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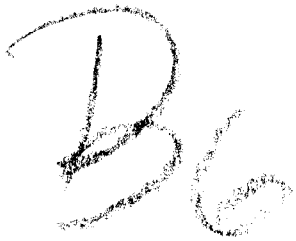

[redacted]

FILE: LIN 03 259 50302 Office: NEBRASKA SERVICE CENTER Date: SEP 22 2005

IN RE: Petitioner:
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:

[redacted]

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 immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a software development and consulting company. It seeks to employ the beneficiary as a programmer analyst. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 February 24, 2003. The proffered salary as stated on the labor certification is $50,000 per year.

With the petition, the petitioner, through counsel, submitted a copy of the front page of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and copies of its 2003 second quarter federal wage and tax filings. The tax return reflected an ordinary income of $10,921. Schedule L was not submitted, and, therefore, CIS could not determine the petitioner's net current assets. The director

considered this documentation insufficient and on March 1, 2004, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of February 24, 2003 and continuing to the present. The director specifically requested the petitioner's 2003 federal income tax returns. The director also requested a copy of the beneficiary's 2002 and/or 2003 Forms W-2, Wage and Tax Statements, if the petitioner employed the beneficiary in 2002 and 2003.

In response, counsel submitted copies of the petitioner's bank statements from February 2003 through February 2004, copies of the petitioner's 2003 quarterly federal wage and tax filings, a copy of a current pay voucher for the beneficiary, a copy of the front page of the petitioner's 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and a list of the petitioner's pending immigrant petitions with wages for each. The 2003 tax return reflected an ordinary income of $25,129. Schedule L was not provided, and, therefore, net current assets could not be determined for 2003. The petitioner's bank statements reflected balances from a low of $31,314.19 to a high of $153,287.87. Total wages paid by the petitioner in 2003 equaled $702,395. The beneficiary's current pay voucher reflected wages earned of $4,000 between February 16, 2004 and March 15, 2004. The petitioner reported having nine additional petitions pending with salaries totaling $508,000.

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 May 6, 2004, denied the petition.

On appeal, counsel submits previously submitted documentation and a letter from the American Institute of Certified Public Accountants that shows a compilation of the petitioner's 2002 and 2003 accounts receivable and the total gross revenue for the period ending April 30, 2004. Counsel further submits copies of the petitioner's bank statements for the period January 2004 through April 2004 showing balances ranging from a low of $132,732.55 to a high of $213,966.12. Accounts receivable for 2002 and 2003 were $84,276 and $126,790, respectively, and total gross revenue for the period ending April 30, 2004 was $705,650. Schedule L for 2002 and 2003 were, again, not submitted. Counsel states:

> The Service does not take into consideration the fact that the beneficiary was not employed at the time and the income reported therefore did not reflect the revenue that would have been generated if the beneficiary would have been employed at that time. The Service seems to think that employers hire people and pay them lump sum salaries without any expectation that the employee will be generating income. The 2003 tax return clearly indicates that the petitioner is an ongoing business and is capable of generating income to pay its employees once they are hired.
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> In [redacted] (AAU Aug. 4, 1992), "the INS' Administrative Appeals Unit (AAU) recently approved an employment preference immigrant visa petition that had been denied on the basis that the employer had not shown an ability to pay the wage offered the alien. **The AAU approved the petition after the petitioner submitted wage and tax**

documentation for the year in which the underlying labor certification application was filed."

The Service states that "the petitioner submitted a number of statements and deposits and filings. These documents contain insufficient detail to render a determination regarding the petitioner's ability to pay the offered wage and will not be discussed in detail." The petitioner in fact submitted a full record of all its bank statements for the relevant years and all tax filings as well which indicated that the petitioner has more than sufficient income to pay the offered wage every month had the employee been working for them. The Service's assertion that these records were insufficient in detail is false and contrary to what the service states in another paragraph of the denial.

The Service states that "counsel refers to the earning potential of the beneficiary and of the other aliens being petitioned for, indicating that this will strengthen the petitioner's financial status. While this statement is likely sound, it constitutes nothing more than speculation and cannot be accepted." We find this statement to be perplexing. The Service seems to not understand that all employment is somewhat speculative. There is no guarantee that any company will earn a profit but there is an understating of fact that employer[s] do not hire people who will not generate income for them. The courts have upheld this notion in many cases. In the Matter of Sonegawa, 12 I&N Dec. 612, the Courts states, "**we find that the petitioner's expectations of continued increase in business and increasing profits are reasonable expectations and that it has been established that she has the ability to pay the beneficiary the stipulated wages and meet the conditions of the certifications."**

No single factor should be used exclusively to determine whether a company has the ability to pay, including income tax returns. Instead, the Service should review the company's financials as a whole and consider it's continuing operation. This point is reiterated in a discussion of Sixth Preference Denials on Basis of Ability to Pay Wage, 66 IR 652. A case discussed is Masonry Masters, Inc. v Thornburgh, 875 F2d 898 (D.C. Cir. 1989). The Court writes, "The INS's approach is puzzling. The balance sheet is only a snapshot of the employer's assets at the given moment and, thus, speaks only obliquely to the employer's ability to generate cash for payment of wages at some later date. **The INS' interest in the income statement appears to assume that the worker will contribute nothing to income.** (Emphasis added) This seems wholly unrealistic; one would expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceed their wages. Assuming that the INS has some theory as to how to assess an employer's ability to pay a wage it would be helpful if it revealed what it was."

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 petitioner did not establish that it had employed the beneficiary in 2003 at a salary equal to or greater than the proffered wage. Evidence in the record does show that the beneficiary was paid $4,000 for the period February 16, 2004 through March 15, 2004.

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.

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(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 failed to provide Schedule L for the 2002 and 2003 income tax returns, and, therefore, it is impossible for the AAO to determine the petitioner's

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[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 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.

net current assets for those years. Counsel did provide a letter from Lakshman Dommaraju, a certified accountant with the American Institute of Certified Public Accountants, who states the compiled accounts receivables for 2002 and 2003 were $84,276 and $126,790, respectively. However, a compiled statement is 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. In addition, accounts receivable is considered to be a current asset, and as stated above, total assets must be balanced by the petitioner's liabilities. Therefore, CIS will not consider accounts receivable without considering all of the petitioner's current assets and all of the petitioner's current liabilities.

Counsel also contends that the petitioner's bank balances establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. Again, 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. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, 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 is considered when determining the petitioner's net current assets.

Counsel points to a non-precedent decision, *Matter of Quintero-Martinez,* A29-928-323 (AAU Aug. 4, 1992), in support of his contention that the petitioner established its ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also argues that as in *Masonry Masters, Inc. v Thornburgh,* 875 F2d 898 (D.C. Cir. 1989), the petitioner has further proven its ability to pay the proffered wage. Although part of *Masonry Masters, Inc. v. Thornburgh* mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a software engineer will significantly increase the petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Finally, counsel cites *Matter of Sonegawa,* 12 I&N Dec. 612, to support his argument that the petitioner has established its ability to pay the proffered wage. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was

a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2003 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

The 2002 tax return reflects an ordinary income of $10,921. The petitioner could not have paid the proffered wage from its ordinary income in 2002.

The 2003 tax return reflects an ordinary income of $25,129. The petitioner could not have paid the proffered wage from its ordinary income in 2003.

Furthermore, it is noted that the petitioner has nine additional petitions pending with wages totaling $508,000. Therefore, the petitioner must show that it has the ability to pay not only the beneficiary's wages but also the wages of the remaining nine potential employees from their respective priority dates and continuing until these employees obtain lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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.