letter dated August 5, 1999 to the Los Angeles District Office reporting his new address. The record does not contain any evidence showing the director sent a copy of the NOIR to the petitioner at its address. Therefore, the AAO concurs with counsel's assertion that the petitioner through its counsel did not receive the NOIR dated November 5, 2005. The submission of the instant appeal itself indicates that the petitioner does not have the intent to abandon this immigrant petition by not responding to the director's NOIR. Therefore, the petition will be remanded to the director to reissue and resend a NOIR to the petitioner so that the petitioner will have an opportunity to submit evidence to rebut the grounds of revocation.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director

that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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, 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).

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.

In the instant case, the director issued the NOIR because he found the petition was approved in error based on the Los Angeles District Office's determination that the petitioner did not establish its ability to pay the proffered wage because its tax return and Form DE-6 for 2004 do not match. The district officer noted that the petitioner reported total compensation of \$675,871.95 on its DE-6 forms for 2004 while its tax return indicates that the petitioner paid \$117,360 as compensation of officers and \$23,830 as salaries and wages, totaling \$141,190, in 2004. However, the petitioner's 2004 tax return also reflects that the petitioner paid \$534,682 as cost of labor in Line 3 of Schedule A to the form 1120, which, combined with officer's compensation and wages, makes the total compensation paid by the petitioner in 2004 of \$675,872. The AAO cannot find any inconsistency here. In addition, the regulation at 8 C.F.R. § 204.5(g)(2) clearly lists a tax return as one of the three types of evidence required to illustrate a petitioner's ability to pay a proffered wage instead of Form DE-6. In the event there was an inconsistency between the tax return and Form DE-6, the tax return always supersedes the form DE-6. Furthermore, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return. 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 petitioner's Form 1120, U.S.

Corporation Income Tax Return, for 2004 demonstrates that the petitioner had a net income¹ of \$52,847 in 2004, and thus, the petitioner had sufficient net income to pay the full proffered wage of \$27,000. Therefore, the petitioner established its ability to pay the proffered wage with its net income in 2004.

The record also contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2002 and 2003. The petitioner's 2002 and 2003 tax returns demonstrate that the petitioner had a net income of \$91,988 and \$154,179 respectively. Therefore, for the years 2002 and 2003, the petitioner also established its ability to pay the proffered wage with its net income. The portion of the director's decision that the petitioner did not have the ability to pay the proffered wage in these years is withdrawn.

However, beyond the director's NOIR and NOR, the AAO has identified an additional ground of revocation and will discuss whether or not the petitioner established its ability to pay the proffered wage beginning on 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).

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). In the instant case, the priority date is August 30, 1994. The proffered wage as stated on the Form ETA 750 is \$2,250 per month (\$27,000 per year).

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 did not submit any evidence to show that the petitioner paid the beneficiary any amount of compensation in 1994, the year of the priority date, and 1995. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 1994 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, as discussed above, CIS will next examine the net income figure²

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

² 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. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1995. The petitioner's 1995 tax return demonstrates that the petitioner had a net income of \$(183,559). Therefore, for the year 1995, the petitioner did not have sufficient net income to pay the proffered wage that year.

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.³ 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 1995 tax return shows that the petitioner's net current assets during that year were \$(317,639). Therefore, for the year 1995, the petitioner did not have sufficient net current assets to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that a petitioner must establish its ability to pay the proffered wage beginning on the priority date, i.e. 1994. However, the petitioner did not submit its tax return for 1994. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). 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. Without a tax return or other regulatory-prescribed evidence, CIS cannot determine whether or not the petitioner had the ability to pay the proffered wage. The petitioner failed to establish its ability to pay in 1994 because it failed to submit its tax return or other regulatory-prescribed evidence for 1994.

income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

³According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 1994 to 1995 through an examination of wages paid to the beneficiary, its net income, or its net current assets. Therefore, the director erred in approving the instant petition on August 20, 1996.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to provide the petitioner an opportunity to rebut the grounds of revocation by re-issuing the NOIR. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.