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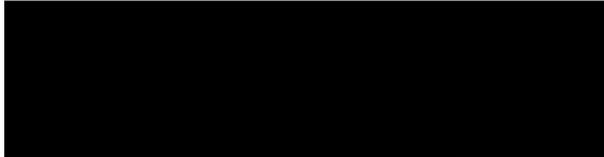
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE:

EAC 04 021 52419

Office: VERMONT SERVICE CENTER

Date: **JAN 10 2006**

IN RE:

Petitioner:
Beneficiary:



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 denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a information technology consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. 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 Citizenship and Immigration Services (CIS) did not review the entire record. Counsel submits a brief and additional evidence.

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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 6, 2001. The proffered wage as stated on the Form ETA 750 is \$79,830.40 annually.

In the petition, the petitioner claimed it was established in May of 1997, has three employees, and had a gross annual income of \$534,728 and a net annual income of \$44,042. With the petition, the petitioner submitted IRS Forms 1120, federal corporate income tax return, for the tax year 2001 and 2002; Forms W-2 Wage and Tax Statement for the beneficiary for tax years 2001 and 2002; a letter from the petitioner's accountant that examined the beneficiary's claimed salary and benefits; copies of the petitioner's investment account with [REDACTED] from May to December 2001; and copies of the petitioner's business checking account with Chase Bank from May to December 2001. The petitioner also submitted additional statements from both its [REDACTED] account and Chase account for various months in 2002 and 2003, as well as the beneficiary's earnings statements in 2003. The last earning statement submitted to the record is dated September 2003 and indicated the beneficiary had earned \$51,700 at that date. In addition, the petitioner submitted evidence with regard to the beneficiary's baccalaureate degree from India, and his work experience in India and in the United States. The petitioner also submitted the beneficiary's Federal income tax returns IRS Form 1040, for tax years 2001 and 2002.

With regard to the Forms W-2 submitted to the record, both the 2001 and 2002 document indicated the beneficiary earned \$60,000. [REDACTED] the petitioner's accountant, stated in his letter dated October 21, 2003, that the beneficiary was paid a salary of \$60,000 and a bonus of \$5,000 for the petitioner's fiscal year of May 1, 2001 to April 30, 2002. The accountant also stated that the petitioner had established a paired Keogh plan consisting of a Money Purchase Plan (10% mandatory contribution) and a Profit Sharing Plan (0 to 15 per cent contribution). In the fiscal year ending April 30, 2002, the accountant described the contribution to the money purchase plan and the profit sharing plan as \$6,500 and \$9,750 respectively. The accountant also stated that in the fiscal year ending April 30, 2003, the beneficiary received a salary of \$60,000 and a bonus of \$5,000. [REDACTED] also stated that the petitioner contributed the maximum permitted \$9,750 into the profit sharing plan and the required \$6,500 towards the money purchase plan. The accountant stated that the petitioner had net profit of \$19,706 as of April 2002, and net profits of \$44,042 for the fiscal year ended April 30, 2003.

The petitioner's federal income tax returns indicate the same net profit figures stated by the petitioner's accountant. With regard to the investments and cash available through the petitioner's [REDACTED] accounts, the documents indicate that as of the September 2001 priority date, the petitioner had stock and mutual funds investments worth \$14,976.82.

On August 4, 2004, the director denied the petition. In his decision the director stated that the petitioner's 2001 federal tax return indicated a net profit of \$19,706, and the accompanying Schedule L for the 2001 tax return indicated the petitioner had \$2,789 in current assets and \$8,142 in current liabilities. The director then stated that since the petitioner had a total net profit of \$19,706 available in 2001, and its current assets did not exceed its current liability, it did not appear that the petitioner had the ability to pay the proffered wage. The director noted that the petitioner had submitted bank statements to the record form 2001. The director stated that the ending balances of these statements were routinely less than the proffered wage, and did not have ending balances that increased and remained above the proffered for a sustained period of time.

On appeal, counsel states that CIS did not examine the entire record. Counsel asserts that the director only looked at the employer's tax return indicate a net profit of \$19,706 without recognizing the fact that the net profit was produced after paying wages of \$60,000 to the beneficiary. Counsel states that since the petitioner paid the beneficiary \$60,000 in 2001, it only needs to demonstrate the ability to pay the balance, namely \$19,830.40.

Counsel then examines the petitioner's bank statements from [REDACTED] and from the [REDACTED] statements and lists the total cash available each month as documented by the bank statements. Counsel also asserts that the director disregarded the accountant's letter submitted by the petitioner. Counsel states that the payments of the beneficiary's \$5,000 bonus, payment of \$6,500 to a money purchase plan and \$9,750 toward a profit sharing plan were all voluntary, discretionary and not required. Counsel asserts that these same cash payments could have been applied to the beneficiary's salary, and that the payments indicate that the beneficiary receive a salary well in excess of \$79,830.40 for the fiscal year 2001. Counsel submits a second letter form [REDACTED] that examines the salary provided to the beneficiary on both a fiscal year and a calendar year basis. In his letter the accountant examines the wages paid in either the fiscal year or calendar year period, the prorated annual wages, the petitioner's net income after wages, and the petitioner's total ability to pay the proffered wage. The accountant also examined the impact on the petitioner's net profit for 2001 if the beneficiary had not been employed in 2001 and had not received his salary, bonus, profit sharing contributions and money

purchase plan contributions. Finally the accountant examined the impact of the petitioner's depreciation deductions on the petitioner's net profit if the petitioner had not employed the beneficiary and if the depreciation expenses were added back to the petitioner's net profit.

Counsel submits the beneficiary's earning statements from February 2001¹ to April 30, 2002. These statements all indicate the monthly salary of \$5,000. In addition, counsel submits the beneficiary's investment report for the Keogh money purchase and profit sharing accounts for April 2002 to May 2002. Another document identified as Fidelity Investments indicates that the beneficiary has had checks for \$16,250 deposited to two accounts as a Keogh contribution. Counsel also resubmits statements from the [REDACTED] accounts, and submits more recent statements with regard to these same accounts.

Counsel in the initial petition submitted the petitioner's business checking accounts with Chase Manhattan for various periods of 2001 and 2002. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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. 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement for September 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return.

With regard to [REDACTED] comments with regard to adding back depreciation to the petitioner's net profit, 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 court in *Chi-Feng Chang* further 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 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.

With regard to utilizing a bonus in determining the beneficiary's wages, although both counsel and the petitioner's accountant assert that the beneficiary received a \$5,000 bonus during both 2001 and 2002 that raised his salary to \$65,000; however, the record does not reflect such a salary in 2001. The earnings statements submitted by counsel on appeal indicate that a \$5,000 bonus was paid to the beneficiary in December 2001, which brought his salary up to \$60,000 for the year. Thus it appears that the beneficiary earned \$55,000 in wages and

¹ The petitioner's accountant and counsel both assert that the beneficiary began working for the petitioner in February 2001.

\$5,000 in a bonus in 2001. With regard to the beneficiary's claimed salary of \$65,000 in 2002, the record does not contain any further information beyond the assertions of counsel and the petitioner's accountant. The assertions of counsel, and by extension, the petitioner's accountant, do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With reference to the petitioner's contributions to the beneficiary's KEOGH Money Purchase Plan, it is not clear as to whether the first contribution is voluntary and could be used to pay the difference between the beneficiary's actual wages and the proffered wage as of the priority date, as the accountant in his letter refers to this contribution as mandatory.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from February 2001 to the present, and the petitioner's employment records reflect his employment as of February 2001. The salary paid to the beneficiary in both 2001 and 2002 is \$60,000, which is less than the proffered wage of \$79,830. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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 income² 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 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, now CIS, should have considered income before expenses were paid rather than net income.

Based on line 28 of the petitioner's federal income tax returns, the petitioner's net profit for 2001 was \$19,706 and for 2002, was \$44,042. The petitioner's net profit in 2002 is sufficient to pay the difference between the beneficiary's actual wages of \$60,000 and the proffered wage of \$79,830.40, namely \$19,830.40. Thus the petitioner has established that it has the ability to pay the proffered wage in 2002. However, the petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's taxable income in 2001, \$19,706 is not sufficient

² Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

to pay the difference between the beneficiary's actual wages and the proffered wage. The petitioner lacks just \$124.40 in net income to pay this difference.

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. In addition, 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.³ 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 tax returns reflect the following information for the following years:

	2001
Taxable income	\$ 19,706
Current Assets	\$ 2,789
Current Liabilities	\$ 7,698
Net current assets	\$ -4,909

The petitioner has demonstrated that it paid wages of \$60,000 to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$19,706, which is only \$124.40 less than the difference between the beneficiary's actual wages and the proffered wage. The petitioner also has negative net current assets of \$4,909 in 2001 and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's actual wages and the proffered wage, namely \$19,830.40 from its net current assets.

With regard to additional financial assets that the petitioner may use to pay the difference remaining between the beneficiary's actual wages and the petitioner's net income, namely, \$124.40, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage in 2001. As previously stated, the petitioner has established that it has the ability to pay the proffered wage in 2002, and only falls \$124 short in 2001, a sum that is approximately one tenth of one percent of the proffered wage. Given the size and number of investment assets and employee

³ 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.

benefit plans, the AAO will conclude that the petitioner could have allocated an extra \$124 in 2001 if the need had arisen. Therefore the petitioner has established the ability to pay the proffered wage as of the 2001 priority date and onward.

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 met that burden.

ORDER: The appeal is sustained.