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U.S. Citizenship  
and Immigration  
Services

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NOV 30 2004



FILE: WAC 03 139 53707 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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:



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 (AAO) 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 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 concluded that the beneficiary did not meet the job qualifications set forth on the Form ETA-750. The director also 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. For the reasons discussed below, the petitioner overcomes the director's first basis of denial, but not the second.

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. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

To determine whether a beneficiary is eligible for a preference immigrant visa subject to labor certification, Citizenship and Immigration Services (CIS), must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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).

The Form ETA requires a Master's or foreign equivalent in computer science, electronics/communications, or a related field. The beneficiary possesses a Master of Business Administration from the University of Poona.<sup>1</sup> The transcript indicates at the bottom that the beneficiary's special group was "computer management." An evaluation of the degree from the Foundation for International Services, Inc. concludes that the petitioner's degree is the equivalent of a U.S. Master of Business Administration degree with an emphasis in management information systems.

The director concluded that the beneficiary's transcripts included no computer related courses and, thus, his degree was not computer science related. The transcript, however, reflects that the beneficiary took three computer systems management courses. Thus, we find that the beneficiary's degree is sufficiently related to the field specified on the Form ETA-750.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

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<sup>1</sup> The name is how it appears on the transcript; the diploma provides the name as University of Pune.

*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 10, 2001. The proffered wage as stated on the Form ETA 750 is \$75,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$5,000,000, a net annual income of \$600,000, and to currently employ 25 workers. In support of the petition and in response to the director's request for additional evidence, the petitioner submitted the following evidence relating to its financial situation: Form 1120 Corporate tax returns for the petitioner for the years 2000 and 2001. As the priority date is in 2001, the petitioner's 2000 tax return is not relevant and need not be considered. The petitioner also submitted unaudited financial statements and a Form 100 California Corporation Franchise or Income Tax Return for 2002.

The federal and state tax returns and unaudited financial statements reflect the following information for the following years:

	2001	2002 (CA tax return)	2002 (financial statements)
Net income	\$31,091 <sup>2</sup>	\$44,682 <sup>3</sup>	\$862,758.37 <sup>4</sup>
Current Assets	(\$6,575)	\$51,086	\$1,959,730.73
Current Liabilities	\$28	\$1,987	\$154,024.24
Net current assets	(\$6,603)	\$49,099	\$1,805,706.49

In addition, the petitioner submitted quarterly wage reports for the first three quarters of 2003 reflecting between zero and 21 employees, depending on the month. None of the employees listed are the beneficiary.

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 October 24, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's ability to pay the proffered wage is demonstrated through its gross annual income and payments to 41 employees in 2001, 33 employees in 2002 and 16 employees in 2003. Counsel also asserts that the petitioner has \$1.3 million in cash and a credit line of \$225,000. The petitioner submits a November 12, 2003 letter from the petitioner's accountants asserting that it has prepared the petitioner's tax returns since 1997 and that the company is a rapidly expanding, highly stable company that has always met its financial commitments in a timely manner. The petitioner also submitted bank

<sup>2</sup> Before net operating loss deduction and special deductions.

<sup>3</sup> Before state adjustments.

<sup>4</sup> Net ordinary income.

statements for July through October 2003 reflecting that the petitioner maintained a money market account at Wells Fargo Bank with a balance over \$1.2 million during that period.

The unaudited financial statements submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Moreover, those statements conflict significantly with the petitioner's California tax return for the same year. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

The petitioner has not resolved the inconsistencies between the financial statements and the tax returns.

In addition, counsel's reliance on the balances in the petitioner's 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) 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. Finally, no evidence was submitted to demonstrate that these funds were available to the petitioner at the time of filing and in 2002. The petitioner reported negative cash on its 2001 federal tax return, Schedule L and only \$51,086 in cash on its 2002 California state tax return, Schedule L.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

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). Contrary to the analysis urged by counsel, 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 Service should have considered income before expenses were paid rather than net income.

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. We reject, however, any argument that the petitioner's total assets should have been 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>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) on the Federal return, lines 1(d) through 5(d) on the California state return. Its year-end current liabilities are shown on lines 16(d) through 18(d) on the Federal return, 15(d) through 17(d) on the California state return. 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 petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 and 2002. During those years, the petitioner shows a net income of only \$31,091 and \$44,682 respectively and net current assets of only (\$6,603) and \$49,099 respectively. Thus, the petitioner has not demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during those years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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>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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.