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FILE: WAC 02 201 50034 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 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 remanded for further consideration.

The petitioner is an Internet marketing firm. It seeks to employ the beneficiary permanently in the United States as a marketing manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 25, 2001. The proffered salary as stated on the labor certification is \$42.24 per hour or \$87,859.20 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of Form 941, Employer's Quarterly Federal Tax Return, for the quarter ended March 31, 2002, and a copy of Form DE-6, Quarterly Wage and Withholding Report, for the quarter ended March 31, 2002. The tax return reflected an ordinary income of \$45,650 and net current assets of -\$1,757. The Form DE-6 reflected wages earned by the beneficiary for the first quarter of 2002 of \$44,500. The director considered this documentation insufficient and on September 26, 2002, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 25, 2001 and continuing to the present to be in the form of copies of annual reports, federal tax returns (with appropriate signature(s)), or audited financial statements.

In response, counsel submitted signed copies of the petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, and a copy of a compiled financial statement for the six months ended June 30, 2002. The 2000 tax return reflected an ordinary income of -\$39,966 and net current assets of -\$35,373. The compiled financial statement reflected an ordinary income of \$26,627 and net current assets of \$41,308.

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 January 31, 2003, denied the petition.

On appeal, the petitioner, through counsel, submits Forms DE-6 for the years 2000 through 2002, a letter from the president of the corporation, and a letter from Charles Reibel, CPA. The Forms DE-6 reflected salaries paid to the beneficiary of \$175,488 in 2000, \$144,000 in 2001, and \$170,000 in 2002. The letter from [REDACTED] CPA states:

The Corporation was first organized on September 25, 1997 and since that time has been in continuous operation. To the best of my knowledge the Corporation has never failed to pay wages on time. Also, to the best of my knowledge, the corporation has never filed for bankruptcy or failed to pay any of its debts or obligations as the same became due in the regular course of business.

* * *

The Decision of the Director is wrong. For the calendar year 2000 the cash assets of the corporation were a positive \$11,953. In addition the Corporation had other current assets of \$10,402. These figures are contained on Schedule L of the tax return. On line 1 of Schedule L the cash of the corporation at the start of the year is listed at \$16,576 and at the end of the year the cash was \$11,953. On line 6 of Schedule L is listed other current assets in the amount of \$10,402. The other current assets are explained in greater detail in Statement 3 of the federal income tax return. Both the cash and other current assets amounts are positive amounts not negative as stated in the decision of the Director. Thus at the end of year 2000 the corporation had cash and other current assets of \$22,355.

For year 2001 the Corporation had taxable income of \$45,927 after paying all salaries and wages. Once again the Corporation had positive cash. The statement in the decision that the Corporation had negative cash assets of -\$7,834 is, once again, simply wrong. The 2001 tax return Schedule L shows beginning cash of the Corporation at Line 1 as \$11,953. This directly corresponds to the ending cash for the previous year (please refer to paragraph 6 supra). At the end of the year the Corporation had cash of \$72,743 (also see Line 1). This is a gain in cash of more than \$60,000 during the year. In addition, the Corporation had other current assets (Schedule L line 6) of \$9,500 making the total of cash and current assets \$82,243. Thus the figures cited by the decision in this matter are wrong by more than \$90,000.

During calendar year 2001 the beneficiary was employed by the Corporation and was paid \$144,000 for his services. Copies of the State of California Quarterly Wage and Withholding Report are attached to the declaration of [REDACTED] and marked

“Exhibit B”. The quarterly payments to the beneficiary were \$37,500; \$36,000; \$36,000; and \$34,500. Wages and salaries paid are listed as deductions and subtracted from the total income of the Corporation which was \$1,736,126 for calendar year 2001.

For the year 2001 the Corporation not only was able to pay the offered wage but paid the beneficiary substantially more than the wage and still has a net operating profit of more than \$45,000. In addition the corporation had cash and current assets at the end of the year of more than [\$]82,000.

The letter from the president of the corporation states:

Webstar employed the beneficiary, [REDACTED] for all of calendar year 2000 and paid him total compensation of \$175,488 for regular and overtime services. True and correct copies of the Webstar Quarterly Wage and Withholding Reports submitted to the State of California Employment Development Department (“EDD”) for each of the four (4) quarters of 2000 are attached hereto, marked **Exhibit A** and incorporated herein by reference.

In 2001 Webstar paid the beneficiary \$144,000 including bonuses. True and correct copies of the Webstar Quarterly Wage and Withholding Reports submitted to the California EDD for each of the four (4) quarters of 2001 are attached hereto, marked **Exhibit B** and incorporated herein by reference.

For calendar year 2002 Webstar paid Mr. [REDACTED] \$170,000 including bonuses. True and correct copies of the Webstar Quarterly Wage and Withholding Reports submitted to the California EDD for each of the four (4) quarters of 2002 are attached hereto, marked **Exhibit C** and incorporated herein by reference.

Counsel reiterates the statements made by the president of the corporation and [REDACTED] CPA and asserts:

Although the petitioner had a net operating loss of <\$39,966> (the decision incorrectly states the amount as \$39,366) for the 2000 calendar year, the Decision failed to consider that the loss was more than covered by the petitioner’s retained earnings from the previous year.

The petitioner’s 2000 income tax return at Schedule L, line 24 shows retained earnings at the start of the year of \$60,013. At the end of the year this figure, although reduced, is still a positive \$8,447. In addition, the corporation, at the end of 2000, had cash and other current assets of more than \$22,000 (Schedule L, lines 1 and 6).

The Decision wrongly states that the corporation had negative (-) cash assets in both 2000 and 2001. As set forth in the declaration of the petitioner’s certified public accountant, [REDACTED] the corporation had positive cash and current assets in both years. The declaration at paragraph 6 states that the cash assets of the corporation in 2000 were a positive \$11,953 and total cash and other current assets were \$22,356. This directly refutes the analysis of the Decision.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the Forms DE-6 show that the beneficiary earned \$175,488 in 2000¹, \$144,000 in 2001 and \$170,000 in 2002. However, it is unclear what part of the wages earned were regular salaries and what part were bonuses. The regulation at 20 C.F.R. § 626.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis." The wages paid in 2001 were only \$87,212 for all the employees, less than the proffered wage for the beneficiary.

As an alternative 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. 623 F.Supp 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, 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. 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.

¹ The visa petition has a priority date of 2001. Thus, the financial information in 2000 is irrelevant to the petitioner establishing its continuing ability to pay the proffered wage beginning on the priority date.

Net current assets are the difference between the petitioner's current assets and current liabilities.² 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 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's net current assets during 2000 and 2001 were -\$1,757 and -\$35,373, respectively. The petitioner could not have paid the proffered wage in 2000 or 2001 from its net current assets.

Counsel suggests that the petitioner's retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer. Counsel cites no authority for this proposition. It is noted that the court in *Sitar v. Ashcroft*, (2003 WL 22203717 (D. Mass)) specifically rejected this line of reasoning, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet.

The 2000 tax return reflects an ordinary income of -\$39,966 and net current assets of -\$35,373. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of \$45,650 and net current assets of -\$1,757. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

The petitioner has provided evidence that it paid the beneficiary above the proffered wage in 2000 through 2002. However, that evidence includes bonuses and commissions, forms of compensation that are not clearly appropriate, according to the regulation at 20 C.F.R. § 626.20(c)(3). In addition, further examination of the corporation has revealed that the petitioner changed its name from Helmy Enterprises, Inc. to Webstar Marketing Group on May 14, 2001, just eleven days after the priority date was established. The labor certification reflects the name of Webstar Marketing Group. However, it is noted that the beneficiary was the president of Helmy Enterprises, Inc. Therefore, the record in this case lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether a pre-existing family or business relationship may have influenced the labor certification. The record is unclear as to who actually owns and manages the corporation and to the relationship of the beneficiary to the corporation. Whether a bona fide job opportunity is available to U.S. workers is questionable.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

through friendship.” See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court’s dismissal of the alien’s appeal from the Secretary of Labor’s denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien’s ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary is a past president of the petitioner, the facts of the instant case suggest that this too is the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the how the beneficiary was paid (a break-down of regular salary versus bonuses and commissions) in 2001 and 2002, the ownership of the corporation, the beneficiary’s relationship to the corporation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s January 31, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.