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EAC-04-020-51699

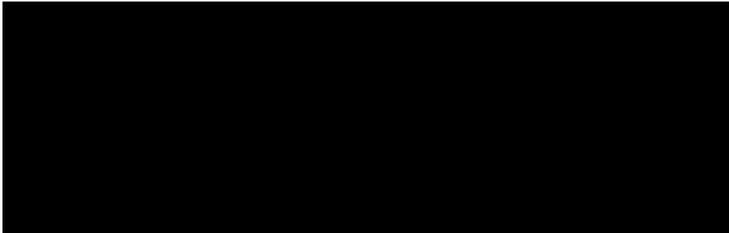
Office: VERMONT SERVICE CENTER

Date:

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.


Robert P. Wiemann, Director
Administrative Appeals Office

CC: [Redacted]

DISCUSSION: The immigrant visa petition was denied by the director of the Vermont Service Center, and, it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology, (IT) consulting and development corporation. It seeks to permanently employ the beneficiary in the United States as a Technical Representative according to the petitioner's alien labor certification at a prevailing wage of \$60,000.00 annually. As required by statute, a Form ETA 750 entitled Application for Alien Employment Certification, approved by the Department of Labor, accompanied the petition (the "Alien Employment Certification"). The priority date of the Alien Employment Certification is November 4, 2002. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage.

Counsel¹ in this matter filed an appeal together with a brief and additional evidence to the AAO.

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 petitioner is petitioning for the permanent employment of a skilled worker.

The applicable regulation at Title 8, Code of Federal Regulations, Part 204.5(g)(2) states in pertinent part the following:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant, who 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 annual reports, federal tax returns, or audited financial reports.

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 November 4, 2002. The proffered wage as stated on the Form ETA 750 is \$60,000.00 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary stated he worked for the petitioner since January 2002.

The only financial evidence submitted by petitioner to support the filing of the I-140 petition was the petitioner's Form 1120S federal tax return for its tax year 2002 along with the 2002 Wage and Tax Statement of beneficiary. Upon review of that return stating an income loss of \$2,076.00, and finding current liabilities greater than current assets by \$51,813.00, the director denied the petition on July 8, 2004.

¹ Petitioner's counsel had not provided a signed Form G-28 to accompany the Appeal Form I-290B. However, counsel signed the appeal form and the brief filed in this matter. Counsel is copied on this decision with the original decision sent to the attorney in the same law firm who is authorized by a signed Form G-28 to represent the petitioner in all related matters involving the petition.

On appeal, petitioner's counsel submits a brief and additional evidence to support its contention that it had the ability to pay the proffered wage. The evidence is as follows: the petitioner's Form 1120S federal tax return for year 2003; the beneficiary's W-2 Wage and Tax Statements for 2002 and 2003; the beneficiary's pay statements for the first five months of 2004; line of bank credit; the petitioner's bank statements from January 2004 to June 8, 2004; and, an excerpt from an account of a meeting between the American Immigration Lawyers Association and CIS Vermont Service Center representatives.

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, that evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As demonstrated below, the petitioner did not employ the beneficiary at a salary equal to or greater than the proffered wage stated in the Alien Employment Certification from the date Form ETA 750 was accepted for processing by the U.S. Department of Labor.

Alternatively, 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 *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service, now called U. S. Citizenship and Immigration Services (CIS), had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. Salaries and wages paid by the petitioner to its employees are included as deductions in the tax form calculations to determine "Ordinary income (loss) from trade or business activities."² The petitioner employed the beneficiary as evidenced by W-2 Wage and Tax Statement for 2002. In year 2002, the beneficiary's wages were \$38,308.00. Adding the petitioner's taxable income of \$-2,076.00 stated in its tax return for year 2002, together with the wages paid to the beneficiary in that year, demonstrates a deficit of \$23,768.00 (i.e. the proffered wage of \$60,000.00 - \$36,232.00 equals \$23,768.00) needed to equal the proffered wage. Therefore the petitioner has not met its burden of proof to show it did not have ability to pay the proffered wage in year 2002. The petitioner did not employ the beneficiary at a salary equal to or greater than the proffered wage in 2002.

Upon appeal, the petitioner submitted a tax return Form 1120S filed in 2003 for the company. 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 petitioner's federal income tax return, without consideration of depreciation or other expenses as well as a review of petitioner's net assets as discussed below. In Form 1120S, net income is stated on line 21. CIS may rely on federal income tax returns to assess a petitioner's ability to pay the proffered wage according to case precedent cited above. The 2003 return demonstrated ordinary income of \$8,936.00 that was insufficient

² Line 21, U. S. Income Tax Return for an S Corporation, Form 1120S, Department of the Treasury Internal Revenue Service.

even added with the beneficiary's salary of \$41,539.00 to equal or be greater than the proffered wage stated in the Alien Employment Certification.

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. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has tax income to pay the proffered wage.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16(d) through 18(d). 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.

Examining the two (2) Form 1120S U.S. Income Tax Returns submitted by petitioner, the current liabilities are greater than current assets for tax years 2002 and 2003. Petitioner has not demonstrated its ability to pay the proffered wage through its currently available assets (i.e. net current assets).

Additionally, petitioner's counsel submitted several bank statements "... [to] demonstrate that substantial cash is available to pay the prevailing wage from the time of the labor certification was filed to present..." [A partial quote from counsel's brief in support of petitioner's appeal, page five, lines 4 and 5]. The petitioner's bank statements submitted were dated from January 2004 to June 8, 2004. The petitioner's bank statements demonstrate closing balances of a high of \$59,912.46 to a low of \$10,757.67 for a five-month period in 2004.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show a sustainable ability to pay the proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it has established lines of credit from its bank in the amount of \$75,000.00. Exhibit "G", as referenced in its legal brief, is a letter sent to the petitioner's attorney by its bank dated July 16, 2004. It references petitioner's "Revolving Credit Information" that are three "Small Business Credit Lines". The first credit line is dated

³ 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 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.

3/6/2002 in the amount of \$12,500; the second is dated 12/31/2002 in the amount of \$50,000.00; and, the third dated 2/27/2003 in the amount of \$12,500.00.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's lines of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel introduced an excerpt from an account of a meeting between the American Immigration Lawyers Association and CIS Vermont Service Center representatives, as referenced in petitioner's brief, in support of the above line of credit contention.⁴ As already stated above, and as substantially paraphrased in the excerpt, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position.⁵ In our present proceeding the petitioner did none of those things to support its contention. Petitioner has not demonstrated its ability to pay the proffered wage through the availability of established lines of credit.

The petitioner has not demonstrated that it could pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor for years 2002 and 2003.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

⁴ Posted on AILA InfoNet at Doc. No. [REDACTED] at item 15. A.

⁵ *Matter of Great Wall, Id.*