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U.S. Citizenship
and Immigration
Services

B6

FILE: EAC 02 152 54113 Office: VERMONT SERVICE CENTER Date: SEP 30 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:

[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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accounting company. It seeks to employ the beneficiary permanently in the United States as an accounting assistant. 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 denied the petition accordingly.

On appeal, counsel states that the replacement of outside accounting services with an in-house accounting staff as well as appreciation charges noted on the petitioner's income tax returns would provide sufficient funds to pay the proffered wage. Counsel submits further documentation.

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.

Section 203(b)(3)(A)(ii) of 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 12, 1997. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$27.23 or a yearly salary of \$56,638.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in January 1993, to have four employees, and to have a net annual income of \$22,070. In support of the petition, the petitioner submitted a letter of support dated August 8, 1996 that stated the petitioner was a professional corporation doing business in accounting, tax and financial investment for corporate and individual clients. The petitioner stated it employed five fulltime employees and had a gross business income of \$450,000. The petitioner also submitted an

educational evaluation document written by Dr. [REDACTED] Dean, School of Business, Public Administration and Information Science, Long Island University, Brooklyn, New York, along with relevant educational documentation. Finally the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax return for 1997. This document indicated the petitioner had ordinary income of \$33,783 in 1997.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 22, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal tax returns for 1998, 1999, 2000, and 2001, with all schedules and attachments. The director also stated that the petitioner could submit annual reports for the same years accompanied by audited or reviewed financial statements. The director also stated that if the petitioner had employed the beneficiary in any of the years in question, it should submit copies of the beneficiary's Form W-2 Wage and Tax Statements. The director also noted that the educational evaluation submitted to the record was insufficient because it did not state what the beneficiary's education in India was equivalent to in the United States. The director requested that the petitioner submit a copy of the beneficiary's college transcript.

In response, counsel resubmitted Dr. [REDACTED] education evaluation form, with transcripts of coursework undertaken in science and accounting. It also submitted IRS Form 1120S, the petitioner's corporate tax returns for the years 1998 to 2000.

The director denied the petition on June 12, 2003. In his denial of the petition, the director stated that the petitioner had not established the ability to pay the proffered wage of \$56,638.40 based on its federal income tax returns. The director examined the petitioner's ordinary income in the tax years 1997 to 2000, as well as the petitioner's current assets and current liabilities for these years. Although the director determined that the petitioner had positive net current assets for all four years, he also determined that the net current assets were insufficient to pay the proffered wage. The director also noted that the petitioner had not submitted its federal tax return for 2001.

On appeal, counsel states that the petitioner's income tax records indicate that outside accounting services are used in the petitioner's business operations. Counsel further states that the petitioner wishes to eliminate these outside accounting services. Counsel states that the elimination of outside accounting services charges plus the petitioner's ordinary income would be sufficient to pay the proffered wage. Counsel submits a letter from the petitioner that states its income tax return for 1997 indicates a charge for outside accounting services for \$23,634. The petitioner also notes that the charges for outside accounting services were \$22,481 in 1998, \$28,463 in 2000, and \$61,573 in 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 claim that it employed and paid the beneficiary the full proffered wage in 1997 and onward.

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, CIS will next examine the net income figure 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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 1997 to 2001 show the following amounts of ordinary income: in 1997, \$33,783; in 1998, \$22,025; in 1999, \$22,070; in 2000, \$8,280; and in 2001, -\$3,704. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$56,638.40.

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 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 submitted the following information for tax years 1997 to 2001:

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.

	1997	1998	1999
Ordinary Income	\$ 33,783	\$ 22,025	\$ 22,070
Current Assets	\$ 12,725	\$ 35,998	\$ 27,563
Current Liabilities	\$ 0	\$ 0	\$ 0
Net current assets	\$ 12,725	\$ 35,998	\$ 27,563
	2000	2001	
Ordinary Income	\$ 8,280	\$ -3,704	
Current Assets	\$ 18,633	\$ Unknown ²	
Current Liabilities	\$ 0	\$ Unknown	
Net current assets	\$ 18,633	\$ Unknown	

These figures fail to establish the ability of the petitioner to pay the proffered wage based on its net current assets. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in any of the years in question. The petitioner's net current assets in the years 1997 to 2001 as illustrated above are not sufficient to pay the proffered wage of \$56,638.40. The petitioner has not, therefore, shown the ability to pay the proffered wage from 1997 and continuing to the present date, based on either its net income or net current assets.

On appeal, counsel asserts that the replacement of the petitioner's outside accounting services will provide sufficient funds to pay the proffered wage. The petitioner also notes the amount of monies paid to outside accounting services, as reflected in the petitioner's tax returns for the period of time in question. However, the record does not, however, name these outside accountants, state their wages, verify their employment status, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the outside accounting services involves the same duties as those set forth in the Form ETA 750. If these employees or contractors performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel also notes the depreciation charges on the petitioner's federal tax returns. With regard to the use of depreciation charges to establish the petitioner's ability to pay the proffered wage, the court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining

² The petitioner did not submit a Schedule L with its 2001 federal income tax return. Therefore, the AAO cannot determine the petitioner's net current assets for 2001.

petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage as of the 1997 priority date and to the present. Therefore the director's decision shall stand and the petition will be denied.

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.