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U.S. Citizenship
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **OCT 31 2007**
EAC 05 032 51186

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

The petitioner is an international shipping company. It seeks to employ the beneficiary permanently in the United States as a transportation manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's March 16, 2006 denial, 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 noted that the petitioner's address listed on its 2001 federal tax return does not match the petitioner's address listed on the petition. 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.

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, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and 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 DOL. *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 DOL 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 December 26, 2001. The proffered wage as stated on the Form ETA 750 is \$65,829.40 per year. The Form ETA 750 states that the position requires a bachelor's degree in international shipping or transportation management, two years of experience in the job offered or two years of experience in any managerial or consultant position in marine transportation, and fluency in Chinese (Mandarin).

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, the petitioner's payroll registers for the first three months of 2006, the beneficiary's IRS Forms W-2 issued by the petitioner for 2001, 2002, 2003, 2004 and 2005, and an IRS-certified copy of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001. Other relevant evidence in the record includes a copy of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1993, to currently employ 3 workers,² to have a gross annual income of approximately \$140,000 and to have a net annual income of \$0. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 16, 2001, the beneficiary claimed to have worked for the petitioner as a freight traffic consultant from May 1999 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the prevailing wage for the position of transportation manager is \$65,829.40, and that the petitioner listed an annual wage of \$74,999.60 in the Form I-140 because the petitioner was paying the beneficiary \$74,999.60 per year at the time the Form I-140 was filed. Counsel asserts that the petitioner has sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage in 2001. Counsel acknowledges that the petitioner paid the beneficiary less than the proffered wage in 2002 and 2003, but that the difference between the wages paid to the beneficiary and the proffered wage in those years is not significant. For 2004 and 2005, counsel asserts that the petitioner paid the beneficiary an annual wage that is greater than the proffered wage. Counsel also states that the petitioner's address listed on its 2001 tax return is its accountant's address and that the petitioner's failure to provide an IRS-certified copy of its 2001 federal tax return in response to the director's request for evidence (RFE) was due to circumstances beyond the petitioner's control.

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).

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

² The petitioner's payroll registers for the first three months of 2006 indicate that the beneficiary is the petitioner's sole employee.

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 beneficiary's IRS Forms W-2 for 2001, 2002, 2003, 2004 and 2005 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$52,572.46.
- In 2002, the Form W-2 stated compensation of \$45,000.08.
- In 2003, the Form W-2 stated compensation of \$60,000.00.
- In 2004, the Form W-2 stated compensation of \$75,000.00.
- In 2005, the Form W-2 stated compensation of \$75,000.00.

Therefore, for the years 2004 and 2005, the petitioner has established that it employed and paid the beneficiary the full proffered wage. For the years 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$65,829.40 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$13,256.94, \$20,829.32 and \$5,829.40 in 2001, 2002 and 2003, respectively.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 Chang* at 537.

The record before the director closed on March 2, 2006 with the receipt by the director of the petitioner's submissions in response to the director's RFE.³ As of that date, the petitioner's 2005 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2004 is the most recent return available. However, the petitioner did not submit its tax returns for 2002, 2003 or 2004. The petitioner's Form 1120S for 2001 stated net income⁴ of \$26,499.00. Therefore, for the year 2001, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. The petitioner has overcome the portion of the director's decision pertaining to its ability to pay the proffered wage in 2001.

However, the petitioner must establish that it has the ability to pay the beneficiary the proffered wage as of the priority date in 2001 and continuing until the beneficiary obtains permanent residence. For the years 2002 and 2003, the petitioner provided no evidence to establish that it has the ability pay the difference between the wages actually paid to the beneficiary and the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date. Because the director did not request the petitioner's 2002 and 2003 tax returns in her RFE, this matter will be remanded to the director for further consideration of the petitioner's continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.⁵ 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,

³ In her decision, the director noted that the petitioner's address listed on its 2001 federal tax return does not match the petitioner's address listed on the petition. On appeal, counsel states that the petitioner's address listed on its 2001 tax return is its accountant's address, and that the petitioner's failure to provide an IRS-certified copy of its 2001 federal tax return in response to the director's request for evidence (RFE) was due to circumstances beyond the petitioner's control. However, the IRS-certified copy of the petitioner's 2001 federal tax return does not resolve the issue concerning the petitioner's address, as the IRS-certified copy is identical to the copy originally provided by the petitioner with the petition. Based on the petitioner's IRS Forms W-2, its bank statements, and other tax forms submitted by the petitioner in response to the RFE, the petitioner has established that its address is the address listed at Part 1. of the Form I-140.

⁴ 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) or line 17e (2004) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and deductions shown on its Schedule K for 2001, the petitioner's net income is found on Schedule K of its tax return.

⁵ 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*, 229 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).

as certified by the DOL and submitted with the instant petition. *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, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, 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 transportation manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|---|
| 14. Education | |
| Grade School | blank |
| High School | blank |
| College | blank |
| College Degree Required | Bachelor's |
| Major Field of Study | International Shipping or Transportation Management |

The applicant must also have two years of experience in the job offered or two years of experience in any managerial or consultant position in marine transportation. The duties of the job offered are delineated at Item 13 of the Form ETA 750A. Since this is a public record, the duties will not be recited in this decision. Item 15 of Form ETA 750A requires fluency in Chinese (Mandarin).

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he received a bachelor's degree in international shipping in 1993 from Shanghai Maritime University in China, and that he received a master's degree in transportation management in 2000 from State University of New York Maritime College in New York. He does not provide any additional information concerning his education on that form. On Part 12 of Form ETA-750B, eliciting information regarding the beneficiary's special qualifications and skills, the beneficiary represented that he is fluent in Chinese (Mandarin).

The petitioner submitted no evidence to establish that the beneficiary has a bachelor's degree in international shipping or transportation management as required by the Form ETA 750. Further, the petitioner submitted no evidence to establish that the beneficiary is fluent in Chinese (Mandarin) as required by the Form ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for 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, which, if adverse to the petitioner, is to be certified to the AAO for review.