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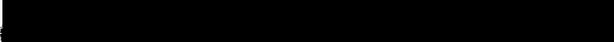
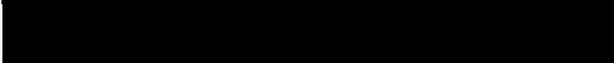


U.S. Citizenship
and Immigration
Services

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invasion of personal privacy**



FILE:  Office: CALIFORNIA SERVICE CENTER Date: **APR 12 2004**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a senior software engineer at an annual salary of \$79,200. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel asserts that the director failed to consider that the petitioner is and has been paying the beneficiary the proffered wage.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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 priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's filing date is May 21, 2001. The beneficiary's salary as stated on the labor certification is \$79,200 annually.

With the original petition, the petitioner submitted a letter from William Mitchell, President of the petitioning company, asserting that the petitioner, doing business as RealtyExpo, was incorporated in January 2001 and that RealtyExpo, in business since 1996, was "formerly the product line of Infinite Access, Inc." The petitioner also submitted an unaudited income statement for the ten months ending October 31, 2002. Further, the petitioner submitted software license and information technology service agreement between the petitioner and Cendant Operations, Inc. dated October 30, 2002. Finally, the petitioner submitted a professional services agreement and a license agreement between the petitioner and NRT, Inc. both dated January 11, 2001.

On February 18, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage. In response, counsel reiterated that RealtyExpo was formerly the product line of Infinite Access, Inc. and asserted that it paid the beneficiary's wages" for more than three years both before and since the filing of the Labor Certification." The petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for the tax years ending 2001 and 2002 that contain the following information:

	2001	2002
Officers compensation	\$0	\$144,000
Salaries	\$75,200	\$292,462
Net income (loss)	\$0	(\$701)
Current assets	\$44,002	\$211,258
Current liabilities	\$63,781	\$261,703

The petitioner also submitted its income statement for the three months ending March 31, 2003, a balance sheet as of that date and Forms W-2 issued to the beneficiary in 1999, 2000 and 2001. All three Forms W-2 were issued by Infinite Access, Inc. The 2001 Form 2001 reflects a wage above the proffered wage.

The director denied the petition, concluding that the petitioner's net loss and negative net current assets in 2001 cannot establish its ability to pay the proffered wage as of the priority date.

On appeal, counsel argues that the loss reflected in 2001 is a result of using the accrual method of accounting and a decision to issue bonuses to the founders of the petitioning company. Counsel asserts that the petitioner now has substantial revenues and positive cash flow. Counsel cites *Matter of Sonogawa*, 12 I&N 612 (Reg. Comm. 1967) for the proposition that Citizenship and Immigration Services (CIS) can consider information beyond the petitioner's tax returns. The petitioner submits a letter from its president asserting that the net income reported in 2001 "includes the payment" of the beneficiary's wages. The petitioner also submits evidence of its current available cash and evidence that it is now paying the beneficiary the proffered wage.

Counsel is not persuasive. Examining the net income reflected on the tax return is well established by judicial precedent. *Elates Restaurant Corp. v. Sava* F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305 (9th Cir. 1984)). CIS is not required to consider gross income without also considering the expenses that were incurred to generate that income. See *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); see also *Chi-Feng Chang and Chi-Shing Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989). The case cited by counsel is equally unpersuasive. In that case, the petitioner had demonstrated 11 years without financial difficulties. The instant case is not comparable; the petitioner incorporated in 2001.

We are also not persuaded by the letter submitted on appeal. The expenses listed on the petitioner's 2001 tax return do not include the beneficiary's wages. The Form W-2 issued to the beneficiary in 2001 is issued by Infinite Access, Inc., which has a different employer's identification number than the petitioning company. Moreover, the petitioner's 2001 tax return reflects that the total wages paid that year were \$75,200, less than the proffered wage. The record contains no evidence that the petitioning company is the successor to Infinite Access, Inc. In fact, as Infinite Access, Inc. continued to pay the beneficiary's wages in 2001, after the petitioner incorporated, they appear to be two separate companies.

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 sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.