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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 I Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: EAC 01 246 52819 Office: Vermont Service Center Date: JAN 14 2004

IN RE: Petitioner: [redacted]
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: [redacted]

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 the Bureau of Citizenship and Immigration Services (Bureau) 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, Director
Administrative Appeals Office

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

The petitioner is a software development and computer consultancy. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. The petition states that the petitioner is Optima Systems, Inc. of 237 West 35th Street in New York city. 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 or seasonal nature, for which qualified workers are not available in the United States.

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 continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification 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 request for labor certification was accepted for processing on February 2, 2001. The proffered salary as stated on the labor certification is $70,000 per year.

With the petition, counsel submitted the Form 2000 940-EZ Employer's Annual Federal Unemployment Tax Return and Form 941 Employer's Quarterly Federal Tax Return of Optima Software Solutions, Inc., c/o Bornstein of Teaneck, New Jersey. The petitioner submitted no evidence that this is a name under which it does business.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 15, 2001, requested evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's 2000 income tax returns or annual reports and audited or reviewed financial statements. In addition, the Service Center requested that, if the petitioner employed the beneficiary during 2000, that it submit Form W-2 wage and tax statements showing the amount it paid the beneficiary.

In addition, the Service Center requested information pertinent to the proffered position. The Service Center asked whether the proffered position was a newly created position. If not, the Service Center directed the petitioner to state how long the position had existed and what wages it was paying the incumbent in the position, identify the incumbent, and document that the position had been vacated.

In response, counsel submitted a letter, dated December 26, 2001. In that letter, counsel stated that the petitioner is a wholly owned subsidiary of Optima Technology Partners, Inc. and has the ability to pay the proffered wage. Counsel stated that copies of the petitioner's tax returns were enclosed. Counsel also stated that the petitioner did not employ the beneficiary during 2000.

Counsel did not answer the Service Center's questions pertinent to whether the proffered position is a new position or, if not, how much the previous employee had been paid. As such, this office is unable to find that the petitioner would replace an employee whose wages would then be available toward payment of the proffered wage.

Counsel also submitted an undated letter on the petitioner's letterhead and signed by Mian I. Siddique stating that on August 1, 2001, 100% of the petitioner was acquired by Optima Technology Partners, Inc. and the petitioner became a wholly owned subsidiary of Optima Technology Partners, Inc.

Counsel submitted the 2000 Form 1120S, Income Tax Return for an S Corporation of Optima Technologies, Inc., of the same address as the petitioner. Because the priority date of the petition is February 2, 2001, the information on that 2000 tax return bears no

direct relevance to the petitioner's ability to pay the proffered wage after the priority date or to any other issue in this case. Further, the record contains no evidence that the petitioner does business under that name.

Finally, counsel submitted a letter, dated December 17, 2001, stating that based on transactions recorded up to November 30, 2001 and management's projections for the remainder of the year Optima Technology Partners, Inc. anticipated sales of about $2.1 million and net profit of about $150,000 during 2001.

On April 30, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner's ordinary income during 2000 was sufficient to pay the proffered wage, but that the petitioner also then had four I-140 petitions pending, and that the petitioner's ordinary income was insufficient to pay the proffered wage of all the beneficiaries of those pending petitions.

On appeal, counsel submitted bank statements pertinent to accounts of Optima Technology Partners, Inc. Those bank statements cover all twelve months of 2001.

Counsel also submitted the 2001 Form 1120S income tax return of an S corporation for Optima Technology Partners, Inc., of 24R Hill Road in Parsippany, New Jersey. The return shows that the company reported an ordinary income of $268,193 during that year. The accompanying Schedule L shows that at the end of that year, the petitioner had current assets of $157,382 and current liabilities of $114,152, which yields net current assets of $43,230.

Counsel noted that during 2001 the petitioner employed the other four beneficiary's for whom it had I-140 petitions pending. As such, counsel argued, the salaries paid to them during 2001 were available to pay the proffered wage, had those petitions been approved.

Counsel presented the amounts of the wages proffered to those four employees and the amounts actually paid to them during 2001, and argued that the difference could easily have been paid by the amount of the petitioner's ordinary income during 2000 added to the amount of the petitioner's average monthly bank account balance during 2001.

In one case, counsel notes that the petitioner paid a beneficiary for whom it had filed $100,558, whereas the proffered wage in that petition is only $80,000. Counsel's calculation indicates that the

difference of $20,558 was available to pay the wage proffered to the beneficiary in the instant case, but offered no evidence of that assertion.

In attempting to demonstrate the petitioner's ability to pay the proffered wage, counsel advocates adding the petitioner's 2000 ordinary income to the petitioner's 2001 average monthly bank account balance. How that statistic would show the petitioner's ability to pay the proffered wage during 2001 is unclear.

Counsel's reliance on the bank accounts in this case is inapposite. First, those accounts belong to the petitioner's alleged owner, Optima Technology Partners, Inc., rather than to 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. Third, bank accounts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

The petitioner is obliged to show the ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted no annual reports or audited financial statements, and must rely on the federal tax returns which have been submitted.

The petitioner in this case is Optima Systems, Inc. Counsel did not submit the petitioner's 2001 tax return, but submitted the tax return of Optima Technology Partners, Inc., instead. Counsel submitted the statement of August 1, 2001, that the petitioner is a wholly owned subsidiary of Optima Technology Partners, Inc., but submitted no documentation to corroborate that assertion.

The petitioner, however, is a corporation. Generally, a corporation's owners, whether those owners are corporate or individual, are not obliged to pay the corporations debts and obligations out of their own funds. As such, the income and assets of the owners, whether corporate or individual, cannot be used to show the petitioner's ability to pay the proffered wage.

The petitioner has submitted no copies of annual reports, no audited financial statements, and no federal tax returns pertinent to the petitioner itself. As such, the petitioner has submitted no competent evidence of the petitioner's ability to pay the proffered wage during 2001.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it has had the continuing

ability to pay the proffered salary 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.