U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 162 50514 Office: CALIFORNIA SERVICE CENTER Date: JUN 2 4 2004

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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: SELF-REPRESENTED

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is an educational service firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. The petitioner is self-represented.[1]

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 or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $19.17 per hour or $39,873.60 per year.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. In requests for evidence (RFEs), dated June 14, 2002, August 19, 2002, and February 13, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFEs exacted, for 2001 to the present, the petitioner's signed federal income tax return, annual report, or audited financial statement. The petitioner's federal tax return for 2000 established a fiscal year (FY) from October 1, 2000 to September 30, 2001.

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[1] An immigration consultant and law school graduate filed a Notice of Entry of Appearance as Attorney or Representative (Form G-28) as to various applications in this record, including the present Immigrant Petition for Alien Worker (I-140). He did not, however, state that he is appearing under the supervision of a licensed attorney or accredited representative and without direct or indirect remuneration from any alien whom he may represent. *See* 8 C.F.R. §292.1(a)(2)(iii). Separately, he acknowledged that his capacity includes non-legal assistance and advice only, citing California Business and Professions Code § 22441(a)(4). The record contains two (2) forms G-28 of an attorney, but their terms limit them to representation on an Immigrant Petition for Alien Entrepreneur (I-526) and a Petition by Entrepreneur to Remove the Conditions (I-829). AAO will weigh salient evidence in the entire record, but will notify only the petitioner of the decision.

This FY 2000 Form 1120, U.S. Corporation Income Tax Return, including the priority date, reflects taxable income before net operating loss deduction and special deductions, the petitioner's taxable income, as a loss of ($41,606). The petitioner, also, stated the payment of wages to the beneficiary of $19,500 in calendar year 2000 and of $18,000 in calendar year 2001. *See* 2000 and 2001 Wage and Tax Statements (Forms W-2).

The petitioner's FY 2001 Form 1120, for October 1, 2001 to September 30, 2002, reflected taxable income of $18,864. No evidence indicated the apportionment of the 2001 W-2 wages, $18,000, between FY 2000 and 2001. Bank statements commenced with October 1, 2001 and ended with February 28, 2002.

The director mentioned, but did not define or state the effect of, "cash assets." Net current assets equal the difference of the taxpayer's current assets minus current liabilities. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.[2]

Schedule L of the FY 2000 Form 1120 reported current assets, at the priority date, consisting only of cash of $3,461, minus current liabilities of $3,013, being net current assets of $448, less than the proffered wage. Schedule L of the FY 2001 Form 1120 stated current assets only of $8,968 cash, minus current liabilities of $4,686, being net current assets of $4,282, less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner avers that the director erred in two misunderstandings of the evidence. The petitioner gave further evidence to address them. First, the petitioner asserts that the beneficiary worked only part-time in 2001 and argues that the director denied the petition because the wages paid to the beneficiary in 2001 were only $18,000, less than the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will first examine whether the petitioner employed the beneficiary at or after the priority date. If documentary evidence supports the employment of the beneficiary at a salary equal to, or greater than, the proffered wage, such evidence is *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner established the payment to the beneficiary of $18,000, less than the proffered wage.

In the alternative, AAO will consider wages that the petitioner paid to the beneficiary plus the petitioner's net income, as 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. Tex. 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

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[2] Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, such as Form 1120, 1120S, or 1065.

571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In respect to the priority date, the petitioner's FY 2000 Form 1120 showed no taxable income, but, a ($41,606) loss. The AAO adds wage payments to the beneficiary of $18,000, but the result is less than the proffered wage. The alternative method does not establish the ability to pay the proffered wage for the priority date. The AAO observes that the FY 2001 Form 1120 states taxable income of $18,864 and adds wage payments of $18,000 in 2001, for a total of $36, 874, less than the proffered wage.

Consequently, the AAO reviewed a final test of the ability to pay, the petitioner's net current assets, as equal to, or greater than, the proffered wage. Based on Schedule L of the federal tax returns, they were S448 as of the priority date and $4,686 in FY 2001, less than the proffered wage and the difference between the proffered wage and wages actually paid. The net current assets did not satisfy the test to demonstrate the ability to pay the proffered wage.

In its second point, the petitioner perceives error in the director's use of net profit to determine the ability to pay the proffered wage. The petitioner says that CIS must add back salaries and wages and consider total income for a true result. To the contrary, the authorities cited reject that approach and approve, precisely, of the use of net income.

The petitioner submitted its commercial bank statements, on appeal, to demonstrate that it had sufficient cash flow to pay the proffered wage. These balances range from a low of $1,919.41 at the priority date, on April 30, 2001, to a high of $13,140.80, on August 31, 2001, and end with $8,300.93 on January 31, 2002. There is no proof that they somehow represent additional funds beyond those of the tax returns and financial statements. AAO has already considered cash in Schedules L, as an item of net current assets. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Also on appeal, the petitioner presents the beneficiary's W-2 for 2002, showing the payment of wages of $33,000, less than the proffered wage. It does not pertain to the ability to pay the proffered wage as of the priority date in 2001. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility as of the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

The petitioner offered a Certified Public Accountant's (CPA's) compilation report of the petitioner's financial statements (unaudited report) for October 1, 2001 to February 28, 2002 as evidence of the continuing ability to pay the proffered wage. The unaudited report admits that management omitted substantially all disclosures and the statement of cash flows, required by generally accepted accounting principles. The CPA, also, notes that the unaudited report only reflects representations of management. The regulations do not provide for unaudited

statements, which are of little evidentiary value as proof of the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

After a review of the federal tax returns, Forms W-2, the unaudited report, and bank statements, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The RFE of February 13, 2003 requested evidence to verify the beneficiary's qualifying experience of two (2) years, as set forth in the ETA 750, Part A, block 15. Also, the RFE sought an explanation of descriptions, in other proceedings, of the beneficiary's experience as that of a director and vice-president, escrow agent, and general officer. Currently, the petitioner states that they were administrative assistant positions. *Cf.* ETA 750, Part B, block 15.

The petitioner responded with four (4) letters concerning the beneficiary's qualifying experience, as in a position of administrative assistant, and stated:

> The previous statement as a Director/Vice President of Escrow Agent [sic] that you have mentioned in your inquiry may refer to [the beneficiary's] prior I-829 application. However, this statement might be prepared by the attorney who helped filing [the beneficiary's] prior I-829 application and thus is not consistent with the enclosed letter of employment. Please ignore the statement. We hereby clarify this statement and request [CIS] to refer to the employment letter we are enclosing as [the beneficiary's] true experience.

The petitioner's response admits that there is an inconsistency and speculates that, perhaps, an attorney caused it. The petitioner does not offer any explanation from the possible attorney.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> 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.

None of the four (4) letters reconciles the previous account of the beneficiary's qualifying experience, as holding the position of a director and vice-president, escrow agent, and a general officer. *Matter of Ho, Id.*, 591 states:

> 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.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001). The beneficiary may not take a different job opportunity than the one that the ETA 750 justifies.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). For this additional reason, the petition may not be approved.

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.