U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 270 51705 Office: CALIFORNIA SERVICE CENTER Date: NOV 29 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]

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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.

Michael Valdez

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a photocopier sales and repair company. It seeks to employ the beneficiary permanently in the United States as an office machine repairman. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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.

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 granting 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.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 12, 1998. The proffered wage as stated on the Form ETA 750 is $18.63 per hour, which equals $38,750.40 per year.

On the petition, the petitioner stated that it was established during 1988 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary on September 1, 1999, the beneficiary claimed to have worked for the petitioner since June 1995. Both the petition and the Form ETA 750 originally indicated that the petitioner would employ the beneficiary in Los Angeles, California, but were amended to show that the petitioner would employ the beneficiary in Van Nuys, California.

In support of the petition, the petitioner submitted the 1998 and 1999 Form 1120 U.S. Corporation Income Tax Returns of Rapid Copier Repairs & Sales, Inc., the original petitioner. The petitioner submitted the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation of A1 DataPrint Solutions, Incorporated (DataPrint).

The 1998 tax return shows that the original petitioner declared a loss of $21,786 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had $46,758 and current liabilities of $32,514, which yields net current assets of $14,604.

The 1999 tax return shows that the original petitioner declared a loss of $55,754 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that DataPrint declared ordinary income of $87,480 during that year. Counsel submitted DataPrint's 2001 Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return.

The petitioner submitted a bill of sale, dated August 23, 1999, showing that Rapid Copier Repair & Sales, Inc., sold its goodwill, phone number, customer lists, existing service agreements, furniture, equipment, existing inventory, and covenant not to compete to Gregory Spaulding, the current petitioner's president, for $25,000.

Finally, the petitioner submitted an amendment to the Form ETA 750, dated November 10, 1997 and signed by the beneficiary, stating that the beneficiary had been unemployed since September 1997, when he ceased to work for the petitioner.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on December 12, 2002, requested, *inter alia*, additional evidence pertinent to that ability.

In response, the petitioner submitted additional copies of the previously submitted tax returns and copies of DataPrint's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that during that year DataPrint declared a loss of $56,339. The corresponding Schedule L shows that at the end of that year DataPrint's current assets exceeded its current liabilities.

On March 27, 2003, the Service Center issued another request for evidence. The Service Center observed that the Form ETA 750, Part B, states that the beneficiary has worked for the petitioner since June of 1995 and requested copies of the beneficiary's W-2 forms showing wages the petitioner paid to the beneficiary during 1999, 2000, 2001, and 2002. The Service Center also requested a new Form ETA 750 completed by the successor-at-interest petitioner.

In response, the petitioner submitted a 1999 W-2 showing that [redacted] paid $9,000 in wages to [redacted] during that year. The employee's typed name and social security number was struck out on that form, and the beneficiary's name and social security number handwritten in their place. When that substitution was made, or by whom, is unclear.

The petitioner submitted a 1999 W-2 form showing that the National Administrative Services, Incorporated paid $9,000 in wages to [redacted] during that year. The petitioner submitted a 2000 W-2 form showing

that Professional Admin. Employer paid $26,000 in wages to [redacted] during that year. The petitioner submitted a 2001 W-2 form showing that Professiona[redacted] paid $26,131.25 in wages to [redacted] ring that year.[1] The petitioner submitted a 2002 W-2 form showing that Rhythm [redacted] aid $25,412.50 in wages to [redacted] during that year.

The petitioner submitted the beneficiary's 1999, 2000, 2001, and 2002 Form 1040 tax returns confirming that the beneficiary was paid a total of $18,000 during 1999, $26,000 during 2000, $26,131 during 2001, and $25,413 during 2002.

The petitioner also included various pay stubs showing payment[redacted] An August 12, 1999 stub shows a year-to-date total of $186 paid to him by [redacted] A December 17, 1999 stub shows a year-to-date total of $8,000 paid to him by [redacted] A March 24, 2000 stub shows a year-to-date total of $6,000 paid to him by [redacted] An April 25, 2003 stub shows a year-to-date total of $9,286 paid to him [redacted]

In a letter dated May 29, 2003 the petitioner's president stated that,

> [redacted] uses a payroll service for its employees. The name of the payroll service for the past several years has bee[redacted] ast year we used a company called [redacted] These companies handle the Workers [redacted] Taxes and filing of the appropriate documentation (W2's, Etc.)

In a letter dated May 26, 2003, the beneficiary stated that he had used the name Jose Castellon in his employment for the previous four years.

The petitioner submitted a 1998 Form 1099 showing that the original petitioner [redacted] paid [redacted] sic) $19,949 in non-employee compensation during that year. The petitioner submitted 2000, 2001, and 2002 Forms 1099 showing tha[redacted] paid the beneficiary $2,588, $2,365, and $1,077 during those years, respectively. The petitioner submitted 2000, 2001, and 2002 Schedules C showing that the beneficiary owned [redacted] during those years and that suffered a loss of $41 during 2000, earned a profit of $41 during 2001, and suffered a loss of $111 during 2002.[2]

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[1] This office notes that National Administrative Services, Professional Admin. Employer, and Professional Employer Solutions all had the same address.

[2] The amount shown on as paid to the beneficiary on the 2000, 2001, and 2002 1099 forms is exactly the same as the company's gross receipts during those same years. This office notes that a sole proprietorship does not correctly issue a Form 1099 to its owner for its gross receipts, but that it's profits are calculated on the Schedule C and rolled forward to the owner's Form 1040 personal tax return. This office assumes, however, that the Form 1099 was issued in error. In any event, amounts paid to the beneficiary by his own company are irrelevant to the ability of the petitioner to pay the proffered wage.

The petitioner also submitted a new Form ETA 750, as requested. On the Form ETA 750, Part B, which the beneficiary signed on May 23, 2003, the beneficiary stated that he had worked for the petitioner since June 1995.

On June 20, 2003 the Service Center issued another request for evidence. The Service Center noted that the W-2 forms submitted are from various employers rather than from the petitioner, and that they were issued to [redacted] rather than in the name of the beneficiary. The Service Center asked that the petitioner explain those discrepancies and provide documentary evidence in support of the explanations.

In response, the petitioner submitted a letter, dated June 11, 2003, from its president. In that letter, the president explained that the petitioner utilizes a payroll company to process its paychecks and associated documentation. The petitioner also submitted a letter dated July 14, 2003 in which the petitioner's president stated that the petitioner had utilized a company named [redacted] during 2000, a company named Professional Employer Solutions during 2001, and a company named [redacted] during 2002.

The president referred to the beneficiary's letter of May 26, 2003 for an explanation of the name discrepancy. The petitioner provided another declaration from the beneficiary; this one dated July 18, 2003, in support of the assertion that the beneficiary had used the name [redacted] for employment purposes. The petitioner submitted a July 18, 2003 letter from a tax preparer noting that the IRS had accepted the beneficiary's tax returns notwithstanding that the name shown on his W-2 forms was [redacted] The petitioner provided no additional documentary evidence in support of those explanations of the discrepancies.

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 August 19, 2003, denied the petition. The decision of denial did not comment on the various discrepancies in the evidence, or the lack of documentary evidence in support of the petitioner's explanations of those discrepancies. That decision did not address the issue of whether DataPrint is a true successor-at-interest of Rapid Copier Repairs & Sales, Inc., the original petitioner. The decision found that, even accepting the petitioner's version of events, the petitioner had not shown the ability to pay the proffered wage.

On appeal, counsel asserts that DataPrint has assumed all of the assets and liabilities of [redacted] Counsel further asserts, supported by citations, that documentation provided by individuals with personal knowledge of an employer's business may be persuasive.

Finally, counsel asserts, citing the petitioner's liquid assets and a [redacted] that the petitioner has demonstrated the ability to pay the proffered wage.

Counsel submits no precedent in support of his implicit proposition that this office is bound by Department of Labor decisions and this office is aware of none. Neither the petitioner's total assets, nor its total current

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[3] Although this office notes that the name is sufficiently unusual for a payroll processing company so as to be suspect, that is not a factor in today's decision.

assets shall, in themselves, be counted as funds available to pay the proffered wage, for reasons explained below.

As the original petitioner's successor-at-interest,[4] the current petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981)

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that 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.

The various W-2 forms submitted by the petitioner as evidence of wages it paid to the beneficiary contain various employer names. Further, most show the employee name of [redacted] The evidence that the beneficiary used the name [redacted] in his employment is convincing. The evidence that the various employers shown were all the petitioner's alter egos that it used for payroll purposes is somewhat less convincing. Nevertheless, the director appears to have accepted that the petitioner paid amounts shown on various W-2 forms to the beneficiary, and this office shall not disturb that finding. The pay stubs from Spaulding Enterprises also appear to represent payments the petitioner made to the beneficiary.

The petitioner has demonstrated, therefore, that Rapid Copier Repair & Sales employed and paid the beneficiary $19,949 during 1998 and $9,000 during 1999. The petitioner has demonstrated that the DataPrint employed and paid the beneficiary $9,000 during 1999,[5] $26,000 during 2000, $26,131.25 during 2001, and $25,412.50 during 2002.

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, the AAO will, in addition, examine the net income figure reflected on the

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[4] Actually, whether DataPrint has established that it is the successor-at-interest of [redacted] the original petitioner, is unclear. To show it is a true successor-at-interest DataPrint must show that it has assumed all of the rights, duties, obligations, and assets of the original employer. Counsel and the petitioner's president have, several times, asserted that proposition as a fact. The chief evidence in support of those assertions, however, is the August 23, 1999 bill of sale; described above, showing that DataPrint purchased listed assets of Rapid Copier. Nothing in that bill of sale indicates that the list of assets is exhaustive, and the bill of sale does not mention the liabilities, if any, of Rapid Copier.

[5] The evidence on the W-2 forms indicating that the beneficiary has worked for the petitioner during all of the salient years tends to contradict the beneficiary's assertion, made on the amendment to the Form ETA 750 on November 10, 1997, that he ceased working for the petitioner during September 1997. Those apparently divergent assertions may be reconciled, however, if the beneficiary returned to work for the petitioner sometime later.

Further, the statement on the November 10, 1997 amendment to the Form ETA 750, that the beneficiary ceased to be employed by the petitioner during September 1997 and remained unemployed until at least November 11, 1997, appears to contradict the statement, on the amended version of the ETA 750 signed on May 23, 2003, that the beneficiary had worked for the petitioner since June 1995. This office supposes, however, that in the context of a statement made on May 23, 2003, the beneficiary may have considered that interlude not to represent a true break in his employment for the petitioner.

petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

As was stated above, the proffered wage is $38,750.40 per year and the priority date is June 12, 1998.

Rapid Copier Repair & Sales operated the petitioning business during 1998, and the petitioner must demonstrate that Rapid Copier was able to pay the proffered wage during that year. The evidence demonstrates that Rapid Copier paid the beneficiary $19,949 during 1998 and the petitioner must now demonstrate the ability to pay the $18,801.40 balance of the proffered wage. During that year, Rapid Copier declared a loss. Rapid Copier is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of profits. Rapid Copier ended that year with net current assets of $14,604. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to Rapid Copier during that year with which it might have paid the proffered wage. The petitioner has not demonstrated that Rapid Copier was able to pay the proffered wage during 1998.

Rapid copier continued to operate the business from January 1, 1999 through August 23, 1999, when it sold the business. The prorated portion of the proffered wage for that part of the year is $24,842.72[6]. The

[6] $38,750.40 x 234/365

petitioner has demonstrated that Rapid Copier paid the beneficiary $9,000 during 1999, and must now demonstrate that Rapid Copier was able to pay the $15,842.72 balance of the prorate portion of the proffered wage.

During 1999 Rapid Copier declared a loss. The petitioner is unable, therefore, to demonstrate that Rapid Copier had the ability to pay any portion of the proffered wage out of its profits. Rapid Copier ended that year with negative net current assets. The petitioner is unable to demonstrate that Rapid Copier was able to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to the petitioner with which to pay the proffered wage during that year. The petitioner has not demonstrated that Rapid Copier was able to pay the total amount of the proffered wage during 1999 the portion of 1999 when it owned the business.

During the portion of 1999 after August 23, 1999, DataPrint must show that it was able to pay the remaining $13,907.68 of the proffered wage.[7] The petitioner has demonstrated that it paid the beneficiary $9,000 during that year, and must now demonstrate that it was able to pay the remaining $4,907.68. The petitioner, however, submitted no evidence pertinent to its earnings or assets during 1999. The petitioner has failed to demonstrate that it was able to pay the prorate amount of the proffered wage during the portion of 1999 during which it owned the petitioning business.

During 2000 and ensuing years, the petitioner must show the ability to pay the entire proffered wage. During 2000, the petitioner paid the beneficiary $26,000. The petitioner must demonstrate the ability to pay the $12,750.40 balance of the proffered wage. During 2000, the petitioner declared ordinary income of $87,480. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner paid the beneficiary $26,131.25. The petitioner must show the ability to pay the $12,619.15 balance of the proffered wage. During 2001, however, the petitioner declared a loss. The petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of the year the petition had negative net current assets. The petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it with which to pay the proffered wage during that year. The petitioner has not demonstrated that ability to pay the proffered wage during 2001.

The current petitioner failed to submit evidence sufficient to demonstrate that Rapid Copier was able to pay the proffered wage during 1998 or the period of 1999 during which it owned the business. The current petitioner failed to submit evidence sufficient to show that it was able to pay the proffered wage during the portion of 1999 after it acquired the business. The petitioner failed to submit evidence sufficient to show that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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[7] $38,750.40 - $24,942.72

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.