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FILE: LIN 06 133 53425 Office: NEBRASKA SERVICE CENTER Date: **JUL 30 2008**

IN RE: Petitioner:  
Beneficiary:



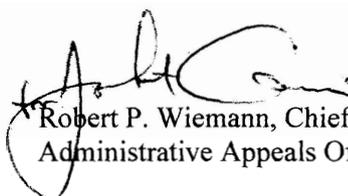
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a biotechnology company. It seeks to employ the beneficiary permanently in the United States as a junior budget analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2003 priority date based on the petitioner's incomplete tax returns, the petitioner's insufficient net income in 2003, and on the wages the petitioner paid the beneficiary in the relevant period of time. 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 November 20, 2006 denial, the primary 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. The petitioner filed the instant petition as a skilled worker.

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.

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).

Here, the Form ETA 750 was accepted on November 25, 2003. The proffered wage as stated on the Form ETA 750 is \$41,580 per year. The Form ETA 750 states that the position requires a bachelor's degree in accounting, finance, business administration or a related field.

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.<sup>1</sup> On appeal, the petitioner submits a letter and a copy of its Bank of America business checking account statement for September 2006 that indicates an ending balance of \$68,282.69. In a later submission dated April 13, 2007, the petitioner also submits its complete 2005 Form 1120 U.S. Corporation Income Tax Return that indicates taxable income before net operating loss deduction and special deductions of \$3,198,758.

With the initial I-140 petition, the petitioner also submitted the first pages of the petitioner's federal tax returns for tax years 2002, 2003, and 2004,<sup>2</sup> a copy of the petitioner's Form W-3, Transmittal of Wage and Tax Statements for tax years 2002 and 2004 that indicated wages, tips and other compensation paid of \$1,209,050.29 and \$917,924.63 respectively. and copies of Forms 941, Employer's Quarterly Federal Tax Return for the first three quarters of tax year 2005. The petitioner also submitted excerpts from its Internet website, and a copy of the petitioner's building lease, owned by the petitioner's president.

In response to the director's request for further evidence (RFE) dated July 14, 2006, the petitioner submitted the beneficiary's W-2 Wage and Tax Statement Forms for tax years 2002 to 2005. These documents indicated the petitioner paid the beneficiary \$11,475.32 in 2002, \$30,666.59 in 2003, \$22,596.78 in tax year 2004, and \$31,880.16 in tax year 2005. The petitioner also submitted its Form W-3 for tax year 2004 that indicated the petitioner paid wages, tips and other compensation of \$917,924. Included in the response were copies of the petitioner's Bank of America bank statements for June, July and August 2006 that indicated balances of \$85,271.90, \$94,603.38, and \$225,778.64, respectively. The petitioner also submitted in its response an IRS Form 7004, Application for Automatic 6-month Extension of Time to File Certain Business Income Tax, Information, and Other Returns. In this document, the petitioner asked for the automatic extension for the tax year beginning on July 1, 2005 and ending June 30, 2006.

In its response, the petitioner also stated it had hired a C.P.A. firm in 2006 to audit the petitioner for three years from 2002 to 2004, and that the audit would not be completed until December of 2006. The petitioner stated that as soon as the audit was completed, it would be sent to the record. The petitioner's owner also stated that the petitioner maintained several different bank accounts in different banks, but that the major bank account was with Bank of America, and that the average balance each month for that account was over \$85,000. The petitioner also stated that its 2005 federal income tax return would not be completed until March 2007, and that the petitioner would submit the return as soon as it was completed. Although the

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<sup>1</sup> 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).

<sup>2</sup> The AAO notes that the priority date for the instant petition is November 25, 2003, and therefore the petitioner's income tax return for tax year 2002 is not dispositive in these proceedings.

petitioner stated that its tax return for 2002 and 2003 were submitted in response to the director's RFE as Exhibit C, Exhibit C is not found in the record. The AAO notes that the petitioner only resubmitted the first pages of its Forms 1120 for tax years 2002, 2003, and 2004. Finally the petitioner stated in its response that between the years 2003 and 2004, it had a cooperative agreement with Administaff Companies II, L.P., as a small share partner valid for 15 months, and that the beneficiary's W-2 Forms for the years 2003 and 2004 were provided by the petitioner and this company. The petitioner did not provide any further evidence to further corroborate the business relationship between the two companies or the beneficiary's additional wages. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, the petitioner describes its taxable income for the years 2002 to 2004 as \$18,002, -\$38,197, and \$0 for tax year 2004. The petitioner also states that the beneficiary's present position is staff accountant, under her valid H-1B status, and her current salary is \$32,240. The petitioner reiterates that the beneficiary received W-2 Forms from two companies in tax years 2003 and 2004, which should be added together to determine the beneficiary's yearly wages. The petitioner requests 90 days to provide more information from its CPA firm with regard to the beneficiary's W-2 Forms, and its tax returns.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in October 7, 1996, to have a gross annual income of \$3,503,772, a net annual income of \$2,746,196, and to currently employ forty-five workers. On the Form ETA 750B, signed by the beneficiary on October 29, 2003, the beneficiary claimed to have worked for the petitioner since June 2002.

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).

The petitioner's reliance on the monthly 2006 balances in the petitioner's Bank of America business checking 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), which includes federal tax returns, 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. Further, the petitioner's bank balances in tax year 2006 cannot be used to establish the petitioner's ability to pay the proffered wage as of the 2003 priority date. 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. The AAO notes that the director specifically requested complete copies of the petitioner's corporate income tax returns to examine the petitioner's net current assets, although to date the record does not contain complete copies of the petitioner's 2003, or 2004 tax returns.

The AAO will discuss more fully the analysis of the petitioner's net current assets based on the petitioner's Schedules L further in these proceedings.

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 has established that it employed and paid the beneficiary during the relevant period of time. The petitioner submitted the beneficiary's W-2 Forms for tax years 2002 to 2005. Since the priority date for the instant petition is November 25, 2003, the beneficiary's W-2 Form for tax year 2002 is not dispositive in these proceedings. The beneficiary's W-2 Forms for tax years 2003 to 2005 indicate the petitioner paid the beneficiary \$30,666.59 in 2003, \$22,596.78 in tax year 2004, and \$31,880.16 in tax year 2005. The petitioner therefore did not establish that it paid the beneficiary the proffered wage of \$41,580 as of the 2003 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2003, 2004 and 2005, namely, \$10,910.41 in tax year 2003, \$18,983.22 in tax year 2004, and \$9,699.84 in tax year 2005.

Although the petitioner stated in response to the director's RFE and on appeal, that the beneficiary received two W-2 Forms during tax years 2003 and 2004, as stated previously, the record contains no further information with regard to multiple W-2 Forms, nor has the petitioner established any rationale for why an additional W-2 Form from an employer distinct from the petitioner should be considered in determining the petitioner's ability to pay the proffered wage.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 AAO notes that the petitioner did not provide its complete tax returns for tax years 2003, 2004 and 2005 when the director requested them. While the petitioner provided its complete 2005 tax return on appeal, the record is not clear as to why the requested complete 2003 and 2004 tax returns were not provided to the record, either in response to the director's RFE or on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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 tax returns submitted by the petitioner with the initial I-140 petition and resubmitted in response to the director's RFE do not include the petitioner's Schedules L and thus are only sufficient to demonstrate the following financial information with regard to the petitioner's net income:

- In 2003, the Form 1120 stated a net income<sup>3</sup> of -\$38,197.
- In 2004, the Form 1120 stated a net income of \$68,958.<sup>4</sup>  
In 2005, the Form 1120 stated a net income of \$3,195,758.

Therefore, for the years 2004 and 2005, the petitioner did have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. However, the petitioner did not establish its ability to pay the difference between the beneficiary's actual wages in the 2003 priority date and the proffered wage in tax year 2003 based on its 2003 net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. 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.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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. As noted by the director in his decision, the petitioner did not submit its complete tax return with Schedule L for tax year 2003. Thus, the

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<sup>3</sup>The petitioner's net income is its taxable income before net operating loss deduction and special deductions, as reported on Line 28 of the Form 1120.

<sup>4</sup> The petitioner incorrectly identified its 2004 net income as 0 (zero) based on Line 30, taxable income, of its tax return.

<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner has not established its ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net current assets. Therefore, from the 2003 date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income, or its net current assets in tax year 2003.

The petitioner asserts on appeal, and in its response to the director's RFE, that its bank account statement balances provide evidence that the petitioner can pay the proffered wage. However, as previously discussed, the petitioner's reliance on its bank statements is misplaced. The petitioner's statements on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage beginning on the priority date in 2003.

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.