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U.S. Citizenship
and Immigration
Services

B6

[redacted]

MAY 06 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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 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 software and information systems consulting and project management firm. It seeks to employ the beneficiary permanently in the United States as a software engineer (e-commerce developer). As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 turns, in part, 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. The petition's priority date in this instance is October 16, 2000. The beneficiary's salary as stated on the labor certification is $65,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's qualifications. The evidence consisted of the following: a copy of the first page of the petitioner's Form 1120 U.S. corporation tax return for the year 2000; a letter dated May 21, 2002 from the petitioner substituting the beneficiary for an earlier beneficiary on the petition; an educational evaluation dated April 13, 1998 by Education Evaluators International, Inc.; a copy of diploma dated September 10, 1997 from Pondicherry University, Pondicherry, India, awarding the beneficiary the degree of Master of Computer Applications; and a letter dated November 1, 1999 from a software firm in Bangalore, India, confirming the beneficiary's work experience with that firm from October 1996 to September 1999.

In a request for evidence (RFE) dated September 3, 2002 the director requested evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE also requested evidence to establish that the beneficiary possessed the requisite education and training, including evidence that the beneficiary possessed a Master's degree.

The petitioner responded to the RFE with a letter on its letterhead signed by an individual with the title of business analyst. With the letter the petitioner submitted the following documents: copies of the first pages of the petitioner's Form 1120 U.S. corporation income tax returns for 1998, 1999, 2000, and 2001; copies of earnings statements for the beneficiary issued by the petitioner for the months of July and August 2002; an additional copy of the education evaluation dated April 13, 1998 by Education Evaluators International, Inc.; an additional copy of the diploma dated September 10, 1997 from Pondicherry University, Pondicherry, India, awarding the beneficiary the degree of Master of Computer Applications; copies of transcripts of the beneficiary at Pondicherry University for 1994 through 1996; and a course transcript of the beneficiary for a course in Physics at Magadh University, Bodh-Gaya, [India] in 1993.

The director made an initial finding that the petitioner's evidence failed to establish its ability to pay the proffered wage, and issued a notice of intent to deny dated December 12, 2002.

In response to the notice counsel submitted a letter dated February 4, 2003 accompanied by the following documents: a copy of an article dated November 19, 2002 describing the business activities in India of a corporate shareholder of the petitioner; and copies of the petitioner's Form 1120 U.S. corporation income tax returns, including all schedules, for the years 1998, 1999, 2000 and 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On the Form I-290B notice of appeal counsel checked the block indicating that a brief and/or additional evidence would be sent to the AAO within thirty days. Nonetheless, to date, no additional documentation is in the file.

Counsel states on appeal that temporary unprofitable periods do not bar a showing of a petitioner's ability to pay the proffered wage and that CIS must give appropriate consideration to other forms of evidence, such as cash reserves, which have allowed the payment of the proffered salary between periods of profitability.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. 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 the instant case, the petitioner established that it had previously employed the beneficiary. The Form W-2 Wage and Tax Statements in the record show the following amounts received by the beneficiary from the petitioner: $17,234.60 in 1999, which is $47,765.40 less than the proffered wage; $78,976.99 in 2000, which is $13,976.99 more than the proffered wage; and $59,326.56 in 2001, which is $5,673.44 less than the proffered wage. In the year of the priority date, 2000, the beneficiary received compensation in excess of the proffered wage. That evidence is sufficient to establish the ability of the petitioner to pay the proffered wage in that year. However, in the following year, 2001, the amount received by the beneficiary was less than the proffered wage. Therefore the evidence of the beneficiary's compensation in 2001 fails to establish the ability of the petitioner to pay the proffered wage in that year.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. *K.C.P. Food Co., Inc., supra,* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp., supra,* at 1054.

The petitioner's Form 1120 U.S. corporation income tax return for 2001 shows taxable income before net operating loss deduction and special deductions, on line 28, as -$122,428. Since that figure is negative, this evidence fails to establish the ability of the petitioner to pay the proffered wage in the year 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant case, the petitioner's Schedule L for the year 2001 shows current assets at the end of the year as $1,003,402, and current liabilities as $2,491,558. A calculation based on those figures yields net current assets as -$1,488,156 for the end of the year 2001. Since net current assets are negative, this evidence also fails to establish the ability of the petitioner to pay the proffered wage in the year 2001.

In his decision the director summarized the information from the petitioner's tax returns. The director found that the petitioner had negative taxable income for 2001, and that the petitioner had net current liabilities of -$1,488,156 at the end of 2001. The director found that those figures failed to establish the ability of the petitioner to pay the proffered wage in 2001. The director analyzed the beneficiary's W-2 form from 2001 and found that the beneficiary's compensation of $59,326.56 was less than the proffered wage that year. The director therefore found that the beneficiary's W-2 form for 2001 failed to establish the petitioner's ability to pay the proffered wage in that year. The director's approach somewhat obscured the proper method of analysis, since the director failed to explicitly state that the compensation received by the beneficiary would be credited toward the proffered wage when evaluating whether the petitioner's taxable income and net current assets were sufficient to pay the proffered wage. Nonetheless, the director's conclusion that the evidence fails to establish the ability of the petitioner to pay the proffered wage in the year 2001 is correct.

Counsel asserts that the director failed to take into account the financial reserves available to the petitioner during an unprofitable period. The evidence, however, fails to establish that the year 2001 was an unprofitable period which was only temporary. The petitioner's Form 1120 U.S. corporation income tax returns in the record show the following amounts on line 28, for taxable income before net operating loss deduction and special deductions: -$19,743 for 1998; $586,435 for 1999; -$617,036 for 2000; and -$122,428 for 2001. During the four-year period from 1998 to 2001 only one year was profitable for the petitioner, namely 1999. The petitioner's net current assets at the end of 2000 were $354,827, but they declined at the end of 2001 to -$1,488.156. The foregoing figures therefore, fail to establish that the year 2001 was a temporary period of unprofitability, or that the petitioner was likely to regain profitability in later years. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel asserts that the Indian parent company of the petitioner has significant cash reserves which are available to assist the petitioner during unprofitable periods. However, the evidence in the record fails to establish the amount of any cash reserves held by the corporate parent of the petitioner or to establish any commitment by the parent company to provide funds to the petitioner during unprofitable periods. 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).

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.