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U.S. Citizenship and Immigration Services

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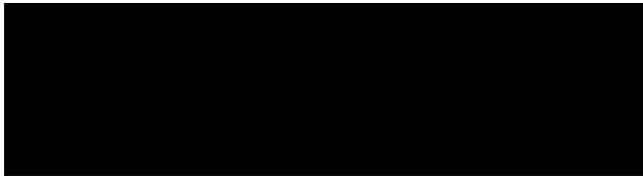
FILE: WAC-02-266-54243 Office: CALIFORNIA SERVICE CENTER Date: **OCT 22 2004**



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:



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.

for 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 firm providing automation services. It seeks to employ the beneficiary permanently in the United States as a research assistant II. 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, the petitioner submits a letter 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.

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 April 26, 1999. The proffered wage as stated on the Form ETA 750 is \$28.75 per hour, which amounts to \$59,800 annually.

With the petition, the petitioner submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return and 2000 Form 1040 U.S. Individual Income Tax Return for the petitioner's owner.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 22, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of its EDD Form DE-6 Quarterly Wage Reports, a prospective employment letter, and evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date specifically relating to 1999 and 2000.

In response, the petitioner submitted its DE-6 wage reports for the quarters ending October 31, 2001, January 31, 2002, April 30, 2002, July 31, 2002 and October 31, 2002. The record reflects that, from January 2002 forward, the petitioner's owner was its only employee. During 1999 and 2000, the petitioner filed its taxes as a sole proprietor, and submitted its 1999 and 2000 Form 1040 U.S. Individual Income Tax Returns. The return for 1999 reflected an adjusted gross income of \$30,787. Schedule C of the return reflected gross receipts of \$265,675, wages paid of \$0, and a net profit from business of \$34,462. The tax return for 2000 reflected an adjusted gross income of \$34,619, gross receipts of \$370,638, wages paid of \$6,000 and a net profit from business of \$32,949.

The petitioner submitted Form 1120 Corporate tax returns for the petitioner for the year 2001. The tax return reflect the following information:

	2001
Net income	-\$5,571
Current Assets	\$70,981
Current Liabilities	\$97,920
Net current assets	-\$26,930

On February 20, 2003, the director issued a Notice of Intent to Deny the petition.

In response, the petitioner submitted a letter stating that if the beneficiary were hired it would be able to eliminate the costs associated with paying outside firms to conduct research for his organization. The petitioner submitted Form 1099 Miscellaneous Income statements for the years 1999 through 2002. The statements reflect that for the years 1999 through 2002, the petitioner paid outside vendors \$71,121, \$81,758, \$84,325 and \$80,157, respectively. The petitioner resubmits tax documentation, previously submitted.

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 March 28, 2003, denied the petition.

On appeal, the petitioner states that the funds specifically allocated for research and development as indicated as a cost of labor in its taxes from 1999 through 2002 would have been used to pay the beneficiary if he had been allowed to work. The petitioner states that it is not trying to recapture funds paid outside contractors as indicated by the director, but stress that they would have been used to pay the beneficiary, if he had been an employee.

The petitioner's argument that had the beneficiary been employed it would not have had to expend the funds listed on the Forms 1099 Miscellaneous Income is not persuasive. Aside from the vendors names, which the petitioner points out typically in clued the word "research," the record contains no evidence of exactly what projects these expenses were for, the total manpower reflected in these expenses, evidence as to whether the beneficiary holds the qualifications and specific experience to purportedly eliminate these expenses, or contrary to the petitioner's assertions, that these expenses would be totally eliminated and not ongoing. Simply going on record without supporting documentary evidence is insufficient 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). As stated in

the director's decision, the funds paid as reflected by the Forms 1099, represent used income that cannot be recaptured. Funds already expended are not available for other uses. The petitioner's repeated assertion that the miscellaneous funds would have been used to pay the beneficiary must be viewed as conjecture without the submission of factual evidence to demonstrate the petitioner's assertion.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary during the years 1999 through 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, CIS will next 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). The petitioner's reliance on the its gross receipts and miscellaneous wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid miscellaneous 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 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 the Service, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid

are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner has not demonstrated that it paid any wages to the beneficiary during 1999 through 2002. In 1999, the petitioner shows an adjusted gross income of only \$30,787 and a net profit from business of only \$34,462. Both amounts are less than the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1999.

In 2000, the petitioner shows an adjusted gross income of only \$34,619 and a net profit from business of only \$32,949. Both amounts are less than the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In 2001, the petitioner shows an income of -\$5,571 and net current assets of -\$26,930, both amounts are less than the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The AAO notes that the petitioner did not submit any tax documents for the year 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1999 or subsequently during 2000, 2001 and 2002. 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.

expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *id.* at 118.