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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 01 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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.

for
Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a pool service company. It seeks to employ the beneficiary permanently in the United States as a retail pool service manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that contradictions exist between the petition and the various documents provided in its support. The director also 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.

On appeal, counsel submits a brief.

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 granting 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 at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that the beneficiary is qualified for the proffered position. Here, the Form ETA 750 was accepted for processing on November 28, 2001. The proffered wage as stated on the Form ETA 750 is $19.05 per hour, which equals $39,624 per year.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary was asked to list all jobs held during the previous three years and all jobs related to the proffered position. The beneficiary did not claim to have ever worked for the petitioner. The beneficiary claimed to have worked for Anagua Sociedade Anonima, as a pool service retail manager, from March 1994 through January 1999. The beneficiary listed no other employment. The beneficiary claimed to have been unemployed from February 1999 through October 2001. The dateline of that Form ETA 750B, however, is March 1, 2001. The Form I-140 petition in this matter was filed on November 18, 2002.

As corroboration of his claim of qualifying employment, the petitioner submitted an undated letter, purportedly from the owner of Anagua Sociedade Anonina (sic), in Minas Gerais, Brazil, confirming that the beneficiary worked for that company as a retail manager from March 1994 through January 1999.

The petition gives a U.S. address for the beneficiary, and states that he entered the United States as a visitor on February 28, 1999. On the petition, the petitioner did not state the date upon which it was established, the number of workers it employs, or its gross and net income. With the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On May 9, 2003, the Texas Service Center issued a Request for Evidence. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested copies of the petitioner's 2002 tax returns or, if those returns were unavailable, copies of the Form W-2 Wage and Tax Statements and Form 1099 Miscellaneous Income Statements the petitioner issued for that year and its last six months of bank statements. Further, the Service Center requested that the petitioner state its number of employees, the date it was established, and its net and gross incomes. Further still, the Service Center requested the petitioner's Federal Quarterly Tax Return showing the names of its employees.

Finally, the Service Center noted that a discrepancy exists between information listed on the petition and supporting documents in this case and documents related to the beneficiary's previously awarded L-visa status.

The concurrently filed I-485 Application to Register Permanent Resident was accompanied by a Form G-325A Biographic Information form. That form restates the petitioner's claim of employment in Brazil from March 1994 through January 1999 and of being unemployed from February 1999 through November 2001. That form also states that the beneficiary was self-employed in the pool service business from November 2001 to October 11, 2002, the date of that form.

The record contains photocopies of pages of the beneficiary's Brazilian passport. Those photocopies show that an L-1 visa, which was issued June 10, 1996, was attached to one of those pages. Issuance and use of an L-1 visa indicates that the beneficiary was admitted to the United States to work for his foreign employer in a managerial capacity for a United States branch of that foreign employer or for a related company. The employer's name, as abbreviated on that L-1 visa, is "CLR IMP EXP SERV." That abbreviation appears to indicate that the beneficiary's employer was an import/export service.

To be eligible for an L-1 visa, a beneficiary must have worked for at least one year of the previous three in a managerial, executive, or special knowledge capacity. In order to qualify for that L-1 visa, the beneficiary must have demonstrated that he worked in such a capacity for one year between June 1993 and June 1996 and indicated that he would work for that same employer, or a related company, in the United States.

Although the Service Center did not clearly describe the perceived discrepancy, it was apparently concerned because the petitioner's employment history showed no managerial, executive, or special knowledge experience with a foreign import/export company during that period and no employment for an import/export

company in the United States during the period that he was in the United States on an L-1 visa. Further, the beneficiary's employment history, as stated to secure approval of the instant petition, avers that he worked in pool service for Anagua Sociedade Anonima beginning on March 1994 and continuing until January, 1999, which is apparently inconsistent with the beneficiary working in a managerial, executive, or special knowledge capacity for an import/export company for at least one year between June 1993 and June 1996, a claim that he must have made in order to obtain the L-1 visa.

In response, counsel submitted a corrected page of the Form I-140 petition, stating that the petitioner was established during 1996, that it employs two employees, that its gross annual income is $1,159,683, and that its net annual income is $79,906.

Counsel submitted copies of the petitioner's 2000 and 2001 Forms 1120S, U.S. Income Tax Return for an S Corporation. The 2000 tax return shows that the petitioner declared ordinary income of $22,426 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $110,867 and no current liabilities, which yields net current assets of $110,867.

The 2001 tax return shows that the petitioner declared a loss of $40,106 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $108,499 and no current liabilities, which yields $108,499 in net current assets.

Counsel also submitted an accountant's analysis of the petitioner's ability to pay the proffered wage. That analysis states that the petitioner's 2000 and 2001 ordinary income, depreciation deduction, interest income, and year-end cash, added together, are greater than the annual amount of the proffered wage. The accountant noted that the petitioner paid compensation of officers of $57,000 during 2000 and $104,000 during 2001, and concluded that $47,000 of the amount paid during 2001 was discretionary and might have been used, if necessary, to pay the proffered wage during that year. The accountant concludes, therefore, that the petitioner has demonstrated its ability to pay the proffered wage.

This office notes, however, that because the priority date is November 28, 2001, evidence pertinent to the petitioner's finances during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, the formula the accountant used for calculating the petitioner's ability to pay the proffered wage is inappropriate in several respects.

Finally, counsel submitted a letter, dated August 7, 2003, in which he stressed the accountant's financial analysis as evidence of the petitioner's ability to pay the proffered wage. Counsel did not submit the requested 2002 tax returns or explain that omission. Counsel also did not, in the alternative, submit the petitioner's Form W-2 Wage and Tax Statements, Form 1099 Miscellaneous Income Statements, or bank statements.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 14, 2003, denied the petition.

On appeal, counsel argues that the petitioner's previous employment for the L-1 employer need not have been in a managerial, executive, or special knowledge capacity, but may have been in any capacity for one year during the previous three. Counsel submits no citation in support of that proposition.

Counsel further argues that the beneficiary's employment verification letter documents that the beneficiary, after entering the United States continued to work for his foreign employer, Anagua Sociedade Anonima, as a manager. Counsel implies that the company name shown on the beneficiary's L-1 visa, "CLR IMP EXP SERV," is the United States branch or affiliate of Anagua Sociedade Anonima. Counsel provided no evidence in support of that assertion. Counsel notes that the beneficiary paid the $1,000 penalty required by 245(i) of the Act and that his being out of status in the United States is therefore excused.

Counsel stated that the date on the Form ETA 750, Part B, March 1, 2001, is the result of a typographical error. Counsel states that the date upon which that form was executed was November 1, 2001. Counsel notes that, therefore, the employment history on that form is accurate, but contains no information pertinent to employment after October 2001.

Finally counsel argued that the petitioner's financial analysis demonstrates that it has the ability to pay the proffered wage. Counsel notes that the analysis shows that during 2001 the petitioner had a "true profit" of $65,027, which is more than sufficient to pay the proffered wage.

Section 101(a)(15)(L) states, which defines the qualifications for an L-1 visa, states, in relevant part, that an L-1 visa may be made available to,

> an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity of an affiliate or subsidiary thereof and who seeks to enter the United States temporarily **in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge . . . .**

[Emphasis supplied.]

That the alien seeks to enter the United States to continue to render his services in a capacity that is managerial, executive, or involves specialized knowledge indicates that the beneficiary's previous employment for that company or the related company must have been managerial, executive, or involved specialized knowledge. Counsel has offered no support for his contrary interpretation of that section and this office is aware of none.

In response to the questions pertinent to the credibility of the beneficiary's employment history, counsel implicitly asserts that the import/export service that petitioned for the beneficiary's L-1 visa is related to Anagua Sociedade Anonima, which provided the employment verification letter upon which the beneficiary's eligibility for the proffered position in the instant petition is based. Counsel also asserted that the date on the Form ETA 750, Part B, is the result of a typographical error.

Doubt cast on any aspect of the petitioner's proof may 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 sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582 (Comm. 1988). Counsel's assertions are not independent and objective evidence. Counsel has insufficiently addressed the discrepancies between various documents submitted.

Section 245(i) allows an alien to apply to adjust status notwithstanding that he or she entered without inspection, overstayed his or her visa, or worked without authorization. Section 245(i) only applies if the alien is the beneficiary of any labor certification or petition filed after January 14, 1998 and before April 30, 2001, and only if the alien was in the United States on December 21, 2000.

Counsel's reliance on section 245(i), and the $1,000 penalty paid by the beneficiary, is misplaced for two reasons. First, the petition was denied based, *inter alia*, on the lack of credibility of the beneficiary's employment documentation. Payment of a penalty pursuant to section 245(i) does nothing to reform that credibility. Second, the Form ETA 750 labor certification in this matter was filed on November 28, 2001 and the Form I-140 petition was submitted on November 18, 2002. Neither of those dates falls between January 14, 1998 and April 30, 2001. Section 245(i) of the Act accords no protection to the beneficiary.

Counsel states that the financial analysis provided by the petitioner's accountant shows that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. That analysis added the petitioner's ordinary income, depreciation deduction, interest income, and year-end cash in order to calculate the petitioner's "true profit," which was then compared to the proffered wage.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The financial analysis also relies on the petitioner's compensation of officers as a fund available, at least in part, to pay the proffered wage. The accountant who issued the analysis relied upon the fact that the petitioner's compensation of officers increased from 2000 to 2001 to show that the difference was discretionary. That difference from one year to the next is insufficient to demonstrate that the owner's were not entitled to that compensation and insufficient to show that they could have foregone that compensation,

and would have, in order to pay the proffered wage. Compensation paid to officers is ordinarily unavailable to pay other expenses, and insufficient evidence has been submitted to show that, in this case, any part of that expense might have been diverted to pay the proffered wage.

Year-end cash, shown at Schedule L, Line 1d, is a current asset. Current assets are an appropriate consideration in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. The correct treatment of current assets is detailed below.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 establish that it employed and paid 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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages or other compensation in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, its cash on hand and those assets expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $39,624 per year. The priority date is November 28, 2001. During 2001, the petitioner declared a loss of $40,106. The petitioner has not shown the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year, however, the petitioner had $108,499 in net current assets. The petitioner has demonstrated the ability to pay the proffered wage out of its net current assets during 2001.

On May 8, 2003, the petitioner was asked to provide its 2002 tax return or, if that return was unavailable, to provide copies of its 2000 Form W-2 Wage and Tax Statements, its Form 1099 Miscellaneous Income Statements, its last six months of bank statements. The petitioner did not provide its 2002 tax return. In the notice of appeal, dated December 2, 2003, counsel stated that the petitioner was unable to provide the 2002 tax return because the petitioner has requested an extension of time to file that return, "which should be filed no later than December 2003." Counsel has provided no evidence of the request for an extension or evidence that the return was filed by December 2003.

Further, even assuming that the petitioner's 2002 tax return was unavailable when the petitioner responded to that request for evidence, the petitioner did not provide the 1099 and W-2 forms and bank statements which the Service Center stated they would accept in that event. Having failed to provide that tax return or any reason why that omission should be excused, the petitioner has failed to demonstrate its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it the petitioner had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

A discrepancy exists between the beneficiary's employment history as stated in his employment verification letter and the evidence that must have been presented in support the petition for the beneficiary's L-1 visa. Faced with that discrepancy counsel chose to submit a version of events pursuant to which the beneficiary's employment claim might be reconciled rather than evidence sufficient to demonstrate that the beneficiary's current employment claim is genuine. Pursuant to the ruling in *Matter of Ho, supra.*, that is insufficient to reform the credibility of the beneficiary's employment claim. The petitioner has not demonstrated that the petitioner is qualified for the proffered position.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.