U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042,
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 06 2005

EAC 03 133 51177

IN RE: Petitioner: [redacted]
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:

[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

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Center Director (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. The petitioner seeks to employ the beneficiary permanently in the United States as a Caribbean specialty cook. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor. 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is $14.96 per hour, which amounts to $31,116.80 per annum. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claims to have worked for the petitioner since November 1994. On Part 5 of the preference petition, the petitioner also states that it has a gross annual income of $286,521 and employs four workers.

In support of its ability to pay the beneficiary's proposed wage offer of $31,116.80 per year, the petitioner initially submitted a copy of its Form 1120-A U.S. Corporation Short-Form Income Tax Return for 2001. The return was prepared by "D.L. H. Management Consultants Inc." On this return, the petitioner uses a standard calendar year to calculate its taxes. The return shows that the petitioner reported taxable income of $25,199 before the net operating loss (NOL) in 2001. Part III reveals that the petitioner had $50,588 in current assets and $95,291 in current liabilities, resulting in net current assets of -$44,703. Besides net income, and as an alternative method of

reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid.[1] A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. In this case, current assets are found on Part III of the petitioner's balance sheet on line(s) 1 through 6 and current liabilities are specified on line(s) 13 and 14. If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage during a given period.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On May 9, 2003, the director advised the petitioner that evidence of its ability to pay the proffered salary must include federal tax returns, audited financial statements or annual reports covering the relevant period. The director requested that the petitioner provide additional evidence to establish its continuing ability to pay the proffered wage. The director also instructed the petitioner to submit a copy of the beneficiary's Wage and Tax Statement if it employed the beneficiary in 2001.

In response, the petitioner, through counsel, provided a copy of its 2001 Form 1120-A corporate tax return, which differs from the one initially submitted with the petition. This tax return is dated July 31, 2003, and was prepared by [redacted] Ltd. The figures for gross receipts and sales (line 1), gross profit (line 3), total income (line11), other deductions (line 22), and total deductions (line 23) on page 1 are different from the earlier return. On the balance sheet found on Part III of the return, all figures are the same except that the beginning of tax year figure of $22,800 and the end of tax year figure of $86,866 given for "other current liabilities" (line 14) in the earlier return have been moved to "other liabilities" on line 17 on the July 31, 2003 return. According to the attached statement, this figure apparently represents monies owed to four individuals, one of whom bears the same name as the beneficiary and is shown as being owed $70,366. The beginning of tax year figure of $5,313 and end of tax year figure of $10,305 found on line 17 as "other liabilities" in the earlier return has been switched to line 14, "other current liabilities," thus reducing the total of current liabilities from $95,291 to 18,730 on the 2001 tax return. The net effect of this is to change the calculation of the petitioner's net current assets from -$44,703 to $31,858.

The changes in the tax returns are not addressed by counsel in his transmittal letter. He merely states that the 2001 business tax return is being submitted. He also states in the transmittal letter that the employer is still in the process of completing the 2002 tax return and has until September 15, 2003, to file. Counsel represents that an application for extension to file the 2002 tax return is "herewith submitted" and that the 2002 tax return will be provided under separate cover. He further provides a copy of the beneficiary's amended individual tax return rather than a copy of a W-2 issued by the petitioner as requested by the director. It shows that the beneficiary amended his individual tax return to increase the amount of reported income. The tax return does not show the origin of the beneficiary's compensation.

The director determined that that the evidence failed to establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 24, 2001 and denied the petition on December 17, 2003. The director noted the changes in both returns including the reduction of legal and professional fees by $13,500 and the addition of $23,400 to "other deductions" in the form of outside services equating to the figure shown as gross receipts on the beneficiary's amended tax return. The director stated that "the second tax return covering the year of filing was submitted with changes appearing to be tailored to establish that you could have met the beneficiary's proffered wage in the year of filing, was not notated as amended with the Internal Revenue Service,

---

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

and had no explanation of the inconsistencies in the two returns." Finally, the director noted that no 2002 tax return was ever submitted under separate cover to the record.

On appeal, counsel submits a letter, dated January 8, 2004, from [redacted] of Jason Maxwell, Ltd., a professional services corporation. [redacted] states that he has been engaged to amend the petitioner's returns for 2001 and 2002, and that he filed for an extension of time to file before September 15, 2003, but the returns could not be mailed to the Internal Revenue Service (IRS) until December 22, 2003. As the IRS computer acknowledgment of receipt of the returns will not occur for several weeks, he states that he is vouching for the submission of such return and is submitting exact copies with his statement. Along with this statement is a letter from [redacted] of the same firm, addressed to counsel. This letter is dated February 16, 2004. It refers to enclosed photocopies representing 2001 and 2002 Form(s) 1099 issued to the beneficiary by the petitioner, an amended 2001 corporation tax return, a "re-amended" corporate tax return for 2001, a 2002 corporate tax return, and an amended 2002 tax return. The letter continues to explain some of the changes made to the tax returns. Accompanying this letter is a copy of a corporate tax return for 2001, labeled as "amended," but dated August 15, 2003. It is unclear if this is the tax return referred to by [redacted] as the one mailed to the IRS on December 22, 2003. The record fails to show that this tax return was ever submitted to the director or to the IRS. Two more 2001 tax returns, dated February 13, 2004, also have been submitted on appeal. As referenced by [redacted] one of the major changes appear to be the recharacterization of monies due to [redacted] which he states should be analyzed as a long-term loan to [redacted] and sales income. At first glance, even these drafts are slightly different as they treat the petitioner's tax overpayment of $500 in different ways.

The AAO will not overturn the director's decision to deny the petition based on tax return financial data that has apparently undergone several revisions two months after the director's decision with no credible proof designating which return has been submitted to the IRS. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate its continuing ability to pay the proffered wage beginning at the time the priority date is established and continuing until the beneficiary gains lawful permanent residence. When the director requested evidence supporting this ability, the petitioner's response relevant to 2002 consisted of only a copy of an IRS extension of time to file its 2002 federal tax returns. The petitioner elected to submit no other evidence relating to its financial ability to pay the proffered wage covering this period, even when the regulation provides for the submission of audited financial statements or annual reports. Even without proof of an IRS filing, the AAO will not accept such evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Moreover, the AAO notes that before any subsequent petition filed by the petitioner on behalf of the beneficiary is deemed eligible for approval, a thorough inquiry should be conducted as to the connection of the beneficiary to the petitioner, insofar as the petitioner owed money to an individual bearing the same name. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, and that a *bona fide* job opportunity was available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-

related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification.

For the reasons stated above, it cannot be concluded that the petitioner demonstrated its continuing financial ability to pay the proffered wage through the prescribed financial documentation set forth in 8 C.F.R. § 204.5(g)(2). As such, this 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.