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FILE: EAC 05 034 50339 Office: VERMONT SERVICE CENTER Date: **MAR 15 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides software development and consulting services. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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. As required by statute, the petition was accompanied by certification from 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 priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and previously submitted evidence. While the brief reiterates earlier assertions, the director did not directly address those assertions or some of the evidence resubmitted on appeal. Thus, counsel has submitted a substantive appeal. On April 6, 2006, this office requested additional evidence. The petitioner responded on June 26, 2006 and that response has been incorporated into the record.

For the reasons discussed below, based solely on the evidence of record, we concur with the director. That said, the petitioner's claim to be able to pay the proffered wage is not bolstered by its continued payment of minimal wages to the beneficiary, well below even the wages mandated under the terms of the beneficiary's nonimmigrant visa, during the period at issue in this proceeding, including as late as 2005.¹

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

¹ On November 5, 2003, the petitioner filed a Form I-129 Petition for Nonimmigrant Worker, receipt number EAC-04-025-52588. The annual pay rate listed on the petition, the accompanying ETA Form 9035 and on the Form I-129W is \$49,000. Yet, the petitioner paid the beneficiary only \$29,862 in 2004 and \$16,000 in 2005. Thus, the petitioner continues to pay the beneficiary far below the annual pay rate listed on the nonimmigrant petition, a violation of section 212(n)(1)(A)(i) of the Act.

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 September 4, 2001. The proffered wage as stated on the Form ETA 750 is \$82,950 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 1, 2001.

On the petition, the petitioner claimed to have an establishment date in 1991, a gross annual income of \$887,244, a net income of \$2,359 and eight employees. In support of the petition, the petitioner submitted its Form 1120S corporate tax returns for 2002 and 2003.

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 January 28, 2005, 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 annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its tax return for 2001.

The tax returns reflect the following information for the following years:

	2001	2002	2003
Net income	\$52,501	(\$65,140)	\$2,359
Current Assets	\$66,944	\$52,732	\$1,981
Current Liabilities	\$22,989	\$40,485	\$109,180
Net current assets	\$43,955	\$12,247	(\$107,199)

In addition, counsel submitted copies of the petitioner's checking account statements for the period from August 2001 through February 2005 and evidence of credit lines. The petitioner also submitted Forms W-2, Wage and Tax Statements it issued to the beneficiary in 2001 through 2004. The Forms W-2 reflect wages of only \$5,000, \$10,000, \$24,000 and \$29,862.50 respectively. The petitioner also submitted an accountant's letter asserting that he had prepared "compiled" financial statements for the petitioner reflecting additional accounts receivable not listed on the tax returns due to their preparation under the cash method. Finally, the petitioner submitted consulting contracts and renewals for the beneficiary's services.

The director, considering only the tax returns, 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 June 30, 2005, denied the petition.

On appeal, counsel, citing several non-precedent decisions from this office, requests that the proffered wage be prorated for 2001 and asserts that the bank statements and lines of credit submitted should have been considered. Relying on *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898, 903 (D.C. Cir. 1989), counsel asserts that the contracts for the beneficiary's services reflect

the extra income for the petitioner that the beneficiary's services will generate. Finally, counsel references the accountant's assertions that the tax returns did not include large amounts of accounts receivable.

On April 6, 2006, this office requested the following:

- The petitioner's bank statements for February and March 2006,
- Recent contracts for services,
- The beneficiary's 2005 Form W-2 Wage and Tax Statement,
- The petitioner's employer quarterly wage and withholding reports for 2005, and
- If available, the petitioner's 2004 and 2005 income tax returns.

In response, the petitioner submitted (1) bank statements reflecting balances of \$276,986.97, \$194,733.22 and \$222,051.94 in February, March and April 2006 respectively; (2) recent contracts; (3) the beneficiary's Form W-2 Wage and Tax Statement reflecting earnings of only \$16,000; (4) quarterly wage reports for 2005 reflecting that the beneficiary worked for the petitioner during the entire year, earning only \$4,000 per quarter; (5) pay stubs issued to the beneficiary in January and February 2006 reflecting total wages of \$8,000 for that period (which would annualize to \$48,000); (5) the petitioner's 2004 tax return reflecting net income of \$66,007, current assets of \$1,458, current liabilities of \$71,036 and net current assets of (\$69,578); and (6) a "Summary Balance Sheet" as of December 31, 2005 reflecting current assets of \$466,167.90, current liabilities of \$73,929.76 and net current assets of \$392,238.14.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 any year. The differences between the proffered wage and wages paid are \$77,950 in 2001, \$72,950 in 2002, \$58,950 in 2003 and \$66,950 in 2005.

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 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.

Counsel asserts that the petitioner's net income in 2001 is sufficient to cover the prorated proffered wage for the portion of the year that occurred after the priority date. We will not, however, 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. While CIS will prorate 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), the petitioner has not submitted such evidence. That said, we will look at the monthly proffered wage when considering the bank statements below.

While the petitioner's net income is less than the difference between the proffered wage and wages paid in every year at issue, 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, counsel's argument on the top of page three of the appellate brief 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.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(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.

As stated above, the petitioner has submitted a letter from an accountant listing large accounts payable in 2001 through 2004. The assertions of the accountant, however, are based on "compiled" financial statements that he concedes are based on the representations of management. As such, the letter is 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

² According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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, even if we were to accept the existence of large accounts receivable not listed on the tax returns prepared using the cash method of accounting, it is possible that large accounts payable also exist which were not listed for the same reason. The accountant does not address whether such accounts payable exist and, if so, how much they are. We will not consider accounts receivable without balancing them against accounts payable. A letter based on unaudited statements is not any more persuasive than the statements themselves. In response to our request for additional evidence, the petitioner submitted a 2004 balance sheet allowing us to balance current assets against current liabilities in 2005. The record does not reflect, however, that this balance sheet is audited. As stated above, the regulation at 8 C.F.R. § 204.5(g)(2) requires any financial statements be audited.

Counsel's reliance on the balances in the petitioner's bank account, supported by only non-precedent decisions by this office, is misplaced. First, unlike precedent decisions issued pursuant to the regulation at 8 C.F.R. § 103.4(c), non-precedent decisions are not binding on this office. We are, however, bound by the regulations. 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 satisfactorily 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. Specifically, 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 cash specified on Schedule L that was considered above in determining the petitioner's net current assets. Ultimately, bank statements show the amount in an account on a given date, and typically cannot show a sustainable ability to pay the proffered wage over several years.

Most significantly, the bank statements submitted are not persuasive on their face. When considering bank statements, we must take into account that any funds relied on to pay the proffered wage in a given month would no longer be available in the following month. The monthly proffered wage is \$6,912.50. The petitioner paid the beneficiary \$5,000 over six months in 2001, approximately \$833 per month, leaving a difference of \$6,079.50 per month. As of December 13, 2001, the petitioner only had a cash balance of \$12,971.21. If we consider that the petitioner would have had to spend \$18,238.50 (\$6,079.50 times three) over September, October and November of 2001, the petitioner would not have an additional \$6,079.50 remaining to pay the difference between wages paid and the proffered wage in December 2001. The remaining bank statements do not reflect consistently increasing balances after 2001 that could cover the difference between the proffered wage and wages paid in 2002, 2003 or 2004. Some months reflect extremely low balances, such as \$8,826.97 as of June 11, 2004. Had the petitioner been paying the proffered wage as of the priority date in 2001, this low balance in 2004 would no longer exist.

The record includes a 2001 letter from [REDACTED] verifying that it has agreed to advance the petitioner up to \$250,000. A 2005 letter from [REDACTED] verifies its

agreement to advance the petitioner up to \$140,000. The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. Significantly, the letter from Intouch Concepts, Inc. is dated in 2005, several years after the priority date. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Second, a credit line is not typically a persuasive means of demonstrating an ability to pay the proffered wage since the debt will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Further, [REDACTED] 875 F. 2d at 903, is not persuasive in this matter. First, the court's primary concern was the reliance by legacy Immigration and Naturalization Services (legacy INS) on the prevailing wage from 1982 to evaluate an ability to pay in 1979. The court then questioned legacy INS' lack of an expressed theory for assessing ability to pay, noting that a review of balance sheets and net income fails to take into account that a new employee will contribute to the income of the employer.

Counsel fails to explain how *Masonry Masters, Inc.* applies to a case where the beneficiary is already working for the petitioner. The contracts for the beneficiary's services, including the most recent contracts submitted, are not persuasive evidence of additional funds that would have been available had the beneficiary been employed. The beneficiary has been working under these contracts since the priority date through early 2006. Despite these contracts, the petitioner has not only not paid the beneficiary close to the proffered wage, or even the wages mandated under the terms of the beneficiary's nonimmigrant visa, but is unable to demonstrate sufficient net income or cash to cover the difference between the proffered wage and the wages paid. Even given the substantial raise represented by the 2006 pay stubs, the beneficiary continued to receive well below the proffered wage. The petitioner has offered no explanation for these minimal wages prior to 2006.

The petitioner has not demonstrated that it has paid the beneficiary the full proffered wage at any time. During the relevant years, the petitioner shows minimal net income or net losses and either negative or minimal net current assets and has not, therefore, demonstrated the ability to pay the difference between the wages paid and the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were realistically available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage as of the priority date.

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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.