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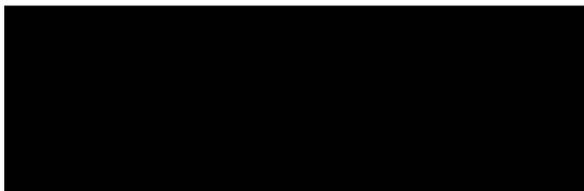
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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 20 2007
WAC 06 015 52603

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is identified on the Form I-140 visa petition as ACT Communications Incorporated of 230 South Garfield Avenue in Monterey Park, California, Employer Identification Number 95-4711898, a telecommunications technology service. It seeks to employ the beneficiary permanently in the United States as a technical support specialist.

As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite education as stated on the labor certification petition. The director denied the petition accordingly.

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

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.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 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). Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$50,274 per year. The Form ETA 750 states that the position requires four years of college culminating in a bachelor's degree in Computer Science or Computer Engineering and one year of experience either in the job offered or as a computer programmer.

The Form I-140 petition in this matter was submitted on October 20, 2005. On the petition, the petitioner stated that it was established during 1998 and that it employs 11 workers. The petition states that the petitioner's gross annual income is \$2,227,714 and that its net annual income is \$150,842.¹ On the Form ETA 750, Part B, signed by the beneficiary on April 17, 2004, the beneficiary claimed to have worked for the petitioner as a computer Technical Support Specialist from September 1999 to December 2001 and as a database administrator from January 2002 to the date of that form. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Monterey Park, California.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal. In the instant case the record contains (1) a Chinese diploma and English translation, (2) a Chinese transcript and English translation, and (3) an educational evaluation dated September 13, 2006.

The diploma states that the beneficiary enrolled in the Computer Engineering department of Capital Normal University, majored in the four-year bachelor's degree Computer Applications curriculum, completed the required coursework between September 1991 and June 1995, graduated, and was awarded his diploma. The transcript provided confirms those dates and lists the courses the beneficiary took and his numerical grades. The record does not contain any other evidence relevant to the beneficiary's education. The educational

¹ The petitioner's 2004 tax return does show gross receipts of \$2,227,714. It does not, however, confirm that the beneficiary's net income was \$150,489 during that year. Rather, that is the amount shown as the petitioner's Line 3, Gross Profit. Gross profit is a taxpayer's gross receipts less its cost of goods sold, but before the subtraction of its other expenses. It is neither equal to nor analogous to net income.

evaluation states that the beneficiary's college education in China is equivalent to a bachelor's degree in Computer Science and Engineering earned at an accredited institution in the United States.

In addition, the record contains (1) the petitioner's 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Returns, and (2) the 2004 and 2005 Form 1120, U.S. Corporation Income Tax Returns of ACT TELE, Incorporated of 2540 Corporate Place in Monterey Park California. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns identify it as American Chinese Telecommunications Incorporated. That entity has the Employer Identification Number [REDACTED] indicating that it is the same entity as the petitioner. The petitioner's tax returns show that it is a corporation, that it incorporated on October 29, 1998, and that it reports taxes pursuant to accrual convention accounting and a fiscal year that runs from October 1 of the nominal year to September 30 of the following year.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,045. At the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,349. At the end of that year the petitioner had current assets of \$303,669 and current liabilities of \$165,425, which yields net current assets of \$138,244.

During its 2003 fiscal year, which ran from October 1, 2003 to September 30, 2004, the petitioner declared a loss of \$72,780 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$249,709 and current liabilities of \$178,365, which yields net current assets of \$71,344.

In a request for evidence issued April 18, 2006 in this matter the director requested, *inter alia*, that the petitioner provide an evaluation of the beneficiary's education, copies of the petitioner's Form 941 Quarterly Federal Tax Returns for all four quarters of the previous three years, and evidence of wages the petitioner paid to the beneficiary since it filed the Form ETA 750. The director also noted that the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In its response, submitted July 12, 2006, the petitioner did not provide the requested educational evaluation, the requested Form 941 quarterly returns, or the requested evidence of wages it paid to the beneficiary. The director denied the petition on July 31, 2006.

In his submissions on appeal counsel characterized the 2004 and 2005 tax returns of ACT TELE, Incorporated as the petitioner's tax returns. The petitioner's tax returns, and other submissions, show that the petitioner's Employer's Identification Number is [REDACTED]. The tax return of ACT TELE, Incorporated shows that its Employer's Identification Number is [REDACTED]. Those different numbers show that ACT TELE, Incorporated of 2540 Corporate Place in Monterey Park, California is not the same entity as the petitioner, American Chinese Telecommunications, Incorporated, of 230 South Garfield Avenue in Monterey Park, California. The relevance of that return to the instant case, if any, is unknown to this office. Figures

from that tax return will not be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserted that an educational evaluation showing that the beneficiary's education is equivalent to a U.S. degree and the petitioner's 2005 tax return were then available. Counsel characterized that evidence as "The required missing two documents." Counsel did not then provide those documents. Subsequently, in response to a request by this office, counsel submitted those documents.

The Form ETA 750 states that the proffered position requires a four-bachelor's degree in computer science or electrical engineering. The transcript and diploma provided show that the beneficiary graduated from a four-year program with a bachelor's degree in engineering. The educational evaluation indicates that the beneficiary's four-year bachelor's degree in engineering is the equivalent of a four-year bachelor's degree in computer science and engineering from a regionally accredited college in the United States.²

The petitioner has demonstrated that the beneficiary has the education required by the approved ETA 750 labor certification. The petitioner has overcome this basis of the decision of denial. The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must also establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of 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 examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage,

² In a request for evidence issued on April 18, 2006 stated, "if the beneficiary's degree(s) are from a foreign school or university, you must also submit an evaluation report, that the beneficiary's foreign degree is equivalent to a Bachelor's degree from a college or university in the United States, in the required field of study." [Emphasis in the original.] The petitioner did not submit such an evaluation in its response to that request. Subsequently, in a submission to supplement the appeal, the petitioner provided the requested educational evaluation.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office is not obliged to accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). In the instant case, however, this office will exercise its discretion and consider the educational evaluation submitted on appeal.

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically³ shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$50,274 per year. The priority date is April 20, 2001. The petitioner's 2000 fiscal year ran from October 1, 2000 to September 30, 2001. The petitioner did not submit its fiscal year 2000 tax return

³ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

or any other reliable evidence pertinent to its ability to pay the proffered wage during that period. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during the period from the priority date to September 30, 2001, the end of its 2000 fiscal year.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,045. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,349. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$138,244. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 fiscal year, which ran from October 1, 2003 to September 30, 2004, the petitioner declared a loss of \$72,780 as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$71,344. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The petitioner did not submit its 2004 tax returns, nor copies of annual reports, nor audited financial statements, pertinent to that year. The petitioner submitted no other reliable evidence pertinent to funds available to it during its 2004 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on October 20, 2005. On that date the petitioner's 2005 tax return was unavailable.⁴ On April 18, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner responded on July 11, 2006 and the record is deemed to have closed on that date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during its 2005 fiscal year and later years.

⁴ Because the petitioner reports taxes pursuant to a fiscal year running from October 1 of the nominal year to September 30 of the following year, the petitioner's 2005 fiscal year ended on September 30, 2006.

The petitioner has not established that it was able to pay the proffered wage from April 20, 2001 to September 30, 2001. The petitioner also failed to show its ability to pay the proffered wage during its 2001 and 2004 fiscal years. Therefore the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

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

In the April 18, 2006 request for evidence issued in this matter the director requested that the petitioner provide copies of the petitioner's Form 941 Quarterly Federal Tax Returns for all four quarters of the previous three years and evidence of wages the petitioner paid to the beneficiary since it filed the Form ETA 750.

The petitioner did not provide the requested Form 941 quarterly returns or any explanation for that omission. Further, although the beneficiary stated that he was employed by the petitioner on October 18, 2002, the petitioner submitted no evidence of wages it paid to him and no explanation of that omission.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.