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MAY 01 2007

File: [Redacted]  
SRC-04-004-51594

Office: TEXAS SERVICE CENTER Date:

In re: Petitioner: [Redacted]  
Beneficiary: [Redacted]

C1

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 Director, Texas Service Center ("director"), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner provides for the management and finance of convenience stores, and seeks to employ the beneficiary permanently in the United States as a bookkeeper ("Full Charge Bookkeeper"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's January 15, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 26, 2001. The proffered wage as stated on Form ETA 750 for the position of a bookkeeper is \$14.35 per hour for an annual salary of \$29,848 per year. The labor certification was approved on September 12, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on October 3, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: established: December 27, 1991; gross annual income: see attached; net annual income: see attached; and current number of employees: 20.

On September 23, 2004, the director issued a Request for Evidence ("RFE"). The director requested that the petitioner submit: evidence related to the petitioner's ability to pay the proffered wage, including the petitioner's 2003 federal tax return; 2004 Quarterly Income and Earning Tax Statement; and since the petitioner indicated that the beneficiary had been employed with the petitioner since February 2001, the RFE requested that the petitioner submit the beneficiary's W-2 statements and payroll records for the year 2001, 2002, and 2003, as well as copies of the beneficiary's last four pay statements.

On October 20, 2004, the petitioner responded to the RFE and submitted the petitioner's 2001, 2002, and 2003 federal tax returns; Forms 941 Quarterly Federal Tax returns for the quarters ending March 31, 2004, and June 30, 2004. The petitioner did not submit the beneficiary's W-2 Forms, or the beneficiary's pay stubs as counsel provided that the beneficiary left the petitioner's employment subsequent to filing the labor certification, and stated that the petitioner's offer position to the beneficiary was a future offer of employment. Following review, the director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition on January 15, 2005. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary listed that he has been employed with the petitioner since February 2001 (to the present, the date of signing April 24, 2001).

The petitioner did not submit any W-2 Forms to document any wages paid to the beneficiary. Further, counsel stated in the petitioner's RFE response that the beneficiary was not currently working for the petitioner, and "therefore does not have W-2s from the petitioner."<sup>2</sup> Since the petitioner has not provided any documentation regarding wages paid to the beneficiary, the petitioner, therefore, cannot establish its ability to pay the beneficiary based on prior wage payment to the beneficiary.

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. 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*,

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<sup>2</sup> We note that a number of documents provide conflicting information regarding the beneficiary's dates of employment with the petitioner, if any, which will be addressed later in the discussion.

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). 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.

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.

The petitioner's tax returns reflect that it is structured as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	\$84,637 <sup>3</sup>
2002	\$5,367
2001	\$36,167

From the above net income, the petitioner would have had sufficient net income in 2001 and in 2003 to pay the proffered wage, but not in 2002.

The petitioner additionally submitted Quarterly Forms 941, which exhibit wage payments to employees in the amount of \$134,104 for the quarter ending March 31, 2004, and wage payments in the amount of \$118,687 for the quarter ending June 30, 2004. While the Forms 941 demonstrate that the petitioner has paid wages to employees in 2004, wages paid to others would not demonstrate the petitioner's ability to pay the wage proffered to the beneficiary for the year 2004.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. 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.

<sup>3</sup> Based on the date of filing the I-140, the petitioner's 2004 federal tax return would not have been available, and would not have been available at the time of the petitioner's response to the RFE. Also, based on the date that the petitioner filed the appeal, the 2004 return may not have been available.

<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.

The petitioner's net current were as follows:

<u>Year</u>	<u>Net Current Assets</u>
2003	-\$194,088
2002	-\$1,332,679
2001	-\$511,773

As demonstrated above, the petitioner did not have sufficient net current assets to pay the proffered wage in any year.

On appeal, counsel provides that the petitioner had gross receipts of \$21.4 million in 2002, as well as total income in the amount of \$2.1 million. Despite the petitioner's net income of \$5,367, counsel argues that the petitioner had \$192,479 deducted in depreciation, which should be considered in determining the petitioner's ability to pay. Further, if depreciation were added to the petitioner's net income, this would demonstrate the petitioner's ability to pay the proffered wage.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

Regarding 2003, counsel provides that the petitioner had the ability to pay based on the petitioner's net income of \$84,637. As noted above, the petitioner is correct in this statement. The petitioner has demonstrated that it can pay the proffered wage in the years 2001, and 2003; however, the record of proceeding is lacking evidence that the petitioner can pay the proffered wage in the year 2002. The petitioner did not provide any further arguments or evidence on appeal to demonstrate that it can pay the beneficiary the proffered wage.

Given that the petitioner can pay the proffered wage in two of the three years in question, we will examine the petitioner's business viewing a totality of the circumstances. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In looking closely at the petitioner's business and tax returns, the petitioner has been in business for over fifteen years; the petitioner has demonstrated significant gross receipts (2003: \$29 million;

2002: \$21 million; 2001: \$6 million); significant total income (2003: over \$3 million; 2002: over \$2 million; 2001: over \$600,000); significant total assets (2003: \$3.8 million; 2002: \$3.09 million; 2001: \$1.34 million); and the petitioner can demonstrate that it can pay the beneficiary's wage in 2001, and 2003. In light of the petitioner's longevity, significant gross receipts and total income, we conclude that the petitioner is able to pay the proffered wage. Although CIS will not consider gross income without also considering the expenses incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In assessing the totality of circumstances in this individual case, we conclude that the petitioner can demonstrate financial strength and viability and has the ability to pay the proffered wage.

However, although not raised in the director's decision, we find that there are significant conflicts in the evidence regarding the beneficiary's prior experience, specifically his dates of employment with the present petitioner, which raises questions regarding both the validity of the job offer, and regarding the credibility of the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), "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." Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 592. 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 should be given an opportunity to address these deficiencies.

The record contains conflicting evidence regarding whether, and when, the beneficiary worked for the petitioner. On the following documents, the beneficiary claimed to have worked for the petitioner:

1. ETA 750B, signed by the beneficiary on April 24, 2001. The beneficiary listed that he worked for the petitioner at [REDACTED], Houston, TX, as a Full-Charge Bookkeeper from February 2001 to present (date of signature April 24, 2001).
2. Form G-325A, signed by the beneficiary on October 21, 2003. The beneficiary listed that he was employed by the petitioner at the [REDACTED] location from February 2001 to August 2003.

The following documents reflect that the beneficiary worked elsewhere during the same or similar time period:

1. Form ETA 9089, signed by the beneficiary on April 12, 2006. A subsequent employer<sup>5</sup> filed a labor certification under PERM<sup>6</sup> for the beneficiary. The beneficiary listed that he worked for

<sup>5</sup> We note that the management of both sponsoring petitioners appear to be related. The federal tax returns identify that the owners of the instant petitioning entity have the same surname as the petitioner's owner on the second labor certification filed. Similarly, both petitioners are located at the [REDACTED] but list different suite numbers. The instant petitioner lists that it operates from either [REDACTED]. We note that different documents provide different suite numbers. It is unclear from the record whether the petitioner maintains multiple suites, whether the petitioner's business moved, or whether the different numbers are the result of typographical errors. The subsequent petitioner lists that it operates from either

[REDACTED] Humble, TX, which is approximately eighteen miles away from Houston, from February 2001 to July 15, 2003 as a Full-Charge Bookkeeper, the same time period as above, where the beneficiary claims to have worked for the present petitioner.

2. [REDACTED], Manager of the [REDACTED], provided a letter dated July 5, 2005, which confirms that the beneficiary was employed by Handi Stop chain stores as a Full Charge Bookkeeper from February 2001 to August 2003.
3. The beneficiary reported to the Houston CIS office for Special Registration<sup>7</sup> on March 31, 2003. At that time, the beneficiary indicated that he had previously worked for [REDACTED] [REDACTED] (which is consistent with the other documents in the record), and that he was employed by [REDACTED] (dates of employment were not listed), but the beneficiary did not list that he was employed with the petitioner at any time period, in conflict with the documents listed above.
4. Counsel's RFE response. In counsel's response, he provides that the beneficiary left employment with the petitioner "after the labor certification was filed. Therefore, there are no W-2s or payroll records available for the years 2001, 2002, and 2003. Please take note in the offer of employment letter . . . it states that [the beneficiary] will be employed by [the petitioner] as Full-Charge Bookkeeper on a full-time basis."

The documents above conflict regarding with which entity the beneficiary was employed between the dates of February 2001 and August 2003. If the information that the beneficiary provided on Forms ETA 750 and Form G-325A is correct, then the beneficiary was employed with the petitioner, in contrast to counsel's statement, and the petitioner should have been able to provide Forms W-2.<sup>8</sup> Similarly, if the information on Form ETA 750 and Form G-325 is correct, then the ETA 9089 would be inaccurate, and leaves the beneficiary's verified work experience for the subsequently approved labor certification, upon which the approval relies, in question and might warrant revocation of the subsequent I-140.<sup>9</sup>

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suite 435, or 425. Further, the individual identified as the corporate representative on the instant petition, is the same individual that signed on the second labor certification for the subsequent petitioner.

<sup>6</sup> On December 27, 2004, DOL's Employment & Training Administration (ETA) published a final regulation, which required the implementation of a new process for the filing of permanent labor certifications. As part of the new process, as of March 28, 2005, Form ETA 9089 replaced the prior form used to file labor certifications, Form ETA 750A&B.

<sup>7</sup> The legacy Immigration and Naturalization Service (INS) finalized a rule as of August 12, 2002, AG Order No. 2608-2002, to register certain individuals. The initial program was expanded as of September 6, 2002 to designate individuals from five countries for Special Registration, and further expanded to register individuals of certain nationalities present in the United States as of November 6, 2002, and November 22, 2002. Individuals present in the U.S. from listed countries were required to report to local INS offices to register. As of December 2, 2003, Immigration Customs and Enforcement (ICE) published an interim rule, which suspended the 30-day and the annual re-registration requirements.

<sup>8</sup> Counsel's response implies that the beneficiary left soon after the petitioner filed the labor certification, otherwise, the petitioner should have been able to provide W-2 Forms.

<sup>9</sup> 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).

Conversely, if the Form ETA 9089 is correct, then the beneficiary has provided false information in the first application and I-485 filing, which results in a serious issue of credibility, as well as potential misrepresentation, and would similarly result in a denial under the Matter of Ho.<sup>10</sup>

Resolution of the conflict in the beneficiary's experience would be critical to determine whether the beneficiary is qualified for the instant petition, and additionally, whether the beneficiary is qualified for the subsequent petition. Accordingly, we will remand the petition to the director so that the director may issue a Request for Additional Evidence to allow the petitioner to submit additional evidence. The RFE should request documentation regarding the beneficiary's experience, specifically for the time period 2001 to 2003, to include secondary evidence such as paystubs, W-2 statements, or such other clear and convincing evidence to resolve any inconsistencies in the record as the director may determine. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director.

Based on the foregoing, the petitioner has demonstrated its ability to pay the beneficiary the required wage from the priority date onward. However, the conflicting evidence in the record demonstrates a significant credibility issue to be addressed on remand. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision, which if adverse to the petitioner should be certified to the AAO.

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

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<sup>10</sup> See also INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 CFR 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

(d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.