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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BE



File:

EAC-03-124-50205

Office: VERMONT SERVICE CENTER

Date: **AUG 27 2008**

In re:

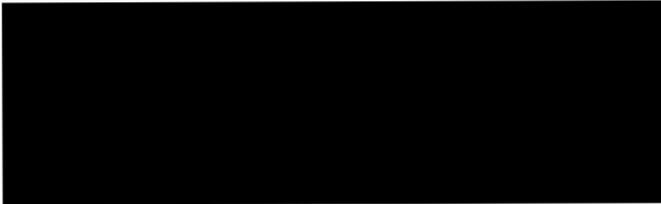
Petitioner:

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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and development company, and seeks to employ the beneficiary permanently in the United States as a computer systems analyst (“Computer Programmer/Analyst”). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s July 18, 2005 decision, the petition was denied pursuant to a January 19, 2005 Thomas E. Cook, Director, Office of Program and Regulations Development, Memorandum (“January 19, 2005 Cook Memo”) listing the petitioner as a debarred entity. Pursuant to the January 19, 2005 Cook Memo, petitions filed by the petitioner “may not be approved for a time period of one year commencing on March 1, 2005, and ending on February 28, 2006.”

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).¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on September 4, 2001.² The labor certification was approved on August 21, 2002, and the petitioner filed the Form I-140 on the beneficiary’s behalf on April 24, 2003.

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 We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of

On December 20, 2004, the director issued a Request for Evidence (“RFE”), which requested that the petitioner provide additional evidence to demonstrate that the petitioner could pay the proffered wage since 2001 pursuant to 8 C.F.R. § 204.5(g)(2). The RFE specifically requested that the petitioner submit its 2001 federal tax return, or alternatively an annual report or audited financial statement. The RFE additionally requested that the petitioner submit W-2 statements for the beneficiary, if the petitioner employed the beneficiary. The RFE also requested that the petitioner submit an evaluation of the beneficiary’s education, and that the petitioner submit Form ETA 750B on behalf of the beneficiary that the petitioner intended to substitute. The petitioner responded. Following the petitioner’s March 10, 2005 response,³ on July 18, 2005 the director denied the petition in accordance with the January 19, 2005 Cook Memo. The petitioner appealed the decision and the matter is now before the AAO.

On appeal, counsel acknowledges that the January 19, 2005 Cook Memo bars CIS from approving any petitions filed by the petitioner between the stated time period of March 1, 2005 and February 28, 2006. However, counsel contends that nothing in Section 212(n)(2)(C)(ii) requires that a petition filed by the petitioner prior to the debarment time period would require that the petition be denied, but rather asserts that the petition should remain pending during the debarment period. Further, counsel asserts that denial of the petition has caused undue impact on the individual beneficiary as his and his family’s Form I-485 Adjustment of Status⁴ applications were denied as a result of the Form I-140’s denial. Counsel contends that once the period of debarment ends on February 28, 2006, the petition should be reopened and approved. Further, counsel contends that equities demand that the beneficiary’s Form I-485 applications automatically be reopened and adjudicated as well. In support, counsel cites to a Memorandum from the General Counsel’s Office of the legacy Immigration and Naturalization Service (“INS”), “Legal Opinion HQ 214h-C Memorandum of June 14, 2003: Section 212(n)(2)(C)(ii) of the Act,” CO 274A-C, July 30, 1993.⁵ The HQ Memo addresses the question of whether DOL’s finding that an employer violated a labor condition requires

substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services (“CIS”) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL’s final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The petitioner submitted its RFE response subsequent to the start of the debarment time period provided for in January 19, 2005 Cook Memo from March 1, 2005 to February 28, 2006.

⁴ On July 31, 2002, the Service published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485. *See*: 67 Fed. Reg. 49561 (July 31, 2002). In the case at hand, the beneficiary’s I-485 was filed on June 3, 2004 while the I-140 was pending.

⁵ *See also* General Counsel’s Office of the legacy Immigration and Naturalization Service (“INS”), “Legal Opinion: INS Procedure for Processing Debarment of Employer Pursuant to Sec. 212(n)(2)(C)(ii) of the INA,” CO 212(n)P, April 12, 1994. The Opinion addresses the question of whether INS may review or challenge a DOL determination of debarment, and concludes that INS may not, but INS may under Sec. 212(n)(2)(C)(ii) have discretion to debar the employer for longer than one year.

the Service to withhold approval of all immigrant and nonimmigrant visa petitions, or only H-1B petitions. Section 212(n)(2)(C)(ii) of the Act references section 204 of the Act, which relates to immigrant petitions; Section 212(n)(2)(C)(ii) of the Act references section 214(c) of the Act, which relates to nonimmigrant petitions. Further, the 1993 memo concludes that Section 212(n)(2)(C)(ii) of the Act “does not require the Service to revoke the approval of visa petitions approved before the Secretary of Labor’s decision to impose sanctions under Section 212(n).” Left unanswered is the situation at hand, where the petition was filed, remained pending, and the employer was then barred from filing.

The petitioner in this case was the subject of an investigation by the Department of Labor Wage and Hour Division in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. The investigation concluded that the petitioner failed to pay required wages, failed to provide notice of filing of the Labor Condition Application (LCA),⁶ failed to make the required displacement inquiry of the secondary employer, and failed to comply with the provisions of subpart H and I of 20 C.F.R. § 655. DOL assessed a fine of \$6,800 in accordance with the statutory provisions allowing for penalties for discovered violations. Further, DOL found that the petitioner owed \$142,565 in back wages to fourteen nonimmigrants. The petitioner’s wage repayment was subject to assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act and DOL policies.

If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 CFR § 655.866(a) “the Administrator shall notify the Attorney General and ETA of the final determination of any violation requiring that the Attorney General not approve petitions filed by an employer. The Administrator’s notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from the approval of petitions.”⁷

⁶ 20 CFR § 655.731 sets forth requirements related to LCA, and provides that an “employer seeking to employ H-1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 or 9035E that it will pay the H-1B nonimmigrant the required wage.” The LCA includes the prevailing wage rate in the location of intended employment for the occupational classification. Pursuant to filing the LCA 20 CFR § 655.731(3)(b) sets forth record keeping obligations for LCA records and employee wage information. The employer must document information related to benefits provided to U.S. workers and H-1B nonimmigrants, and shall offer H-1B nonimmigrants benefits “on the same basis” that it offers to U.S. workers. 20 CFR § 655.731 additionally sets forth deductions, which are allowed, and which are not allowed from the LCA wage. If the employer fails to pay the stated LCA wage to the beneficiary, the employee can report LCA violations to the DOL, and receive protection from retaliation under 20 CFR § 655.801.

Fundamental to the provisions are the principle that DOL sought to require petitioners to pay H-1B nonimmigrants wages in accordance with the prevailing wage so that employing nonimmigrant labor at discounted salaries would not result in discrimination against U.S. workers. As a result, 20 CFR § 655.731 includes protections beneficial to the H-1B worker, and the H-1B workers’ salary.

⁷ On October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations;

INA § 212(n)(2)(C)(ii) provides that CIS may not approve a petition during the debarment period: “the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 years for aliens to be employed by the petitioner.”⁸

Upon notice that the petitioner was in violation of 20 C.F.R. § 655, CIS then issued the January 19, 2005 Cook Memo, which provides that “Pursuant to 212(n)(2)(C)(ii) of the Act, immigrant and nonimmigrant petitions shall not be approved with respect to the named employer(s) for the period indicated below. For the period indicated, a petition may not be approved where the listed organization is the petitioner or employer. This ban does not affect petitions that were previously approved.”

The petitioner in the instant matter was fined based on LCA violations related to H-1B nonimmigrant petitions.⁹ As a result the petitioner was banned from filing nonimmigrant or immigrant petitions and the Attorney General was barred from approving petitions. The Cook Memo provides that nonimmigrant or immigrant petitions may not be approved for the time period indicated.

In the case at hand, the petitioner filed the labor certification application on September 4, 2001. The petitioner then filed the I-140 petition on the beneficiary’s behalf on April 24, 2003. Additionally, the beneficiary’s I-485 Adjustment of Status application was filed on June 3, 2004. The Form ETA 750, Form I-140, and Form I-485 were all filed prior to the DOL determination, dated September 27, 2004, and prior the issuance of the January 19, 2005 Cook Memo. CIS issued an RFE as the petition as filed was not approvable. The petitioner, however, submitted its response to CIS’s December 20, 2004 RFE on March 10, 2005, after the debarment period began. As the petitioner submitted its response after the beginning of the debarment period, under 212(n)(2)(C)(ii) CIS would not be able to approve the petition. We do not agree with counsel, however, that CIS should hold the petition, or should reopen the Form I-485 following the end of the debarment period.

While counsel suggests that CIS should let the petition remain pending during the debarment period, other regulations mandate that CIS adjudicate petitions without unnecessary delay. For example, the Patriot Act, 116 STAT. 2201, Section 459 provides:

(a) IN GENERAL. – The Secretary, not later than 1 year after the effective date of this Act, shall submit to the Committees on the Judiciary and Appropriations of the House of

failure to meet notice or recruitment attestations; or misrepresentation of a material fact on an LCA, and would result in fines of not more than \$1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than \$5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed \$35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.

⁸ *See* General Counsel’s Legal Opinion, CO 212(n)P, INS may not challenge the DOL determination related to debarment.

⁹ Nothing indicates that the petitioner failed to pay the present beneficiary the prevailing or proffered wage, or that the LCA related to any H-1B filing for the beneficiary was subject to DOL investigation, which, if were the case, might impact adjudication of the petition.

Representatives and of the Senate a report with a plan detailing how the Bureau of Citizenship and Immigration Services, after the transfer of functions specified in this subtitle takes effect, will complete efficiently, fairly, and within a reasonable time, the adjudications described in paragraphs (1) through (5) of section 451(b).

(b) CONTENTS. –For each type of adjudication to be undertaken by the Director of the Bureau of Citizenship and Immigration Services, the report shall include the following:

- (1) Any potential savings of resources that may be implemented without affecting the quality of the adjudication.
- (2) The goal for processing time with respect to the application.
- (3) Any statutory modifications with respect to the adjudication that the Secretary considers advisable.

(c) CONSULTATION. – In carrying out subsection(a), the Secretary shall consult with the Secretary of State, the Secretary of Labor, the Assistant Secretary of the Bureau of Border Security of the Department, and the Director of the Executive Office for Immigration Review to determine how to streamline and improve the process for applying for and making adjudications described in section 451(b) and related processes.

Similarly the American Competitiveness in the Twenty-First Century Act of 2000 (“AC 21”) is another regulation that Congress passed to alleviate long adjudication time-frames. AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

In legislation such as the Patriot Act, and AC 21, Congress has expressed its intent that CIS should act on applications in a reasonable time frame without unnecessary delay, or has sought remedy to aid beneficiaries as the result of delayed adjudications. Further, Congress has also expressed its intent where applications might validly be held. For example, Section 203(b)(2)(B)(ii)(III) allows a physician who “agrees to work full-time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals” to file an application for Adjustment of Status while the physician is fulfilling the required five years of service in the shortage area. The Act designates that the

application may be filed prior to the completion of the required experience, with the practical effect that the application may be held until the five-year experience requirement is met.

Additionally, other statutes that preclude CIS from approving applications effectively require that CIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that “notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present].”

Congress has expressed its intent that CIS act within reasonable time frames to adjudicate applications. In other instances, the Act provides situations where CIS may hold applications. Nothing in 212(n)(2)(C)(ii) would suggest that CIS should hold an application during the period of the petitioner’s debarment. Accordingly, the instant petition was properly denied as the petition became ready for adjudication, following the petitioner’s response to the RFE, during the period of debarment.

Additionally, although not raised in the director’s decision, we find that there is an issue as to whether the beneficiary will be employed in accordance with the terms of the ETA 750, and further whether the petitioner is able to pay the proffered wage. 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).

Citizenship and Immigration Services (“CIS”) must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the “job offer” position description for a computer programmer analyst provides:

Will develop and maintain company product data model including tables, elements relations and key. Will develop process models for new product functs and models. Will Develop on-line documentation, testing, and implementation, and management of various computer programs for analyzing data files or providing survey support services BS/MS in CS or related field.

Further, the job offered is located at the petitioner’s address: [REDACTED] IA; the petitioner did not list that the beneficiary will work at a different location. The proffered wage of \$60,000 was based on wages for the occupation in the area of intended employment. The job offer listed that the position required:

Education: College: 4 years;
College degree: Bachelors;

Major Field Study: Engineering/Electronics.

Experience: no experience requirement listed.

The ETA 750 was certified based on the position, location, and wage above. 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).

The petitioner submitted Forms W-2, which show the petitioner's wages paid to the beneficiary for the years 2001, 2002, and 2003. The beneficiary's listed address on these forms is:

[REDACTED] for the years 2001 and 2002. Additionally, Form I-140, Form I-485, and Form G-325 list the beneficiary's address as in Austin, Texas, and show that he has resided in Austin, Texas since he came to the U.S. in May 1998. Further, an I-129 H-1B petition that the petitioner filed on the beneficiary's behalf, valid from June 8, 2004 to June 8, 2005 lists that the beneficiary will work at the petitioner's Marlborough, Massachusetts location. Form I-129 does not list any other work location. Accordingly, both prior filed Form I-129, and Form ETA 750, which list a work address in Massachusetts conflict with the beneficiary's residence in Austin, Texas. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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). It is questionable whether the job offer remains in Marlborough, Massachusetts, and whether the petitioner intends to employ the beneficiary in Marlborough, as opposed to Austin. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

Additionally, the petitioner has not demonstrated its ability to pay the proffered wage from the time of the priority date onward. 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on September 4, 2001. The proffered wage as stated on Form ETA 750 is \$60,000 per year, based on a schedule of 40 hours per week. The petitioner listed the following information on the I-140 Petition: date established: September 19, 1996; gross annual income: \$12.32 million; net annual income: not listed; and current number of employees: 56.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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 petitioner provided the following Forms W-2 to document wages paid to the beneficiary:

<u>Year</u>	<u>W-2 Wages</u>
2003	\$90,000
2002	\$92,000
2001	\$80,138.27

While the wages purportedly paid would exhibit the petitioner's ability to pay for the years 2001 through 2003, the petitioner did not provide any evidence of wage payment for the year 2004, either in the form of a W-2 statement, or other pay statements. Moreover, as discussed above, the petitioner has been debarred for failure to pay back wages to the nonimmigrants for whom it has petitioned. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Given the petitioner's history of failing to pay the required wages, Forms W-2 unsupported by transcripts from the Internal Revenue Service have little evidentiary value.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *See 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services ("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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	-\$26,271
2002	-\$10,933
2001	-\$58,444

The petitioner did not provide its federal tax return for the year 2004 although the appeal was filed on August 17, 2005.

Significantly, the petitioner has filed for multiple I-140 applicants.¹⁰ The petitioner must demonstrate that it can pay the proffered wage for all sponsored workers. The petitioner's tax returns reflect negative net income for each of the years 2001 through 2003, and would not demonstrate the petitioner's ability to pay for all sponsored workers. Additionally, the petitioner's gross receipts declined by more than half between the years 2001 to 2003.

¹⁰ CIS records reflect that the petitioner has filed 590 Form I-129 or Form I-140 petitions as of August 2008. Further, records reflect that the petitioner has filed at least 40 Form I-140 petitions.

Further, the petitioner has filed a number of H-1B petitions. The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. As the DOL Assessment against the petitioner makes clear, the petitioner has failed to satisfy its wage obligations, and owed \$142,565 in back wages to fourteen nonimmigrants.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹¹ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2003	\$1,033,239
2002	\$737,794
2001	\$1,257,952

While the petitioner's tax returns do exhibit positive net current assets, the petitioner must demonstrate that it can pay the proffered wage for all sponsored workers from each respective priority date until the beneficiary obtains permanent residence. CIS records reflect that the petitioner has filed for approximately 40 beneficiaries, and would need to demonstrate that it could pay the wage for all sponsored workers. Further, the petitioner did not provide any evidence of its ability to pay for the year 2004. Additionally, the DOL wage assessment evidences that the petitioner has failed to pay all of its sponsored H-1B workers in accordance with the regulations. Therefore, we would not conclude that the petitioner has demonstrated its ability to pay the proffered wage, and the petition should have been denied on this basis as well.

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

ORDER: The appeal is dismissed.

¹¹According 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.