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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 2 4 2004

IN RE: Petitioner: [redacted]
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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California 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 computer consulting service. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

> (C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college of university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

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 June 27, 2001. The proffered wage as stated on the Form ETA 750 is $110,000 per year. The ETA 750 also states that the proffered position requires a bachelor's degree and two years of experience.

On the Form ETA 750B, signed by the beneficiary on June 25, 2001, the beneficiary did not claim to have worked for the petitioner. With the petition, however, counsel submitted a letter, dated July 7, 2003, in which he stated that the petitioner had employed the beneficiary since October 12, 2001. On the petition, the petitioner stated that it was established during 1998 and that it employs 14 workers.

In his letter of July 7, 2003, counsel asserted that the petitioner's 2002 revenue was $3,043,763 and that "[t]here can be no doubt that [the petitioner] is capable of financing the continued cost of [the beneficiary's] employment, at $110,000 per annum." Counsel submitted no evidence in support of either assertion with the petition.

Counsel did submit a copy of the first pages of the beneficiary's 1998, 1999, 2000, and 2001 Form 1040, U.S. Individual Tax Returns. Those returns show that the beneficiary received $105,664, and $63,214.96 in wages during 1998 and 1999, respectively, and that he received $23,628 and $101,220 in business income during 2001 and 2002, respectively. The source of that business income was not revealed.

Form W-2 Wage and Tax Statements included with the 1998 and 1999 partial returns show that the beneficiary's income during those years was received from Integration & Networking Consulting, of Englewood, Colorado.

Counsel also submitted pay stubs showing amounts the petitioner paid to the beneficiary for five pay periods during March 2003 through July 2003. The most recent of those pay stubs, for the pay period ending July 25, 2003, shows that as of that date the petitioner had paid the beneficiary $26,450 during 2003.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the beneficiary's eligibility for the proffered position, the California Service Center, on December 23, 2003, requested additional 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 petitioner was instructed to provide this evidence for the years 2001 through 2003. Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(C), the director requested an official college or university transcript showing the beneficiary's baccalaureate degree.

In response, counsel submitted an Industrial Diploma, issued by the Register of Artisans, Pretoria, South Africa, in Afrikaans with an English translation. That diploma, issued September 22, 1981, states that the beneficiary passed the final test of skill in the trade of Millwright on September 1, 1981.

Counsel submitted a Credential Analysis/Evaluation Report, dated November 18, 2000. That report states that the beneficiary's 16 years of employment as a computer professional indicate that he has attained the level of knowledge and ability equivalent to a bachelor's degree in computer science.

Counsel submitted a copy of the first page of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and a complete copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. The partial 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $67,124 during that year. Because the corresponding Schedule L was not provided, this office is unable to compute the petitioner's year-end net current assets.

The 2002 return shows that the petitioner declared a loss of 194,678 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets during that year.

In addition, counsel submitted unaudited financial statements for 2001, 2002, and 2003. Finally, counsel submitted the petitioner's November 2001 and December 2003 banks 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 March 19, 2004, denied the petition.

On appeal, counsel submits a letter, dated March 25, 2004, from the petitioner's tax accountant. The accountant states that CIS has misunderstood the petitioner's financial situation. The accountant notes that the petitioner reports income and expenses on a cash basis, rather than pursuant to accrual convention. According to the accountant, cash basis accounting has caused the petitioner to understate its profits as compared to the profits that would have been reported under the accrual method. The accountant states that the petitioner's tax returns do not accurately reflect its financial strength.

The accountant states that CIS should consider the petitioner's gross revenue and fixed expenses such as payroll to determine the petitioner's ability to pay the proffered wage. In addition to emphasizing the petitioner's gross revenue, the accountant states that the petitioner has been paying the beneficiary's salary for years.

Counsel submits a draft of three pages of the petitioner's 2003 Form 1120 U.S. Corporation Income Tax Return. That draft anticipates that the petitioner will declare a taxable income before net operating loss deduction and special deductions of $33,841 for that year. The draft of Schedule L anticipates that at the end of that year the petitioner's current liabilities will exceed its current assets.

Finally, counsel submits 2002 and 2003 W-2 Wage and Tax Statements showing amounts the petitioner paid to the beneficiary during those years. Those statements show that the petitioner paid the beneficiary $21,878.85 and $66,590 during those years, respectively.

The reliance of counsel and the accountant on unaudited financial statements is misplaced. 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. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

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.

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).

Counsel's and the accountant's reliance on the petitioner's gross receipts and the amount of expenses the petitioner paid is, likewise, misplaced. Showing that the petitioner's gross receipts 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*, 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

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, those 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.

In the instant case, the proffered wage is $110,000 per year. The priority date is June 27, 2001.

The petitioner established, through W-2 forms, that it employed and paid the beneficiary $21,875.85 during 2002, and $66,590 during 2003. Although counsel stated that the beneficiary began work for the petitioner on October 12, 2001, counsel submitted no evidence in support of that statement and no evidence of the amount the petitioner paid to the beneficiary during that year. The petitioner must show the ability to pay the proffered wage, or the balance of the proffered wage, during each of those years.

During 2001, the petitioner had taxable income before net operating loss deduction and special deductions of $67,124 during that year. The petitioner did not provide information from which its year-end net current assets could be calculated. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner declared a loss. The petitioner has not demonstrated that it was able to pay any portion of the proffered wage out of its earnings that year. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Counsel submitted a draft of the petitioner's 2003 tax return. A draft of the petitioner's tax return is not acceptable evidence of its financial strength.

This office notes, however, that the request for evidence, including evidence of the petitioner's 2003 financial performance, was issued on December 23, 2003, when such evidence, including the final copy of the petitioner's 2003 tax return was unlikely to be available. The petitioner was unable, therefore, to adequately comply with the request for information pertinent to 2003 and the request, therefore, was improper. Whether the petitioner demonstrated the ability to pay the proffered wage during 2003 forms no part of this decision.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the petitioner submitted no evidence that the beneficiary has a bachelor's degree. No evidence was submitted that the beneficiary's passage of an examination for the position of shipwright is the equivalent of a college degree. Instead, counsel submitted an educational evaluation stating that, in the opinion of the evaluator, the beneficiary's work experience is the equivalent of such a degree. The Form ETA 750, however, clearly states that the position requires a bachelor's degree.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for that education and a degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution.

CIS will not accept a degree equivalency when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 petitioner has not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the Form ETA 750.

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 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.