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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 03 024 50005 Office: CALIFORNIA SERVICE CENTER Date: **APR 23 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 telecommunications products designer and manufacturer. It seeks to employ the beneficiary permanently in the United States as an electronics engineer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a statement and additional evidence.

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 who are members of the professions.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is July 20, 2001. The beneficiary's proposed salary is \$76,005.00 per annum.

With the petition, counsel provided audited copies of the petitioner's 2000 and 2001 financial statements.¹ In response to a request for evidence issued on January 7, 2003 specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments, counsel submitted copies of the beneficiary's pay stubs and W-2 statements for 2001 and 2002, a copy of the beneficiary's federal tax return for 2001, and a statement from the petitioner's chief financial officer stating that the petitioner employs more than 100 workers and has the ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage. Additionally, the director expressed concern that the petitioning entity is a going concern and denied the petition on February 18, 2003.

¹ The petitioner also provided a copy of the beneficiary's degree certificate and transcript, a valid translation of the foreign documents, an evaluation report, and a letter confirming the beneficiary's experience. Since the director did not base his decision to deny the petition upon the beneficiary's qualifications, this issue will not be discussed within the scope of this decision.

On appeal, counsel contends that the petitioner has been and continues to be able to pay the proffered wage. In support of this position, counsel submits a statement and a letter from the petitioner's president, both of which discuss the financial status of the petitioning entity.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will 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).

In this case, the petitioner failed to submit any copies of its federal tax returns for the relevant period.² As a result, CIS will rely on the audited financial statements for the years 2000 and 2001 that were initially submitted by the petitioner.

Since the priority date in this case is July 20, 2001, only the 2001 financial statement is relevant to this decision. The financial statement shows that on December 31, 2001, the petitioner had a total of \$2,707.00 in net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities.³ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. If a corporation's 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. In this case, the proffered wage is \$76,005.00 per year. It is evident that the petitioner's net current assets as set forth on its financial statement are insufficient to pay the proffered wage.

In response to the request for evidence, the petitioner submitted copies of the beneficiary's W-2 forms for 2001 and 2002. The 2001 W-2 form shows that the petitioner paid the beneficiary a salary of \$55,600.08. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In this case, however, the wages paid to the petitioner in 2001 are \$20,404.92 less than the proffered wage. As noted above, the petitioner's net current assets of \$2,707 for 2001 are insufficient to pay the remaining amount.

In order to perform a fair and thorough assessment of all documentation in the record, the AAO will examine the wages paid in 2001 more closely to determine whether the petitioner had the ability to pay the proposed salary. The petitioner must show that it had the ability to pay the proffered wage *from the establishment of the priority date* and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). (Emphasis added). The regulations

² The only tax document on file is the *beneficiary's* 2001 return.

³ In this case, net current assets were determined by subtracting the petitioner's current liabilities of \$22,144.00 from its current assets of \$24,851.00.

require proof of eligibility at the priority date. See 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). The petitioner, therefore, is only required to demonstrate its ability to pay the proffered wage from July 20, 2001 and thereafter. By pro-rating the proffered wage for this time period, the petitioner is required to show its ability to pay the beneficiary \$34,150.19 in 2001.⁴ Pro-rating the actual wages paid for 2001 results in a total amount paid of \$24,981.95. The petitioner, therefore, must establish for the record that it had the ability to pay the deficit of \$9,220.30. There is no evidence in the record which establishes this ability. In addition, the petitioner has failed to establish its continuing ability to pay the proffered wage for 2002 and thereafter. Although the beneficiary's W-2 form shows that the petitioner paid the beneficiary wages of \$53,540.76 in 2002, it submits no additional financial documentation to show that it had the ability to pay the *entire* amount of the proffered wage.

In addition, counsel submitted a statement from the petitioner's chief financial officer, stating that it was established in 1984 and is a viable business. It claims that for the year 2002, it had revenues of \$31.2 million, paid salaries and wages of \$5.97 million, and employed 107 employees as of January 21, 2003. Although the regulations at 8 C.F.R. § 204.5(g)(2) allow the director to accept a statement from a United States employer stating that it employs 100 or more workers as evidence of its ability to pay, the financial uncertainty of the petitioner prohibits the acceptance of this statement as *prima facie* evidence.

In this case, the director based his decision on the petitioner's financial statements for the years 2000 and 2001, noting that the petitioning entity suffered recurring losses, experienced negative operating cash flows, and had a shareholder's deficit during these years. The director concluded that these issues raise substantial doubt about the entity's ability to continue as a going concern, which is a reasonable ground upon which to deny the petition. Although counsel submits a letter from the petitioner's chief financial officer in addition to counsel's own statement, both of which allege the sound financial status of the petitioning entity, this evidence is not sufficient to prove that the petitioner has the continuing ability to pay the proffered wage and is currently a sound company financially. Specifically, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although counsel urges this office to find in favor of the petitioner, her allegations regarding the financial state of the petitioner are merely opinions which are not supported by separate factual evidence. In addition, the financial officer's letter is not accompanied by independent financial evidence to corroborate his claims. Furthermore, this letter is the only evidence contained in the record that suggests that the petitioner's financial status has improved. This documentation, without additional corroborating evidence, does not prove that the petitioner is financially sound. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing thereafter.

⁴ This figure is determined by calculating the number of days from July 20, 2001 to December 31, 2001. The total number of days, 164, is divided by 365. The resulting figure is then multiplied by the proffered wage of \$76,005.00, for a total of \$34,150.19. The same process applies for prorating the actual wages paid.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.