

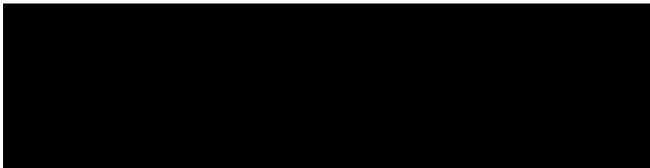
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U.S. Citizenship  
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 24 2006  
EAC 04 075 51512

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:



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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a travel and tours business services company. It seeks to employ the beneficiary permanently in the United States as a translator/interpreter. 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 submitted documentation with regard to its ability to pay the proffered wage. The director denied the petition accordingly.

On appeal, counsel states that the adjusted net current assets of the petitioner demonstrate its ability to pay the proffered wage. Counsel submits additional documentation.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$38,355 annually. The petitioner then subsequently substituted the present beneficiary for the original beneficiary when it submitted the I-140 petition to Citizenship and Immigration Services (CIS). On the ETA 750, the instant beneficiary did not claim that she worked for the petitioner.

On the petition, the petitioner indicated it was established in December 1989,<sup>1</sup> has seven employees, a gross annual income of \$1,064,952, and a net annual income of \$253,183. With the petition, the petitioner submitted documentation on the beneficiary's academic credentials and work experience.

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<sup>1</sup> Statements made by both the petitioner's president and its accountant and contained on the record, suggest

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 3, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal income tax returns with all schedules and attachments. If the petitioner was structured as a corporation, the director requested the petitioner's corporate tax return. If the petitioner was structured as a sole proprietorship, the director requested the petitioner's IRS Form 1040, with Schedule C. The director also stated that if the petitioner ever employed the beneficiary, to submit the beneficiary's W-2 Forms. The director stated that the petitioner could also submit a statement from a financial officer of the company, if the petitioner had over 100 employees, or the petitioner could submit annual reports for 2001 and 2002 accompanied by audited or reviewed financial statements. The director finally stated that additional evidence such as accredited profit/loss statements, bank account records, or personnel records could also be considered, but only as supplementary evidence to establish the petitioner's ability to pay the proffered wage.

In response, the petitioner submitted its Form 1120 corporate tax returns for 2001 and 2002. These documents reflected that the petitioner had taxable income before net operating loss deductions and special deductions of \$544 in 2001 and of -\$13,357 in 2002.

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 May 25, 2004, denied the petition. The director examined the petitioner's taxable income before net operating loss deductions and special deductions and noted that the petitioner's taxable income in 2001 and 2002 was not sufficient to pay the proffered wage of \$38,355. The director then examined Schedule L of the petitioner's corporate income tax return and stated that in 2001 the petitioner had current assets of \$15,365 over the 2001 current liabilities, and in 2002, had net assets of \$16,237 over its net liabilities in 2002.<sup>2</sup> The director stated that based on the evidence submitted, the petitioner did not have the ability to pay the proffered wage as of the priority date and onward.

On appeal, counsel states that the petitioner's adjusted net current assets for the years 2001, 2002, and 2003 are sufficient to pay the proffered wage. In support of this assertion, counsel submits the following documentation:

A letter from [REDACTED] the petitioner's president. In his letter, [REDACTED] states that the petitioner's adjusted net current assets are \$364,116 for tax year 2001, \$359,411 for tax year 2002, and \$377,731 for tax year 2003. [REDACTED] also states that the petitioner has hired an H-

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that the present petitioner was incorporated in 2001. However, no evidence is found in the record to support this assertion or the petitioner's statement on the I-140 that it was established in 1989. The petitioner's IRS Form 1120 indicates the petitioner was incorporated in May 2000.

<sup>2</sup> The director examined the petitioner's net assets and net liabilities as outlined on Schedules L in his decision. Although he identified the overage of the petitioner's assets versus the petitioner's liabilities as net assets, the AAO views this figure as the petitioner's net current assets. How the AAO calculates a petitioner's net current as sets will be examined further in these proceedings.

1B beneficiary as its agency manager and the proffered salary for this position is \$37,128. Mr. Wang notes that CIS approved this petition.

A letter from [REDACTED] Fensterville, Pennsylvania.<sup>3</sup> Mr. [REDACTED] was incorporated in 2001, the principals of the business did not contribute all the business assets of Asia American Travel Agency to the new corporation. [REDACTED] states that these additional assets consist of its office building and certain cash reserves. [REDACTED] states that the building [REDACTED] in Philadelphia is a four-story office building acquired in 1998 for \$445,254, and valued in 2004 at over one million dollars. [REDACTED] also states that the principals retained \$100,000 in two \$50,000 certificates of deposit as a business reserve. [REDACTED] stated another \$26,000 is kept on deposit as part of a mortgage loan agreement. [REDACTED] submits a document entitled Asia America Adjusted Net Worth. For the years 2001, 2002, and 2003, the document identifies the petitioner's claimed cash reserves, worth of its office building, corporate assets, mortgage payable amounts, and corporate liabilities. Based on these figures, the petitioner's net worth is calculated to be \$364,116 in tax year 2001, \$359,411 in tax year 2002, and \$377,731 in tax year 2003, the same figures identified by [REDACTED] in his letter.

A copy of the petitioner's Form 1120 for tax year 2003 which indicates a taxable income of \$10,218 and net current assets of \$40,684. The petitioner resubmits its Forms 1120 for tax years 2001 and 2002.

A statement from Citizens Bank, for the months January 2003 to December 2003 with regard to a two-year certificate of deposit for [REDACTED]. This document indicates that the certificate of deposit is worth \$26,921.54 as of December 31, 2003.

A letter from [REDACTED] Manager, Asian Bank, that states [REDACTED] who reside [REDACTED] floor, have maintained two certificates of deposit since April 16, 2002. [REDACTED] states the total balance of the certificates is \$106,743.02.

A deed of sale, a mortgage record document, and a settlement statement for [REDACTED] Street property. All three documents name [REDACTED] as the buyers, and/or mortgagees.

On appeal, counsel submits documents to the record that establish further financial assets of the petitioner's president. These documents include the documentation of the ownership of 923 Arch Street, owned by the petitioner's president and [REDACTED]. Counsel also submits a certificate of deposit owned by the petitioner's president doing business as New Asia American Group. It is noted that the record does not reflect whether [REDACTED] is the same entity as the petitioner, or another corporate entity owned by Mr.

<sup>3</sup> Counsel on appeal identifies [REDACTED] as a certified public accountant.

<sup>4</sup> [REDACTED] business relationship to the petitioner is not identified in the petition, she is listed as the contact person for the petitioner on the I-140 petition.

Wang. Counsel also submits a letter from [REDACTED] states the petitioner's president [REDACTED] also have maintained two certificates of deposit with a combined value of \$106,743.02 since 2002. The certificates of deposit and the property value of the [REDACTED] property are utilized by the petitioner's accountant to revise the petitioner's net current assets in tax years 2001, 2002, and 2003. Upon review of these documents, they appear to represent the assets of the petitioner's owners or officers as opposed to the instant petitioner.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore the certificate of deposits owned by the petitioner's owner [REDACTED] and real estate property also owned by the petitioner's owner [REDACTED] are not viewed as additional funding that can establish the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The beneficiary indicated on ETA Form 750 that she had not worked for the petitioner. Therefore the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner is structured as a corporation, and submitted its Form 1120 corporate income tax returns to the record. CIS considers the petitioner's net income to be the taxable income figure that is shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return. As previously stated, the petitioner's net income for tax year 2001 and 2002 are \$544 and -\$13,357. In 2003, the petitioner's net income is \$10,218. None of these sums are sufficient to pay the proffered wage of \$38,355. Therefore the petitioner cannot establish its ability to pay the proffered wage based on its net income.

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 net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, 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.<sup>5</sup> 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. The petitioner's tax returns reflect the following information for the following years:

	2001	2002	2003
Taxable income <sup>6</sup>	\$ 544	\$ -13,357	\$ 10,218
Current Assets	\$ 18,360	\$ 18,207	\$ 43,187
Current Liabilities	\$ 2,995	\$ 1,970	\$ 2,503
Net current assets	\$ 15,365	\$ 16,237	\$ 40,684

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$544, and net current assets of \$15,365, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of -\$13,357 and net current assets of \$16,237, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, the petitioner shows a taxable income of \$10,218 and net current assets of \$40,684. Thus, the petitioner had the ability to pay the proffered wage during 2003 based on its net current assets.

However, a 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). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>6</sup> Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. 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).

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the beneficiary's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of translator/interpreter. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |  |
|-----|-------------------------|--|
| 14. | Education               |  |
|     | Grade School            | --                                     |
|     | High School             | --                                     |
|     | College                 | 4                                      |
|     | College Degree Required | BA in Linguistics or related field     |
|     | Major Field of Study    | English Language or English Literature |

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended Liaoning College of Chinese Medicine, Hubei East Chinese Medicine Research Institute, where she received a U.S. baccalaureate degree and medical degree. The beneficiary also indicated she received a certificate in July 1999 in therapy from the same institute. The beneficiary provides no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. The beneficiary's four-year baccalaureate degree in traditional Chinese medicine in no way can be found analogous to a four-year baccalaureate degree in linguistics or a related field.

Thus, the petitioner cannot establish that it is able to pay the proffered wage or that the beneficiary is qualified to perform the duties of the position. 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.