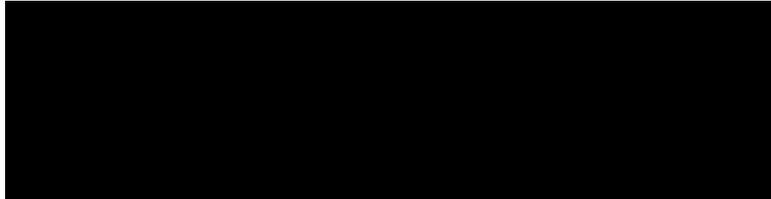


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U.S. Citizenship
and Immigration
Services

BG



FILE: [Redacted]
WAC 04 069 50925

Office: CALIFORNIA SERVICE CENTER

Date: DEC 21 2005

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

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 an IS/IT consulting group. It seeks to employ the beneficiary permanently in the United States as an IS/IT consultant. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

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 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on October 4, 2001. The proffered wage as stated on the Form ETA 750 is \$52,000 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner stated that it was established during 1993. The petitioner did not enter the number of workers it employs in the space provided for that purpose. The petitioner did not enter its gross annual income and its net annual income in the spaces provided for those figures. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Newport Beach, California.

On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed that he worked as an IS/IT consultant/system administrator for Planetary Society in Pasadena, California from May 1998 to December 1999, for Small Offices.com in Malibu, California from January 2000 to May 2000, and for E-poch Internet in Costa Mesa, California from June 2000 to "present." The beneficiary signed that form on February 20, 2001.

With the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and no evidence pertinent to the beneficiary's employment history. Therefore, on March 11, 2004 the California Service Center requested evidence pertinent to both of those issues.

Pertinent to the beneficiary's employment history, the Service Center asked that the petitioner provide evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750. Consistent with 8 C.F.R. § 204.5(l)(3)(ii) the Service Center requested that the evidence pertinent to the beneficiary's employment experience be in letter form on the beneficiary's previous employers' letterheads, stating the beneficiary's title, duties, dates of employment and the number of hours he worked each week, and showing the name and title of the person verifying the information.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and that it demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center requested that the evidence submitted cover the years from 2001 to 2003.

In addition, the Service Center requested that the petitioner submit its California Form DE-6 Quarterly Wage Reports for the past four quarters. Finally, the Service Center asked the petitioner to complete items left blank on the Form I-140 petition.

In response, counsel submitted a letter, dated May 13, 2004, from Winonics Incorporated, in Brea, California. That letter states that the beneficiary has worked for that company since May 13, 2002.

As to the petitioner's ability to pay the proffered wage, counsel submitted the 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns of [REDACTED]. Schedules C attached to those tax returns show that during those years Mr. [REDACTED] held the petitioner as a sole proprietorship. In a cover letter, dated May 27, 2004, counsel stated, "please note that the petitioner has not filed its 2003 return yet." Counsel provided

no evidence in support of that assertion. Counsel also stated that the petitioner does not have Form DE-6 wage reports because it employs only the petitioner's owner. Counsel submitted a copy of the Form I-140, on Page 2 of which the petitioner indicated that it employs one worker.

The 2001 Schedule C shows during that year the petitioner returned a net profit of \$10,096. The tax return shows that during that year the petitioner's owner declared a loss of \$46,177 as his adjusted gross income.

The 2002 Schedule C shows that during that year the petitioner returned a net profit of \$46,137. The tax return shows that during that year the petitioner's owner declared a loss of \$13,437 as his adjusted gross income.

Counsel did not provide the requested W-2 forms.

The director denied the petition on July 21, 2004, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel asserts that the evidence submitted demonstrates that the beneficiary has the requisite employment experience and that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.¹ Counsel submits an appeal brief to supplement that appeal.

As to the beneficiary's work experience, counsel reiterates the beneficiary's employment claims as listed on the Form ETA 750, Part B, except that counsel states that the beneficiary began working for Planetary Society during May of 1999, rather than May of 1998, and states that the beneficiary ceased working for E-poch Networks, Incorporated during June 2001.

As support for the beneficiary's claims of qualifying employment counsel submitted (1) an earnings statement issued by The Planetary Society, (2) a 2000 W-2 form showing that smalloffice.com, Incorporated paid the beneficiary gross pay of \$26,384.38 during that year, (3) a 2000 Earnings Statement issued to the beneficiary by smalloffice.com LLC, (4) 2000 and 2001 W-2 forms issued by E-poch Networks Incorporated of Costa Mesa to the beneficiary showing that the company paid him gross pay of \$39,038.88 and \$38,679.38 during those years, respectively, and (5) two earnings statements issued to the beneficiary by E-poch Networks.

The earnings statement from The Planetary Society shows that it issued the beneficiary a check for \$1,269.85 for the semi-monthly pay period ending December 15, 1999. The statement shows year-to-date total wages of \$16,869.43.

¹ Counsel also asserts that the beneficiary is a citizen of the West Bank and that returning there would be dangerous for him. No hardship exception exists pertinent to the requirements of the instant visa category. Further still, counsel asserts that the beneficiary has two relative petitions pending on his behalf. That assertion is irrelevant to the determinations necessary to the adjudication of this visa category.

The Earnings Statement from smalloffice.com LLC shows that the company paid the beneficiary gross pay of \$2,500 for the two-week pay period ended April 30, 2000. The year-to-date total shown on that statement is \$18,421.04.

The first Earnings Statement issued by E-poch Networks Incorporated to the beneficiary shows that it paid him \$2,788.80 for the two-week pay period ended June 30, 2000. That same statement indicates that the beneficiary's year-to-date earnings were also \$2,788.80.

The second Earnings Statement issued to the beneficiary by E-poch Networks shows that the company paid the beneficiary \$2,020.84 for the two-week pay period ending May 15, 2001. That statement shows a year-to-date total of \$27,187.56.

Counsel did not submit employment verification letters from the beneficiary's previous employers as required by 8 C.F.R. § 204.5(l)(3)(ii) and requested in the March 11, 2004 Request for Evidence. Counsel asserts that E-poch Networks Incorporated and Smalloffice.com are no longer in business, and that letters from those companies are unavailable.

In addition to the evidence pertinent to the beneficiary's employment history, counsel submits evidence pertinent to the petitioner's owner's purchase and ownership of real property. Finally, counsel provides monthly statements pertinent to the petitioner's owner's checking and savings accounts.

The evidence submitted in response to the Request for Evidence shows employment after the priority date of the instant petition. As is noted above, *Matter of Wing's Tea House, supra*, requires that the evidence show that the beneficiary had the requisite employment experience prior to the priority date. Evidence of employment after the priority date does not support that proposition. The evidence pertinent to the beneficiary's employment for Winonics Incorporated does not demonstrate any qualifying employment. As the record contained no other reliable evidence pertinent to the beneficiary's employment history the petition was properly denied on that ground.

The additional evidence submitted on appeal to support the beneficiary's claimed employment history appears to indicate that the beneficiary was employed, for at least some period, by The Planetary Society; smalloffice.com, Incorporated or smalloffice.com LLC; and E-poch Networks Incorporated. That evidence does not accord with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), however. Further, it was not responsive to the request, in the March 11, 2004 Request for Evidence that the

Evidence of prior experience should be submitted in letterform [sic] on the previous employer's letterhead showing the name and title of the person verifying this information [and] the beneficiary's title, duties and dates of employment/experience and number of hours worked per week.

Counsel asserts, on appeal, as an explanation of the failure to provide evidence corresponding to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) that "Epoch [sic] Networks and Smalloffice.com are no longer in business and consequently, we could not obtain employment letters from these two employers." Counsel provides

no evidence in support of the proposition that those two companies are no longer in existence and no evidence to show that, if they have gone out of business, no records or former officials of that company could be found.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to excuse deviation from the requirements of the regulations or to sustain the burden of proof. The petitioner was obliged to provide evidence in accordance with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and the Request for Evidence, but did not.

Even if this office were to consider the W-2 forms, social security documents, and pay statements submitted in this case as evidence of employment, they would be insufficient to show the period of time during the years represented that the beneficiary worked for the various companies. Further, those documents would be insufficient to show that the beneficiary's duties for those companies were similar to the duties of the proffered position. For all of the reasons stated above, the documentary evidence submitted does not show that the beneficiary has two years of qualifying employment experience. The petition was correctly denied on that ground.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, this office notes that counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of 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.² 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 reported on its tax returns.

Although counsel submits evidence that the petitioner's owner has considerable real property, he submits no evidence of the current market value of that property, and no evidence of the amount by which it may be encumbered or that it is unencumbered. As such, this office cannot determine the value of the petitioner's owner's equity. Further, real property is not the sort of liquid asset that may readily be used to pay wages. The value of the petitioner's owner's real property will not be included in the calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

As to the losses shown as the petitioner's owner's 2001 and 2002 adjusted gross income, counsel notes that they were each occasioned by a \$52,920 Net Operating Loss carryover from previous years, and that the petitioner's owner would, without those carryovers, have had a positive adjusted gross income during both years. This office concurs that those carryovers should not be charged against the petitioner's owner's

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

income for the purposes of showing the ability to pay the proffered wage during the salient years.³ Without those carryovers, the petitioner's owner's 2001 income would have been \$6,743,⁴ and his 2002 income would have been \$39,483.⁵

Counsel argues that the value of the petitioner's inventory should be added to its net income in determining its ability to pay the proffered wage during a given year. This office is unpersuaded.

Inventory is a current asset, an asset projected to be converted into cash or cash equivalent, or projected to be consumed, during the coming year. Although this office will consider current assets in appropriate cases, it will not do so without reference to the petitioner's current liabilities, those liabilities to be paid during the coming year. The petitioner's tax return does not list the petitioner's current liabilities. Without those current liabilities shown as an offset, this office will not consider the petitioner's current assets.

Further, even if the petitioner's net current assets, its current assets net of its current liabilities, could be extracted from its tax return, as it can from the returns of many companies,⁶ because of the nature of net current assets, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income may not correctly be added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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. CIS may rely

³ This office notes, however, that carryover losses are an acknowledgement that the taxpayer, in this case the petitioner, has produced more losses than profits during its recent history.

⁴ This number is obtained by adding the petitioner's Net Operating Loss deduction of \$52,920 to its 2001 adjusted gross income, which was a loss of \$46,177.

⁵ This number is obtained by adding the petitioner's Net Operating Loss deduction of \$52,920 to its 2002 adjusted gross income, which was a loss of \$13,437.

⁶ On corporate and partnership returns, for instance, current assets and current liabilities are shown on Schedule L, and net current assets may be readily calculated.

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).

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets, if they are supported by sufficient evidence, are properly considered in the determination of the petitioner's ability to pay the proffered wage. 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$52,000. The priority date is October 4, 2001.

During 2001 the petitioner's owner had adjusted gross income net of Net Operating Loss deduction of \$6,743, including all of the petitioner's net profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted no other reliable evidence of any funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner had adjusted gross income net of Net Operating Loss deduction of \$39,483, including all of the petitioner's net profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted no other reliable evidence of any funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2001.

In the March 11, 2004 Request for Evidence the Service Center requested a copy of the petitioner's 2003 tax return. In his May 27, 2004 cover letter submitted with the response to the Request for Evidence, counsel stated that the petitioner had not yet completed its 2003 return, but provided no evidence in support of that assertion. Although that return was then due, unless the petitioner had applied for an extension, counsel did not submit a copy of an application for extension. The appeal in this matter was submitted on August 9, 2004 and the appeal brief on August 24, 2004. The previously requested 2003 tax return was still not submitted.

Although it was specifically requested, counsel has submitted no reliable evidence pertinent to the petitioner's ability to pay the proffered wage during 2003. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2003.

The petitioner submitted insufficient evidence to show that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied, and the appeal will be dismissed, on this additional ground.

An additional issue appears in the record that was not raised in the decision of denial. In the March 11, 2004 Request for Evidence the California Service Center requested that the petitioner provide its California Form DE-6 wage reports for the previous four quarters. Counsel neither submitted those reports nor an explanation for their omission. The petition should have been denied on this additional ground.

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.