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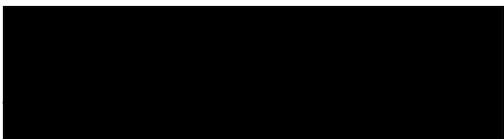
U.S. Department of Homeland Security

Citizenship and Immigration Services

*B6*

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invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, Rm 3042  
425 I Street, N.W.  
Washington, DC 20536



DEC 23 2003

File: LIN 02 206 54250 Office: NEBRASKA SERVICE CENTER

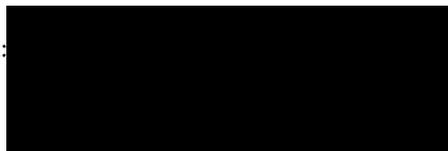
Date:

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

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

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

The petitioner is a computer services company. It seeks to employ the beneficiary permanently in the United States as an engineering and scientific programmer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by 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.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

Eligibility in this matter hinges on the petitioner's 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on December 22, 2000. The proffered wage as stated on the Form ETA 750 is \$62,000 per

year.

With the petitioner's initial filing, counsel submitted an undated letter from the petitioner's president stating that the petitioner's gross sales during its 2000 fiscal year were \$800,000 and that its gross receipts during its 2001 fiscal year were \$1,500,000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on August 15, 2002, requested additional evidence pertinent to that ability. The Service Center noted that the petitioner must submit evidence to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The Request for Evidence stipulated, pursuant to 8 C.F.R. § 204.5(g)(2), that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a letter, dated November 4, 2002, from the petitioner's president. The president stated that the petitioner was employed in H1B status until October 2001 and his salary was part of the deductions on the tax returns. The petitioner's president cited savings accounts, investments, acquisitions, Fortune 50 clients, and expansion as evidence of the petitioner's ability to pay the proffered wage.

Counsel also submitted the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports its taxes based on the calendar year.

During 2000, the petitioner declared a loss of \$71,110 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2001, the petitioner declared a loss of \$19,192 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Curiously, the petitioner's tax returns showed that its gross receipts during 2000 were \$418,080 and that its gross receipts during 2001 were \$589,119. Counsel did not explain the discrepancy between those figures and the figures the petitioner's president reported in the undated letter described above. The apparent misrepresentation of the petitioner's gross receipts adversely affects the petitioner's credibility.

Doubt cast on any aspect of the petitioner's proof may lead to a

reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel also provided bank statements showing the balance in the petitioner's bank accounts at the end of various months.

On November 27, 2002, the Nebraska Service Center issued another Request for Evidence in this matter, again requesting additional evidence of the petitioner's ability to pay the proffered wage. The request specified that, if the petitioner employed the beneficiary during 2000 and 2001, it should submit copies of Form W-2 Wage and Tax Statements showing the amounts it paid to the beneficiary.

In response, counsel submitted copies of 2000 and 2001 W-2 forms showing that the petitioner paid the beneficiary \$55,461.50 and \$51,127.71 during those years, respectively.

On March 27, 2003, the director issued a decision in this matter. The director noted (1) that the wages the petitioner had been paying the beneficiary were less than the proffered wage, (2) that, because the petitioner's income tax returns show losses, there is no evidence the petitioner could have paid the balance of the proffered wage out of profits, and (3) that the petitioner submitted no evidence of any other funds available to pay the proffered wage. The director determined, therefore, 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 denied the petition.

On appeal, counsel asserts that the petitioner's gross receipts, gross profit, total income, salaries paid, and account balances show the ability to pay the proffered wage. Counsel also states that the petitioner has obtained various contracts that will contribute to the petitioner's income in the future. Although counsel states the names of the companies with which the petitioner has allegedly contracted and amounts which counsel states the petitioner will gross from those contracts, counsel provides no evidence to support the existence of those contracts or the income estimates.

Counsel submitted a letter, dated April 22, 2003, from the petitioner's president. That letter describes the petitioner's various ventures and states that the petitioner has the ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is

misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 returns.

Counsel's reliance on contracts the petitioner has allegedly recently closed with various well-known companies is similarly misplaced. Counsel provided no evidence of the existence of those contracts or of the amounts they will yield in gross receipts. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the amount the petitioner will gross from those contracts does not demonstrate the ability to pay the proffered wage even if adequately proven. That the clients are well known and profitable does not demonstrate that the petitioner's contracts will prove any more profitable for the petitioner than its past contracts, which failed to make the petitioner profitable. Counsel submitted no evidence that the new contracts will result in a net gain, rather than increasing the amount of the petitioner's losses.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the taxable income before net operating loss deduction and special deductions 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at

537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

Counsel's reliance on the amount of the petitioner's gross receipts, its salary expenses, and its other expenses is inapposite. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>1</sup> or otherwise increased its net income<sup>2</sup>, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

The priority date is December 22, 2000. The proffered wage is \$62,000 per year. During 2000, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due if it had employed the beneficiary beginning on the priority date. On the priority date, 356 days of that 366-day year had elapsed, and ten days remained. The petitioner must show the ability to pay the proffered wage during the remaining ten days. The proffered wage multiplied by  $10/366^{\text{th}}$  equals \$1,693.99, which is the amount the petitioner must show the ability to pay during 2000.

During 2000, the petitioner paid the beneficiary \$55,461.50 in wages. That amount, however, was apparently for work performed throughout that calendar year and must be similarly prorated. The petitioner paid approximately  $10/366^{\text{th}}$  of that amount, or \$1,515.34, for work performed on or after the priority date. The petitioner must show the ability to pay the balance of \$178.65.

During 2000, however, the petitioner declared a loss of \$71,110 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its assets.

During 2001 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 2001, the petitioner declared a loss of \$19,192 and ended the year with negative net current assets. The petitioner has not

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<sup>1</sup> The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

<sup>2</sup> The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

shown that it was able to contribute toward payment of the proffered wage out of either its income or its assets. The petitioner paid the beneficiary \$51,127.71 during that year, an amount less than the proffered wage. The petitioner has not demonstrated that it had any additional funds with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the portion of 2000 after the priority date or during 2001. 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.