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U.S. Citizenship
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BS

FILE: [REDACTED]
EAC 05 242 52252

Office: VERMONT SERVICE CENTER

Date: **MAR 15 2007**

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, 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 is a computer software company. 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 additional evidence. For the reasons discussed below, we uphold the director's decision.

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 July 15, 2003. The proffered wage as stated on the Form ETA 750 is \$90,261 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. We acknowledge that the petitioner seeks to substitute the beneficiary of this petition for the original beneficiary listed on the ETA 750. Significantly, however, the original beneficiary did not claim to have ever worked for the petitioner either.

On the petition, the petitioner claimed to have an establishment date in 1998, an undisclosed gross and net annual income and eight employees. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the years 2001 through 2004. Only the 2003 and 2004 returns are directly relevant to the petitioner's ability to pay the proffered wage as of the priority date. The petitioner also submitted its bank statements for July 2003 through March 2005.

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 13, 2006, 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 an accountant's letter and unaudited financial statements.

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 June 27, 2006, denied the petition.

On appeal, counsel asserts that the petitioner's cash balances as reflected in its tax returns did not fluctuate and demonstrate sufficient funds to cover the proffered wage. Counsel notes that bank statements are listed as evidence worthy of consideration at 8 C.F.R. § 204.5(g)(2). In addition, counsel asserts that the director should have considered the petitioner's accounts receivable, reflected on the financial statements (prepared using the accrual method) but not on the tax returns (prepared using the cash method). Finally, counsel notes that the petitioner has always met its payroll obligation. The petitioner submits payroll documentation for 2003 through 2006.

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.

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.

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.¹ 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.

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

	2002	2003	2004
Net income	(\$15,784)	(\$421)	\$2,342
Current Assets	\$23,267	\$24,609	\$10,125
Current Liabilities	\$0	\$1,469	\$100
Net current assets	\$23,267	\$23,140	\$10,025

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002, 2003 or 2004. During these years the petitioner shows a net income of only \$2,342 or net losses and minimal net current assets. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets as reflected on its tax returns.

Counsel's reliance on the balances in the petitioner's bank accounts 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, as noted by counsel, 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.

¹ 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.

Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. We acknowledge that the petitioner submitted bank statements covering nearly three years and that, when considering the joint balances in early 2004 when the petitioner was transitioning to a new account, the balances do not fluctuate significantly. Nevertheless, in December 2004 the petitioner maintained only one bank account and the balance in that account at the end of that month was only \$63,989.24, well below the proffered wage. Significantly, had the petitioner been paying the proffered wage in 2003 and early 2004, those funds would not remain available to pay the proffered wage in later months.

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 cash specified on Schedule L considered above in determining the petitioner's net current assets. While the bank balances for the end of the year do not match the cash listed on Schedule L of the petitioner's tax returns, the petitioner has not explained this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The unaudited financial statements that counsel 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.

The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The accountant implies that the petitioner has reported income when it is received, consistent with cash convention, but urges that the amount on the tax return be amended to include income earned during a given fiscal year but not received during that year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not demonstrated that changing from cash to accrual method would make available tens of thousands of dollars that would otherwise never have appeared on the tax return at all.

Our position is consistent with the business reference available at www.referenceforbusiness.com, which provides that while switching accounting methods generally results in adjustments to taxable income, not shown in this matter, "changing accounting methods does not permanently change the business' long-term taxable income, but only changes the way that income is recognized over time."

Regardless, the balance sheets for December 31, 2003 and December 31, 2004 reflect that the petitioner's current liabilities exceed its current assets by several thousand dollars in both years. Specifically, the petitioner shows current assets of only \$24,609 balanced against current liabilities of \$72,539 in 2003 and current assets of only \$10,125 balanced against current liabilities of \$54,811 in 2004. Thus, even these unaudited balance sheets do not reflect net current assets capable of demonstrating an ability to pay the proffered wage.

Finally, the payroll documentation submitted on appeal is not persuasive. The petitioner indicated on the Form I-140 that the position being offered was a new position. The petitioner has not identified an employee that the petitioner would be replacing. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

As stated above, the petitioner is not able to demonstrate its ability to pay the proffered wage out of its net income or net current assets as reflected on its tax returns. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. 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.