U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 16 2007

EAC 04 262 50647

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, Chief
Administrative Appeals Office

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

The petitioner is an importer and exporter of mechanical instruments. It seeks to employ the beneficiary permanently in the United States as an export manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $44.78 per hour, which equals $93,142.40 per year.

The Form I-140 petition in this matter was submitted on September 20, 2004. On the petition, the petitioner stated that it was established during 1993 and that it employs six workers. The petition states that the

petitioner's gross annual income is $150,000. The space provided for the petitioner to report its net annual income was left blank.

On the Form ETA 750, Part B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Edison, New Jersey.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.

In the instant case the record contains copies of monthly statements pertinent to the petitioner's bank account. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On December 13, 2004 the service center issued a request for evidence in this matter. The service center requested that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also requested that, if the petitioner had employed the beneficiary, it provide copies of the Form W-2 Wage and Tax Statements the petitioner issued to the beneficiary.

In response the petitioner submitted additional bank account statements, but no W-2 forms, no copies of annual reports, no federal tax returns, nor audited financial statements.

The director denied the petition on April 6, 2005. On appeal, counsel asserted:

> The petitioner, Oceanland International Ltd. has submitted documentations to demonstrate it has the financial ability to pay the proffered wage at the time the priority date was established or continuing thereafter.

[Errors in the original.]

In a previous letter dated March 3, 2005 and on appeal counsel argued that the petitioner's bank statements demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages,

although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. (Reg. Comm.1967).

The proffered wage is $93,142.40 per year. The priority date is April 26, 2001. The request for evidence was issued on December 13, 2004. The petitioner is obliged to demonstrate that it was able to pay the beneficiary $93,142.40 from April 26, 2001 until at least December 13, 2004.

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.

Counsel's reliance on bank statements to demonstrate the petitioner's ability to pay the proffered wage is 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 evidence required by 8 C.F.R. § 204.5(g)(2) and requested by the service center is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[1] Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Consistent with the requirements of 8 C.F.R. § 204.5(g)(2) the service center requested, on November 13, 2004, that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements. The petitioner provided none of those documents. The petitioner is unable, therefore, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date consistent with the requirements of 8 C.F.R. § 204.5(g)(2). The petition was correctly denied on that basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

In the December 13, 2004 request for evidence the service center requested copies of the petitioner's annual reports, federal tax returns, or audited financial statements. The petitioner did not provide those documents and gave no reason for that omission.

[1] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Not only does the failure to provide that evidence render the petitioner unable to demonstrate its ability to pay the proffered wage, but failure to submit requested evidence that precludes a material line of inquiry is, in itself, grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis.

Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further, that evidence would not necessarily be considered to be timely submitted if the petitioner were to provide it on motion. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal or on motion. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988).

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.