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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 02 2005
WAC-00-015-51811

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

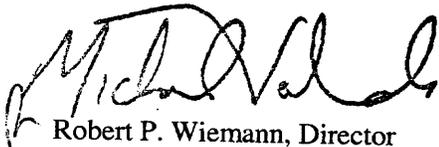
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 employment-based preference visa petition was initially approved by the Director, California Service Center. In adjudicating the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director determined that the visa petition had been approved in error. The director served the petitioner with notice of intent to revoke the approval of the petition. In a notice of revocation, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO initially issued a decision rejecting the appeal as untimely, but, upon further consideration, the AAO determined that the appeal was timely, and issued a decision reopening the appeal on its own motion. The appeal will now be dismissed on its merits.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a company exporting exports vitamins and pharmaceuticals. It seeks to employ the beneficiary permanently in the United States as a technical sales representative. As required by statute, a Form ETA 750 Application for Alien Employment Certification, approved by the Department of Labor, accompanied the petition.

In his revocation decision, 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 states that the evidence on the petitioner's total financial situation establishes the petitioner's ability to pay the proffered wage.

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 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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is August 6, 1997. The proffered wage as stated on the Form ETA 750 is \$3,500.00 per month, which amounts to \$42,000.00 annually. On the Form ETA 750B, signed by the beneficiary on July 29, 1996, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in July 1978, to have a gross annual income of \$666,878.00, to have a net annual income in excess of \$49,000.00, and to currently have one employee.

In support of the petition, the petitioner submitted a copy of a Form 7004 Application for Automatic Extension of Time To File Corporation Income Tax dated September 9, 1999 for its 1998 tax year; a partial copy of the petitioner's Form 1120-A U.S. Corporation Short-Form Income Tax Return for 1996; a partial copy of the petitioner's Form 100 California Corporation Franchise or Income Tax Return for 1996; a partial copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1997; a copy of the beneficiary's professional resume; a copy of a letter dated November 30, 1964 from [REDACTED] Ltd, of Lahore, Pakistan, stating the beneficiary's employment with that company as a laboratory assistant from February 26, 1964 until November 30, 1964; a copy of a letter dated December 31, but with the year missing from the copy, from [REDACTED] of Lahore, Pakistan, stating the beneficiary's employment with that company as a sales representative from December 1964 to December 1968; and a copy of a letter dated July 15, 1974 from [REDACTED] and [REDACTED] Ltd., Karachi, stating the beneficiary's employment with that company as a sales executive from January 1, 1969 to July 1, 1972.

The director initially approved the petition in a decision dated November 27, 2000.

On December 26, 2001, the beneficiary filed an I-485 Application to Register Permanent Resident or Adjust Status, with supporting documentation. In connection with the I-485 application, the director issued a request for evidence (RFE) dated February 5, 2002 requesting marriage and birth certificates relevant to the beneficiary's family, tax documents of the beneficiary (the applicant on the I-485 application), and tax documents of the petitioner. Concerning the petitioner's tax documents, the director specifically requested copies of the 1997, 1998, 1999 and 2000 tax returns. The director also requested photocopies of the ETA 750 labor certification and of the I-140 petition which had been submitted on the beneficiary's behalf.

In response to the RFE, counsel submitted a letter dated March 28, 2002 and the following documents: a letter from the petitioner's president dated March 19, 2002 concerning the beneficiary's offer of employment and employment status with the petitioner; copies of Form 1040 U.S. individual income tax joint returns for the beneficiary and his wife for 1997, 1998, and 1999; a copy of an unaudited financial statement of the petitioner dated June 30, 2000; a letter dated April 1, 2002 from a customer service representative of the Bank of America, Corona, CA, stating the balance in an account of the petitioner with that bank; a letter dated March 25, 2002 from the petitioner's president concerning a theft of a computer containing some of the petitioner's accounting information; a copy of a police report dated November 21, 2001 on a burglary of items from the petitioner's office; a complete copy of the petitioner's Form 1120-A U.S Corporation Short-Form Income Tax Return for 1996; a complete copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1997; a complete copy of the petitioner's Form 100 California Corporation Franchise or Income Tax Return for 1997; photocopies of the I-140 petition and of the ETA 750 application which had been submitted on the beneficiary's behalf; and copies of affidavits of marriage and of birth pertaining to the beneficiary's family.

A second response to the RFE was received by CIS on April 8, 2002 which consisted of a letter dated April 5, 2002 from counsel and the following documents: a copy of an unaudited financial statement of the petitioner dated June 30, 2001 with an accountant's compilation report dated April 4, 2002; copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998, 1999 and 2000; and copies of the petitioner's Form 100 California Franchise or Income Tax Returns for 1998, 1999 and 2000.

In adjudicating the beneficiary's I-485 application, the director determined that the I-140 petition had been approved in error. The director issued a notice of intent to revoke (ITR) dated April 9, 2002 finding that the petitioner's tax returns failed to establish the petitioner's ability to pay the proffered wage. The director also noted that the petitioner's tax returns for 1998, 1999 and 2000 were prepared on April 4, 2002, immediately after the RFE, and that no evidence was submitted that those returns had actually been filed with the Internal Revenue Service.

The ITR gave the petitioner thirty days to respond, and stated that any response must include evidence that the 1998, 1999 and 2000 tax returns were actually filed with the IRS. In the ITR the director also requested a duplicate of the entire I-140 petition and its supporting documentation and the petitioner's Form DE 6 quarterly wage statements for the most recent four quarters.

The petitioner's response to the ITR consisted of a letter dated April 12, 2002 from counsel; a letter dated April 12, 2002 from the petitioner's president; copies of six certified mail receipts postmarked April 8, 2002 showing three mailings to the Internal Revenue Service, notated 1998, 1999 and 2000, and three mailings to the California Franchise Tax Board notated 1998, 1999 and 2000; additional copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 1999 and 2000; additional copies of the petitioner's Form 100 California Franchise or Income Tax Returns for 1997, 1998, 1999 and 2000; an additional copy of an unaudited financial statement of the petitioner dated June 30, 2001 with an accountant's compilation report dated April 4, 2002; photocopies of the Form ETA 750 and of the I-140 petition previously submitted and of the supporting documents submitted initially with the I-140 petition; copies of product brochures of the petitioner; a copy of a printout from an apparent Internet Web page record of the California Bar dated April 12, 2002 stating that the petitioner's former counsel is not entitled to practice law in California; a copy of the petitioner's Form DE 88 Employment Development Department card dated March 31, 2002; a copy of the petitioner's Form DE 6 quarterly wage and withholding report for the first quarter of 2002; a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2002; a copy of the petitioner's Form 1096 Annual Summary and Transmittal of U.S. Information Returns for 2001; copies of Form 1099-MISC Miscellaneous Income statements of the petitioner for eight individuals for 2001; copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 1999 and 2001; copies of quarterly payroll records of the petitioner for the fourth quarter of 1999 and the second quarter of 2000; a copy of a Form W-2 Wage and Tax Statement of the petitioner for 1999 showing total compensation to eleven total employees; and a copy of a payroll summary of the petitioner for 1998.

In a decision dated April 17, 2002 the director determined that the petitioner's financial evidence failed to establish its ability to pay the proffered wage during the relevant period and revoked the petition.

The notice of appeal was signed by the petitioner's president and it was received by CIS on May 6, 2002. With the notice of appeal the petitioner submitted a letter dated May 3, 2002 from the petitioner's president and a form G-28 Notice of Entry of Appearance as Attorney or Representative dated May 3, 2002, signed by present counsel and by the petitioner's president.

In a decision dated February 3, 2003 the AAO rejected the appeal as untimely.¹ However, in a decision dated July 8, 2004 the AAO on its own motion reopened the appeal. In reopening the appeal, the AAO noted that the following time limits apply to the instant appeal. Fifteen days are allowed for an appeal of a notice of revocation, under 8 C.F.R. § 205.2(d). Three additional days are allowed where the decision was served by mail, under 8 C.F.R. § 103.5a(b). Finally, when the last day for filing an appeal falls on a Saturday, a Sunday or a legal holiday, the time for filing the appeal is extended to the next day which is not a Saturday, a Sunday or a legal holiday, under 8 C.F.R. § 1.1(h). In the instant case, the time period of eighteen days after the April 17, 2002 notice of revocation ended on May 5, 2002. In its earlier decision rejecting the appeal as untimely, the AAO had failed to note that May 5, 2002 was a Sunday. In its decision of July 8, 2004, the AAO noted that the notice of appeal had been received by CIS on Monday May 6, 2002, which was the appeal deadline as extended by 8 C.F.R. § 1.1(h). Therefore the notice of appeal was timely. The AAO therefore reopened the appeal.

In considering the merits of the appeal, the AAO will evaluate the revocation decision of the director based on the evidence in the record prior to the revocation decision. The letter dated May 3, 2002 from the petitioner's president which is submitted with the notice of appeal is substantially a restatement of the letter dated April 12, 2002 from the petitioner's president, which was submitted prior to the revocation decision. The only differences in the May 3, 2002 letter are minor changes reflecting the changed procedural posture of the petition after the revocation decision and the filing of notice of appeal. The May 3, 2002 letter will be considered for its analysis of the evidentiary materials submitted previously, but it contains no new evidentiary information.

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on July 29, 1996, the beneficiary did not claim to have worked for the petitioner. However, in the letter dated April 12, 2002 from the petitioner's president, the president states that the petitioner began employing the beneficiary in the first quarter of 2002. That statement is corroborated by a copy of the petitioner's Form DE 6 quarterly wage and withholding report for the first quarter of 2002. The Form DE 6 shows two employees of the petitioner receiving compensation that quarter, the petitioner's president, in the amount of \$4,500.00, and the beneficiary, in the amount of \$9,692.28. The amount paid the beneficiary during the first quarter of 2002 would be equivalent to an annual salary of \$38,769.12, an amount which is less than the proffered wage of \$42,000.00. The petitioner's president states that the beneficiary began working for the petitioner in January 2002 and that prior to 2002 the petitioner had no employees other than the president. The petitioner's president states that copies of the beneficiary's actual pay checks are being submitted for the record, but in fact the record contains no copies of any pay checks of the beneficiary or of any other individual. The evidence concerning the beneficiary's employment by the petitioner is insufficient to establish the petitioner's ability to pay the proffered wage for any year at issue in the instant petition.

As another 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 for a given year, 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.*

¹ The record of proceeding is not clear as to whether or not this decision was issued.

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 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. 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." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 25 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns in the record in the instant petition state that the petitioner's tax year runs from July 1 each year until June 30 of the following year. The petitioner's tax returns show the following amounts for taxable income: on Form 1120-A, line 25, \$7,036.00 for 1996 (ending June 30, 1997), and on Form 1120, line 28, \$49,365.00 for 1997 (ending June 30, 1998), \$6,424.00 for 1998 (ending June 30, 1999), \$15,447.00 for 1999 (ending June 30, 2000), and \$15,512.00 for 2000 (ending June 30, 2001). Only in the petitioner's 1997 tax year did its net income exceed the proffered wage. Therefore the petitioner's net income figures fail to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner urges that depreciation expenses be considered as additional financial resources of the petitioner which would raise the petitioner's effective net income figures. However, CIS does not add depreciation expenses back to a petitioner's taxable income figures when evaluating its net income. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The petitioner also asserts that pension contributions for the benefit of the owner, who is the sole employee, are discretionary expenses made mainly for the purpose of reducing the petitioner's taxable income, and that such contributions in fact represent net income of the petitioner. Similarly, the petitioner asserts that salary payments made to the owner varied from year to year, and were higher in years when the petitioner generated higher net income, also for the purpose of reducing the petitioner's taxable income. Notwithstanding these assertions, CIS does not distinguish among different classes of expenses claimed on a petitioner's tax returns and considers the proper measure of net income in a given year to be the petitioner's taxable income before any net operating loss deduction or special deductions, shown on Line 25 of the Form 1120-A, or on Line 28 of the Form 1120. *Id.*

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Form 1120, Schedule L, lines 1(d) through 6(d), or on Form 1120-A, Part III, lines 1(b) through 6(b). Its year-end current liabilities are shown on Form 1120, Schedule L, lines 16(d) through 18(d) or on Form 1120-A, part III, lines 13 and 14. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on Part III of the petitioner's Form 1120-A tax return for 1996 and on the Schedule L's attached to the petitioner's tax returns for 1997 through 2000 on yield the following amounts for net current

assets: \$282,888.00 for the end of the 1996 tax year (June 30, 1997), \$195,552.00 for the end of the 1997 tax year (June 30, 1998), \$87,237.00 for the end of the 1998 tax year (June 30, 1999), -\$24,644.00 for the end of the 1999 tax year (June 30, 2000), and \$27,821.00 for the end of the 2000 tax year (June 30, 2001). Although the year-end net current assets figures for 1996, 1997, and 1998 tax years are each higher than the proffered wage, the petitioner's figures for year-end net current assets for the 1999 and 2000 tax years, ending June 30, 2000 and June 30, 2001 respectively, are each lower than the proffered wage of \$42,000.00 per year. Therefore the petitioner's net current assets are insufficient to establish the petitioner's ability to pay the proffered wage during calendar years 2000 and 2001.

The petitioner's president asserts that since the shares of the petitioner are wholly owned by himself, the money received by the president from the petitioner as well as officer loans to the company should be considered as additional financial resources of the petitioner. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). A federal district court has held that the Service (now CIS) is not required to consider the financial resources of a person who has no legal obligation to pay the proffered wage. *Sitar v. Ashcroft*, 2003 WL 22203713 at *3 (D.Mass. Sept. 18, 2003).

The petitioner's other financial evidence in the record includes partial payroll records from 1999 and 2000, a single quarterly wage and withholding report from 2002, non-employee Forms 1099-MISC of the petitioner for 2001, and unaudited financial statements for the twelve-month periods ending June 30, 2000 and June 30, 2001. The petitioner's additional financial evidence does not cover all of the years at issue in the instant petition and does not remedy the evidentiary deficiencies in the petitioner's tax return evidence.

The payroll records indicate that in 1999 and 2000 the petitioner had eleven employees, information which appears to be inconsistent with statements by the petitioner's president in his April 12, 2002 letter that prior to the year 2002 the petitioner's only employee was the president. The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the apparent inconsistencies in the evidence noted above.

The unaudited financial statements that counsel submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

For the foregoing reasons, the petitioner's evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In the ITR, the director had incorrectly added depreciation expenses to the petitioner's net income figures when evaluating the petitioner's ability to pay the proffered wage. However, in his revocation decision, the director correctly declined to accept the petitioner's assertions that its non-cash expenditures should be considered as additional amounts of net income. In both the ITR and the notice of revocation the director failed to calculate the petitioner's net current assets for the years in question. However, as shown above, the petitioner's figures for net current assets are insufficient to establish its ability to pay the proffered wage for each of the years at issue in the

instant petition. Therefore that error in analysis by the director did not affect the director's decision to deny the petition.

The assertions of the petitioner on appeal have been considered and addressed above. Those assertions fail to overcome the decision of the director.

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.