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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042.  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER Date:

NOV 05 2004

IN RE:

Petitioner:  
Beneficiary:

[Redacted]

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:

[Redacted]

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.

*Marif Johnson*

*RP* Robert P. Wiemann, Director  
Administrative Appeals Office

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

The petitioner is an Internet Advertisement/Software Solutions company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

The regulation at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$70,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 2001.

On the petition, the petitioner claimed to have been established in 2000 and to currently employ 12 workers. In support of the petition, the petitioner submitted the beneficiary's 2001 Form W-2 wage and tax statement issued by the petitioner. The Form W-2 reflects annual income of \$56,538.30. The petitioner also submitted the beneficiary's pay stubs for April and May 2002 reflecting weekly income of \$1,346.15, which would total \$70,000 annually.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 21, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of federal tax returns and quarterly employer's reports to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted the beneficiary's pay stubs for May and June 2003 reflecting weekly wages of \$1,346.15, the beneficiary's Form W-2 for 2002 reflecting annual income of \$65,961.35, and previously submitted documents. The petitioner also submitted a letter from Magdiel Castro, the petitioner's

president, asserting that the beneficiary began working for the petitioner in January 2001 and "has been compensated with an annual salary of \$70,000.00."

Counsel, however, asserts that the lower annual wages reflected on the beneficiary's 2001 Form W-2 are because the beneficiary did not begin working for the petitioner until "after March" and that the lower annual wages reflected on the beneficiary's 2002 Form W-2 result from the beneficiary taking three weeks of unpaid sick leave.

The Forms W-2 reflect \$4,038.65 less than the proffered wage in 2002 and \$13,461.70 less than the proffered wage in 2001. The petitioner did not submit the federal tax returns requested.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 27, 2003, denied the petition.

On appeal, counsel asserts that the director erred in requesting tax returns as the Forms W-2 and pay stubs submitted reflect that the petitioner has been paying the proffered wage. The petitioner submits page one of its 2002 Form 1120S U.S. Income Tax Return for an S Corporation. This document reflects a net loss of \$17,159.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. As stated above, the petitioner paid the beneficiary \$4,038.65 less than the proffered wage in 2002 and \$13,461.70 less than the proffered wage in 2001.

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). 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 Legacy Immigration and Naturalization Service (INS), 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 Legacy INS should have considered income before expenses were paid rather than net income. The record contains no evidence of the petitioner's net income in 2001. In 2002, the petitioner's net loss cannot demonstrate the petitioner's ability to pay the difference between the proffered wage and the wages actually paid.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. Page one of the petitioner's 2002 tax return reflects total assets of \$126,543. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year 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 record contains no evidence of the petitioner's net current assets in 2001 or 2002.

The argument could be made for prorating the proffered wage for the portion of the year that occurred after the priority date because the petitioner is relying on wages paid and counsel alleges no wages were paid prior to the priority date.<sup>2</sup> Even if we ignored the claims by both the petitioner and the beneficiary that the beneficiary began working for the petitioner in January 2001 and, thus, accepted that the petitioner had the ability to pay the proffered wage for the salient portion of 2001, however, the petitioner has not demonstrated its ability to pay the proffered wage in 2002. Whatever reason the petitioner had for not paying the remaining \$4,038.65 that year, it has not established that it had the ability to do so. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date.

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.

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<sup>1</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.

<sup>2</sup> We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. Rather, in appropriate cases, we will consider prorating the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period).