

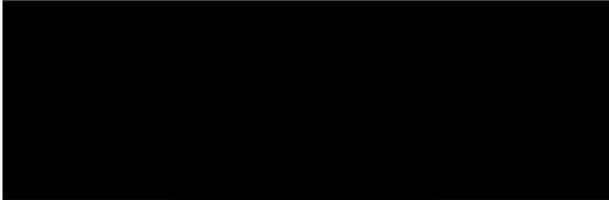
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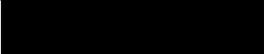


**U.S. Citizenship
and Immigration
Services**

B6



FILE:



Office: TEXAS SERVICE CENTER

Date: **AUG 21 2007**

SRC-06-056-51199

IN RE:

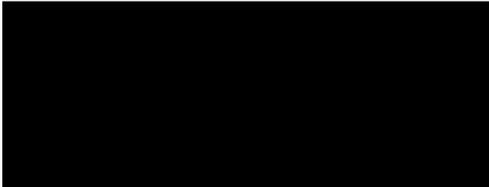
Petitioner:



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 preference visa petition¹ was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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. The director also noted that the petitioner indicated a different job location on the petition without supporting evidence. The director denied the petition accordingly.

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.

As set forth in the director's October 30, 2006 denial, the key issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The petitioner filed a new ETA Form 9089 on behalf of the instant beneficiary with the DOL on July 10, 2006 and the ETA Form [REDACTED] was certified on July 26, 2006. On November 13, 2006, the petitioner filed another I-140 immigrant petition with a premium processing request based upon the newly certified ETA Form 9089 and the new petition (SRC-07-029-52448) was approved on November 16, 2006.

Here, the Form ETA 750 was accepted on January 29, 2003. The proffered wage as stated on the Form ETA 750 is \$70,000 per year. On the Form ETA 750B signed by the beneficiary on January 24, 2003, he claimed to have worked for the petitioner since March 2001. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$842,802, and to currently employ 38 workers.

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 appeal². Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2003 through 2005, payroll records, balance sheets as of December 31, 2004, bank statements for the petitioner's payroll account covering a period from December 31, 2005 to September 29, 2006, Texas Employer's Quarterly Reports and California DE-6 Quarterly Wage & Withholding Report for the first three quarters of 2006, Form W-3 for 2005, 2005 W-2 forms for all its employees, 2005, the beneficiary's W-2 forms for 2003 through 2005 and paystubs covering June 30, 2006 to October 6, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner not only demonstrated its ability to pay at the time the priority date was established but also showed it has the capacity to continue meeting its obligations until the beneficiary obtains his lawful permanent residence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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). 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 2003, 2004 and 2005, and the beneficiary's paystubs for 2006. The W-2 forms show that the petitioner paid the beneficiary \$80,859.70 in 2003, \$76,864.97 in 2004 and \$68,591.86 in 2005. The beneficiary's paystubs show that the petitioner pays the beneficiary \$3,432.00 biweekly in 2006 and has paid \$62,576.10 as of October 6, 2006. Therefore, the petitioner established its ability to pay the proffered wage in 2003 and 2004 through the examination of wage already paid to the beneficiary. It is most likely that the petitioner would establish its ability to pay the full proffered wage of \$70,000 by demonstrating its continuing employment and compensating the beneficiary for the rest period of 2006. However, the petitioner failed to establish its ability to pay the full proffered wage in

² 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) and 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).

2005 through examination of wages paid to the beneficiary. The petitioner is obligated to demonstrate that it had sufficient net income or net current assets to pay the difference of \$1,408.14 between wages actually paid to the beneficiary and the proffered wage.

Counsel submitted the petitioner's balance sheet as of December 31, 2004. But the balance sheet is not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the balance in the petitioner's 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.

Counsel refers to a decision issued by the AAO concerning the balance in the petitioner's checking account in determining the petitioner's ability to pay the proffered wage, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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). The petitioner's reliance on its gross income and gross profit on appeal is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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.

As an alternative method, CIS will review the petitioner's assets. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.³ 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 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 record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003 through 2005. According to the tax returns in the record, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. Since the petitioner established its ability to pay the proffered wage in 2003 and 2004 through the examination of wages paid to the beneficiary, the tax returns for 2003 and 2004 are not necessarily dispositive. The petitioner's tax return for 2005 demonstrates the following financial information concerning the petitioner's ability to pay the difference of \$1,408.14 between wages actually paid to the beneficiary and the proffered wage in 2005:

- In 2005, the Form 1120S stated a net income⁴ of \$24,838.

³According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴Where 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 1120S 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 line 23 or 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for

- The petitioner's net current assets during 2005 were \$(398,508).

For the year 2005 the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2005, however, the petitioner did not have sufficient net current assets to pay the difference. The tax return seems to demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage as of the year of the priority date 2003 through 2005 through an examination of wages paid to the beneficiary and its net income.

However, the director found that the petitioner did not pay some beneficiaries of its multiple H-1B petitions at the prevailing wage rates set forth on the I-129 petitions, and thus failed to establish its ability to pay the proffered wage in 2005. The regulation 8 C.F.R. § 204.5(g)(2) expressly requires the petitioner to demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The AAO concurs with the director's determination that the petitioner must demonstrate that it had sufficient net income or net current assets to pay the full proffered wages or the difference between wages actually paid to the beneficiary and the proffered wages to all the multiple beneficiaries. Therefore, in the instant case, the petitioner must show that it had sufficient income to pay all the wages at the priority date of each petition. However, the director's determination that the petitioner did not establish its ability to pay the proffered wage in 2005 because the petitioner did not pay its H-1B beneficiaries the prevailing wage rate is an error. The fact that the petitioner did not pay the prevailing wage rate to its H-1B employees and thus did not comply with the regulation governing nonimmigrant petitions does not automatically result in the petitioner's failure to establish its ability to pay in an employment-based immigrant petition. Therefore, this portion of the director's decision is withdrawn.⁵

The AAO notes from CIS records that the petitioner filed 13 immigrant petitions, including the instant petition and another immigrant petition filed for the instant beneficiary, as well as 165 nonimmigrant petitions. Among the 11 additional immigrant petitions, there are at least 7 beneficiaries of the approved petitions for whom the petitioner had obligations to show its ability to pay them the proffered wages in 2005⁶. Since these petitions have already been approved, the petitioner must demonstrate that the petitioner had established its ability to pay for all these seven petitions in 2005 through the examination of wages paid to the beneficiaries or that the petitioner had sufficient net income to pay the instant beneficiary the difference of \$1,408.14 after paying the full proffered wages or the differences between wages actually paid to those seven beneficiaries and the proffered wages from its net income of \$24,838 in 2005. The record does not contain any evidence sufficient for the AAO to determine whether or not the petitioner paid the full proffered wages

Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

⁵ The petitioner's nonimmigrant petition filing history suggests that the petitioner might have filed some fraudulent nonimmigrant petitions. The AAO will recommend that the director launch an investigation as to the petitioner's possible fraudulent nonimmigrant petitions.

⁶ These seven approved petitions include SRC-04-207-52439 filed on July 26, 2004 with the priority date of October 8, 2002 and approved on April 13, 2005; SRC-05-254-52021 filed on September 9, 2005 with the priority date of November 4, 2002 and approved on October 28, 2005; SRC-06-055-50987 filed on December 9, 2005 with the priority date of February 3, 2003 and approved on February 7, 2006; SRC-06-056-51229 filed on December 12, 2005 with the priority date of January 30, 2003 and approved on December 1, 2006; SRC-06-002-50982 filed on October 4, 2005 with the priority date of February 27, 2003 and approved on November 8, 2005; SRC-06-133-50598 filed on March 23, 2006 with the priority date of June 21, 2004 and approved on March 30, 2006; and SRC-06-142-50278 filed on April 3, 2006 with the priority date of November 23, 2005 and approved on April 28, 2006.

to the seven beneficiaries in 2005 or whether or not the balance of the net income after the petitioner paid the difference between wages actually paid to the seven beneficiaries and the proffered wages was still sufficient to pay the instant beneficiary the difference of \$1,408.14 in 2005. The petition must be remanded to the director to request the relevant documentary evidence and make a new decision.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). In the instant case, the Form ETA 750 indicates that the proffered position was located at [REDACTED], instead of the petitioner's business address, however, the petitioner offered the beneficiary the job at [REDACTED]. It appears that the petitioner intends to employ the beneficiary outside the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment). The director requested the petitioner to prove the area of the intended employment. In response to the director's request for evidence (RFE) and on appeal, counsel submitted a master consulting agreement entered on June 14, 2000 between the petitioner and its client, Samsung Telecommunications American, Inc. (Samsung) located at [REDACTED], [REDACTED] and its amendments No. 1 to 11, and a printout from Samsung's website. These documents show that the petitioner has been providing the beneficiary's consulting services to Samsung at the site of [REDACTED] since 2000 and Samsung has moved from [REDACTED]. Therefore, the AAO concurs with counsel's assertion that the petitioner demonstrated that the job offer located at [REDACTED] Lookout Drive is a realistic one. These two locations are only 2.3 miles away and both are within the same DOL designated prevailing wage area [REDACTED]. Therefore, the employment location change cannot be construed as that the petitioner intends to employ the beneficiary outside the terms of the Form ETA 750. Therefore, the portion of the director's decision pertinent to the different job location is withdrawn.

Beyond the director's decision and assertions on appeal, the AAO will discuss whether or not the petitioner submitted sufficient evidence to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date. The certified Form ETA 750 in the instant case states that the proffered position requires two (2) years of experience in the job offered in addition to a bachelor's degree in computer science, electrical engineering, electronic engineering, or electronics and communications engineering.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record of proceeding contains two experience letters from alleged former employers of the beneficiary pertinent to the beneficiary's qualification as required by the above regulation. One is from [REDACTED] Manager – Human Resources, of Motorola India Electronics Ltd. verifying that the beneficiary was employed as a software engineer from July 2000 to February 2001. This letter was not dated. It is on Motorola letterhead but the letter does not contain the company's address and telephone number or the writer's address

and contact information. Furthermore, this letter does not verify the full-time employment of the beneficiary. If the beneficiary was employed on a part-time basis, the verified 7 months of experience could only be accounted as 3.5 months of full-time experience.

The second letter was not dated either. It is from [REDACTED], Team Leader: Nortel Group, of Silicon Automation Systems Ltd. in Bangalore, India. It is on the letterhead of Silicon Automation Systems Ltd. with the company's address, telephone number and fax number. The letter verifies that the beneficiary was employed as a software engineer in Nortel Group from February 1999 to June 2000 with a description of the duties the beneficiary performed. However, this letter does not verify the full-time employment of the beneficiary. If the beneficiary was employed on a part-time basis, the verified 16 months of experience could only be accounted as 8 months of full-time experience.

Therefore, without verification of the beneficiary's full-time employment with these two former employers, these two letters cannot demonstrate that the beneficiary possessed the qualifying 2 years of full-time experience in the job offered prior to the priority date. In addition, it is doubtful that the beneficiary possessed exactly 2 years (from February 1999 to February 2001) of experience as a software engineer to meet the minimum experience requirements set forth on the Form ETA 750. Moreover, the letter from Motorola indicated that the beneficiary worked for Motorola until February 2001, while the beneficiary claimed that his employment with Motorola ended in March 2001 on its Form ETA 750B and on March 20, 2001 on the ETA Form 9089 in the record. The petitioner did not submit any independent objective evidence to resolve the inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast 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." "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."

Therefore, the petitioner failed to submit sufficient evidence for CIS to determine whether or not the beneficiary possessed the requisite two years of full-time experience as a software engineer prior to the priority date of January 29, 2003 in the instant case.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.