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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 01 2007

EAC-03-021-51356

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, Chief
Administrative Appeals Office

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

The petitioner is an integrated communications provider, and seeks to employ the beneficiary permanently in the United States as a general manager. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's August 30, 2005 decision, the director denied the case on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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).

The regulation 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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> 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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on October 25, 2000. The proffered wage as stated on the Form ETA 750 is an annual salary of $126,908.60, based on 35 hours per week. The labor certification was approved on September 16, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on October 24, 2002. On the I-140, counsel listed the following information related the petitioning entity: date established: 1998; gross annual income: $3,821,669.00; net annual income: $584,005; and current number of employees: 4.

On February 11, 2005,[2] the director issued a Request for Evidence ("RFE") for the petitioner to provide additional evidence related to the petitioner's ability to pay, and specifically requested: the petitioner's 2001, 2002, 2003, and 2004 U.S. federal income tax returns with all schedules and attachments; and for the petitioner to provide the beneficiary's W-2 statements for the years 2001, 2002, 2003, and 2004, as well as the petitioner's 2001, 2002, 2003, and 2004 W-3 statements, including the names and salaries of all employees.

In response to the RFE, the petitioner provided that funds in the amount of $845,000 were being held in escrow pending the conclusion of litigation against one of the petitioning corporation's former officers. Allegations against the officer included the misappropriation of company funds. The petitioner also submitted a letter from its accountant, which stated that due to the business's proximity to the World Trade Center following the attacks of September 11, 2001, the petitioner had filed an insurance claim and received a settlement check of $1.4 million for loss of business income. The accountant asserted that the petitioner was able to pay the proffered wage, and the salary amount was secured based on the escrowed funds. Further, based on the allegations of the corporate officer's embezzlement, the petitioner had not filed tax returns, and would not file taxes until resolution of the litigation and the "books would be cleared from the fraudulent transactions . . . The IRS has been notified accordingly." The petitioner supplied documentation to show the amount held in escrow, and documentation to show that the petitioner recovered an insurance claim of $835,243.13 for loss of business income following September 11.[3]

The petitioner's treasurer also submitted a letter acknowledging that it owed the beneficiary wages in the amount of $60,000 for 2003, and the same amount for 2004. The petitioner asserted that the deficiency was the result of lost income based on the September 11 events and aftermath.

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[2] In August 2002, the petition was withdrawn upon a request from an officer of the petitioning company. The petition was later reopened as another representative of the petitioner responded to the Citizenship & Immigration Services ("CIS") Notice of Withdrawal and requested that the petition be reopened. The petitioner claimed that it was unaware that a request to withdrawal had been sent to CIS, and that the beneficiary was still employed. CIS reopened the petition.

[3] From the documentation that the petitioner submitted, it is not entirely clear, but the escrowed funds for the litigation appear to be the proceeds paid from the insurance claim, so that the amount that the petitioner would theoretically have available is $845,000 as exhibited by the funds held in escrow, rather than $845,000 in escrow, and an additional expected $1.4 million to be paid yet from the insurance claim. The petitioner refers to both the escrowed funds, and the insurance claim, which implies two sources of revenue. The petitioner would appear to have one source of funds, the escrowed funds, and not the additional revenue from the insurance claim, as this amount appears to have already been distributed to the petitioner.

On August 30, 2005, the director denied the case based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed to the AAO.

We will initially examine the petitioner's ability to pay, and then consider the petitioner's arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed and paid 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 case at hand, on Form ETA 750B, signed by the beneficiary on October 15, 2000, the beneficiary listed that she was employed with the petitioner from July 1999 to the present.[4] The petitioner submitted the following W-2 statements on behalf of the beneficiary:

Year	W-2 Amount Paid
2002	$29,134[5]
2001	$63,710.00
2000	$118,269

The amounts paid to the beneficiary are less than the proffered wage of $126,908, and are deficient in the following amounts: 2002: $97,774; 2001: $63,198; and 2000: $8,639. Therefore, the petitioner cannot establish its ability to pay the proffered wage based on prior wage payment to the beneficiary. The petitioner must demonstrate that it can pay the difference between wages paid and 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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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. 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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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[4] We note that the beneficiary's Form ETA 750B contains three completed work experience blocks. The name and address of the employer, and the dates of employment in the first two experience blocks, which includes the listing for the beneficiary's employment with the petitioner, have been "whited out" and corrected. Changes appear to have been made in relation to the third experience block as well. The third block does contain a stamp exhibiting that DOL approved the corrections. It is unclear from the Form ETA 750B when the corrections were made to the first two experience blocks, and whether this was done prior to the petitioner submitting the Form ETA 750 to DOL. The blocks do not specifically contain the DOL stamp that the corrections were approved, or initials to acknowledge that changes were made to the form.

[5] The petitioner did not submit any W-2 statements for the years 2003, or 2004.

The petitioner is a C Corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $75,000 per year from the priority date:

Tax year	Net income or (loss)
2000	-$106,301[6]

From the above net income, the petitioner cannot demonstrate its ability to pay the proffered wage in the year 2000, even if the wages paid to the beneficiary were added to the petitioner's net income. In the absence of the petitioner's tax returns, we cannot determine the petitioner's ability to pay for the years subsequent to 2000.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Year	Net current assets
2000	$53,616

Based on the petitioner's net current assets, if the wages paid to the beneficiary were added to the net current assets, the petitioner could demonstrate its ability to pay the proffered wage in 2000. As noted above, without the petitioner's tax returns, we are unable to determine the petitioner's ability to pay in other years.

On appeal, counsel provided that, "there is an error of fact in that the company has obtained a significant amount of money, which should be considered in the decision and was not, and the company is able to pay the proffered wage." The petitioner indicated that they would send a brief and/or supporting documentation within 30 days. No additional information was forwarded. On July 27, 2006, the AAO sent a fax to the petitioner allowing the petitioner to forward the brief indicated within five business days, or respond to indicate that no brief was filed. The petitioner responded and attached new evidence.

The new evidence included two letters. The first letter was from [redacted], which provided:

> We are counsel to Line Communications Corporation . . . a jury trial in the action between Line and . . . Line's former CEO, was held from June 20 through June 30, 2006 . . . in the

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[6] The petitioner has submitted only its 2000 U.S. federal income tax return. The petitioner indicated that pending the resolution of litigation against one of its officers, the petitioner had not filed its tax returns until the "books could be cleared."

[7] 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.

> Supreme Court of the State of New York . . . the jury returned a verdict against [the former CEO] for conversion of physical assets, conversion of corporate funds, breach of fiduciary duties and punitive damages, in the total amount of $470,000 . . . the jury also decided that [the former CEO] is owed by Line approximately $144,000 in past salary and loans, and that Line owes [redacted] another party to the action $69,000 for certain telecommunication services. Line will shortly be petitioning the court to have the insurance proceeds held in escrow in the amount of $854,795.83 be released to Line, after a deduction of $69,000 owed to [redacted]. In addition, Line expects to receive a judgment against . . . its former CEO, in the amount of $326,098, plus interest.

A second letter from [redacted]ak, Director for the petitioner, provided:

> We also would like to address the question of self-petitioning as it is raised in Mr. [redacted] letter dated August 30, 2005.[8] Line Communications Corporation is a Delaware Corporation doing business in New York since 1998. The company has 47 shareholders including 46 individuals and one corporation. The company has been funded by the private investors . . . the company's business was deeply affected by the tragic events of 9/11/2001. Since that time the Company has been operated mainly by the Board of Directors that consists of 7 Directors, including myself . . . the Directors of the Company work without the remuneration, so their names would not appear on . . . W-2 or W-3 forms.

Following the AAO's receipt of the petitioner's supplemental documentation, we issued a RFE on October 4, 2006 requesting that the petitioner resolve or submit additional documentation related to a number of inconsistencies in the record prior to making a determination on the petitioner's appeal.[9] Specifically, the RFE noted that the record contained inconsistent evidence related to the beneficiary's position with the petitioner. The RFE raised the issue that, according to a W-2 Form submitted, the beneficiary was paid $118,269 in 2000. That figure matched the listed figure for Officer Compensation on the petitioner's 2000 U.S. Federal Tax Return submitted. Further, on the 2000 tax return, Schedule E, which would address the corporation's ownership, information related to the officer's name, social security number, percent of time devoted to the business, percent of stock owned and the amount of compensation appear to have been blotted out. The evidence suggested that based on the W-2 figure that matched officer compensation exactly, the beneficiary appeared to be the sole corporate officer, and further, that the beneficiary held a percentage of the company.[10]

Further, evidence in the record suggested that the petitioner was the successor-in-interest to the beneficiary's corporation, Octet Communications. The labor certification was initially filed by Octet Corporation, and later amended with DOL permission to list the present petitioner. New York Department of State public records

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[8] The director's decision notes that a W-3 Form was submitted exhibiting only the beneficiary as an employee, which raised the issue whether the beneficiary had filed a petition on behalf of herself.

[9] Based on 8 C.F.R. § 204.5(g)(2), the director may request additional evidence in appropriate cases.

[10] We note that 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, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." If the petitioner did not make the relationship clear to the DOL prior to certification of the ETA 750, then the bona fides of the job offer are unclear.

identify the beneficiary as [redacted]'s "Chairman or Chief Executive Officer." In reference to the petitioner's lawsuit, the AAO obtained a copy of the Supreme Court of New York's court order denying partial summary judgment, which identified Atlantic Express Communications Company as the petitioner's predecessor.

Matter of Ho, 19 I&N Dec. 582, 592 (BIA 1988), provides, "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."

Based on the foregoing issues, in order to resolve the record's inconsistencies, the AAO requested that the petitioner submit the following documentation within 12 weeks, or by January 3, 2007:

1. Court documentation verifying a jury verdict in the petitioner's favor;
2. Original, signed tax returns for 2000 through 2005, including completed Schedules E for each return;
3. Documentation regarding the petitioner's shareholders' identities;
4. Documentation verifying the relationship between the petitioner and [redacted], and the beneficiary's position with Octet.

The petitioner failed to respond. The petitioner forwarded no documentation related to any of the requested points material to the AAO rendering a determination on the appeal. The documentation was specifically required in order to determine whether the petitioner had the ability to pay the beneficiary the proffered wage, and further to reconcile substantial inconsistencies in the record. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The evidence in the record includes only the petitioner's 2000 federal tax return with what appears to be an altered Schedule E. The wages paid to the beneficiary are insufficient standing alone to document the petitioner's ability to pay the proffered wage from the priority date until the present. Regarding the additional evidence on appeal, the petitioner did not provide documentation related to the jury verdict referenced in Mr. [redacted] letter as requested in the RFE. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, whether the petitioner must pay any additional sums from the jury award, and how much it must pay, from the escrowed funds is unclear, such as for legal fees in connection with the litigation. Additionally, when the escrowed funds would be released is unclear. Whether release of the escrowed funds would be delayed if the plaintiff appealed is also unclear. Further, the escrowed funds are a future source to pay the beneficiary's wage. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Further, without the petitioner's tax returns, audited financial statements, or annual reports, we cannot assess whether the petitioner's ability to pay for the years 2001, 2002, 2003, 2004, and 2005. The petitioner has provided no information related to its gross receipts, net income, or net current assets for these years.

Regarding the second letter provided on appeal from [redacted] related to the petitioner's corporate ownership, the petitioner did not provide any documentation to demonstrate corporate ownership. The RFE specifically requested this documentation to resolve questions related to the petitioner's owners.

The petitioner's failure to submit documentation to resolve the inconsistencies above raises doubts. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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." *Matter of Ho*, 19 I&N Dec. at 591-592.

The information contained within the record of proceeding is insufficient to allow us to conclude that the petitioner has the ability to pay the proffered wage. Accordingly, the petition was properly denied.

Further, the petitioner failed to respond to the RFE, and closed material lines of questioning. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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.