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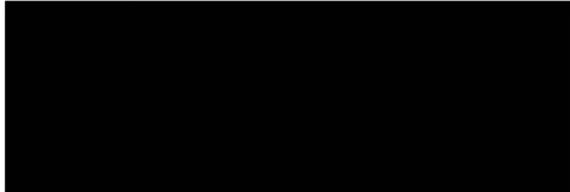
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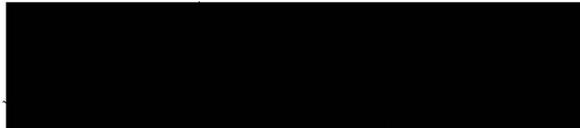
B6



FILE: [Redacted] Office: NEBRASKA SERVICE CENTER  
LIN 04 093 50030

Date: DEC 27 2006

IN RE: Petitioner:  
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:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development company. 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 additional documentation with regard to the petitioner's 2004 finances and the beneficiary's wages.

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.

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 the granting of 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 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 1, 2003. The proffered wage as stated on the Form ETA 750 is an annual salary of \$69,410. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 2002.

On the petition, the petitioner claims to have been established in 2000, to have 45 employees, to have a gross annual income of \$2,000,000, and a net annual income of \$125,000. In support of the petition, the petitioner submitted its IRS Forms 1120S, the petitioner's corporate income tax returns, for 2000, 2001, and 2002. Where an S corporation's income is exclusively from a trade or business, Citizenship and Immigration Services (CIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's

Form 1120S. The petitioner's 1120S forms indicated that the petitioner had net income of \$28,435 in 2000, \$9,282 in 2001, and \$12,915 in 2002. The petitioner also submitted a W-2 form for the beneficiary for tax year 2002 that indicated it paid the beneficiary \$17,000 in 2002. The petitioner also submitted pay statements for the beneficiary for pay periods ending November 30, 2003 and December 31 2003 that indicated the beneficiary had monthly gross earnings of \$3,750.<sup>1</sup>

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 22, 2004, the director requested additional evidence pertinent to that ability. The director noted that the beneficiary's 2002 W-2 form submitted to the record indicates that the petitioner paid the beneficiary less than the proffered wage during 2002, and the petitioner's Form 1120S tax return reflected net income lower than the proffered wage of \$69,410. The director further noted that the petition's priority date was April 1, 2003 and stated that both 2002 documents were of limited evidentiary value. The director requested additional evidence to establish that the petitioner had the ability to pay the proffered was of the April 1, 2003 priority date and onward. The director stated that such evidence must include annual reports, federal tax returns, or audited financial statements. The director further stated that the evidence might include evidence such as audited profit/loss statements, complete bank account records, and/or personnel records. The director finally requested a signed copy of the petitioner's 2003 corporate income tax return, if available.

The director also stated that if the petitioner employed the beneficiary in tax year 2003 to submit his W-2 form, as well as evidence that the beneficiary had the requisite six months experience in the position prior to the April 1, 2003 priority date. With regard to the beneficiary's work experience, the director stated that any evidence submitted must be in the form of letters from current or former employers giving the name, address, and title of the employer and a description of the beneficiary's work experience, including specific dates of the employment and specific duties.

In response, the petitioner submitted two letters of work experience. The first letter dated March 31, 2000, stated that the beneficiary worked for SiaMulticomm Computer Education and Software Development, Chennai, India, from September 1998 to March 2000. The letters list the beneficiary's work responsibilities, and concludes by stating the beneficiary "is a hard Working Guy with great Determination." The letter is signed by an individual identified as [REDACTED]. The second letter dated May 31, 2002 states that the beneficiary worked for [REDACTED] San Ramon, California, and Stratford, Connecticut from March 2000 to May 2002 as a system analyst/programmer. This letter concludes by stating the beneficiary "is a hard Working Guy with great Determination," and is signed by an individual named [REDACTED]. Neither letter identifies the title of the person providing the verification of work experience.

The petitioner also submitted its Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2004.<sup>2</sup> This document indicates the petitioner had 49 employees, with total wages and tips, plus other

<sup>1</sup> The year to date wages noted on the November 2003 wage statement indicates the beneficiary earned \$8,230 as of November 30, 2003.

<sup>2</sup> This document identifies the petitioner's location as [REDACTED] Canton, Massachusetts 02021.

compensation of \$557,327.87. The petitioner also submitted state of Massachusetts documentation with regard to total wages of \$568,240 paid in the first quarter of 2004, as well as unemployment insurance documentation. The petitioner's Quarterly Wage Summary produced by Interpay, a paycheck company, indicates that the beneficiary had gross pay of \$11,250 for the first quarter of 2004. The petitioner also submitted a 2003 Schedule K-1, Shareholder's Share of Income, Credits, Deductions, Inc., that indicated Mr. [REDACTED], [REDACTED] Canton, Massachusetts had ordinary income of \$46,331 for tax year 2003. The petitioner then submitted a bank statement for the petitioner located in Unit D, [REDACTED] Schaumburg, Illinois from CharterOne Bank dated April 30 2004. The petitioner's balance as of April 30, 2004 was \$40,357.46. The petitioner also submitted its payroll journal for June 2004 that listed the beneficiary, employee 24, with a year to date earnings of \$22,500, and a monthly gross payment of \$3,750. Finally the petitioner submitted a paycheck for the beneficiary dated June 3, 2004 in the amount of \$2,740. The accompanying pay statement indicated year to date earnings of \$22,500 as of June 2004. The petitioner also submitted its Form 1120S for tax year 2003 that indicated net income from trade or business activities of \$46,331.

The director denied the petition on April 20, 2005. In his denial of the petition, the director noted that the petitioner's priority date was April 1, 2003, and then restated the petitioner's net income for tax years 2000, 2001, and 2002. The director stated that the petitioner had submitted a copy of its 2003 U.S. income tax return that indicated ordinary income of \$46,331 and cash assets of \$12,665.<sup>3</sup> The director noted that the petitioner had also submitted copies of its 2004 Employer's Quarterly Report for the first quarter of 2004. The director then concluded that the evidence did not establish the petitioner's ability to pay the proffered wage of \$69,410 as of the April 1, 2003 priority date.

On appeal, counsel submits the beneficiary's W-2 for tax year 2004 that indicates he earned \$54,849. Counsel also submits the petitioner's Form 110S for tax year 2004 that indicates net income of \$125,165. This document on its K-1 schedule identifies the sole shareholder's name and address as [REDACTED] Glendale Heights, Illinois. The G-28 submitted by counsel identifies the beneficiary's address as of February 22, 2004 as [REDACTED] Quincy, Massachusetts. Counsel states that the petitioner's 2004 federal tax return establishes its ability to pay the proffered wage. Counsel provides no further commentary.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first 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. Although the petitioner submitted a W-2 form for the beneficiary for tax year 2002, since the priority date for the petition is April 1, 2003, the beneficiary's salary and the petitioner's financial resources in the year 2002 are not dispositive in the present proceedings. With regard to tax year 2003, the petitioner did not submit any documentation as to the beneficiary's final annual salary in tax year 2003; however, it did submit two pay statements to the record for November and December of 2003. These two documents that indicated the beneficiary had earned a monthly salary of \$3,750 during

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<sup>3</sup> This figure is also the petitioner's 2003 net current assets, which the AAO will discuss more fully further in these proceedings.

those two months, and a salary as of November 30, 2003 of \$8,230. With regard to tax year 2004, the payment statement from Interpay that the petitioner submitted to the record, and the beneficiary's W-2 form, submitted on appeal, indicate that the petitioner paid the beneficiary \$54,849.99 in tax year 2004, which is less than the proffered wage of \$69,140. Thus, the petitioner has not established that it paid the beneficiary the entire proffered wage of \$69,140 in tax year 2003. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003 and onward.

Counsel's reliance on the April 2004 balance in the petitioner's CharterOne bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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, without consideration of depreciation or other expenses. 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). 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*, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The evidence indicates that the petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown

on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner's net income is taken from line 21 of the Form 1120S as the petitioner's Schedules K indicate no additional income.<sup>4</sup>

As stated previously, the petitioner's tax returns for tax years 2001 and 2002 are not dispositive in these proceedings because the priority date for the petition is in April 2003. Therefore the AAO will only examine the petitioner's federal tax returns for tax years 2003 and 2004. These two documents show the following amounts of net income: \$46,331, and \$125,165. Thus, the petitioner has established that it has sufficient net income in tax year 2004 to pay the difference between the beneficiary's actual wages and the proffered wage. However, the petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant petition, the petitioner has to establish its ability to pay the proffered wage of \$69,140 as of the April 1, 2003 priority date and onward.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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. Since the petitioner established its ability to pay the difference between the beneficiary's claimed wages in 2004 and the proffered wage, the AAO will only examine the petitioner's net current assets for tax year 2003. The petitioner submitted the following information for tax year 2003:

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<sup>4</sup> If there is additional income on lines 1-6 of Schedule K, the ultimate net income figure is found on line 23 of Schedule K.

	2003
Ordinary Income	\$ 46,331
Current Assets	\$ 12,665
Current Liabilities	\$ 0
Net current assets	\$ 12,665

These figures fail to establish the ability of the petitioner to pay the proffered wage. In 2003, the petitioner has not demonstrated that it paid the difference between the beneficiary's actual wages of \$8,320 and the proffered wage of \$69,140. In 2003, the petitioner shows a net income of \$46,331, and net current assets of \$12,665, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage in 2003 out of its net income or net current assets. As stated previously, the petitioner did establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net income in tax year 2004.

As noted previously, the bank statement of the principal shareholder is not viewed as evidence of the additional funds with which to pay the proffered wage. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, although the petitioner established its ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net income in tax year 2004, the petitioner has not shown the ability to pay the proffered wage during the salient part of tax year 2003. 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, the petition has other deficiencies. 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 regulation at 8 C.F.R. § 204.5(1)(3) also provides:

(ii) Other documentation—

- (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.

The two letters of work verification submitted to the record in response to the director's request for further evidence, with similar format, closing remarks, and non-identification of letter writers are not viewed as sufficient evidence of the beneficiary's previous work experience prior to April 1, 2003. Primarily, as noted by the director, these letters should indicate the name and title of the person providing the work verification. The redundant style format and repetition of remarks also raise questions with regard to their authenticity.

Without the submission of less questionable letters, and/or letters conforming to the content requirements of 8 C.F.R. § 204.5(l)(3), the petitioner has not established that the beneficiary had the requisite six months of work experience prior to April 1, 2003.

Another area of deficiency is the actual identification of the petitioner. As noted previously, the petitioner's federal income tax return indicate a different address for each reporting year during 2000, 2001, 2002, 2003, and 2004. As of the submission of the Form ETA 750, the petitioner's business location is indicated as Schaumburg, Illinois, while the petitioner's federal income tax returns were submitted from the state of Massachusetts. Such submission raises the question of who exactly is the beneficiary's employer, and whether the petitioner is an employment agency as opposed to the actual employer for the beneficiary. The petitioner should submit further documentation with regard to its actual business operation and business incorporation, prior to any further consideration of the instant petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.