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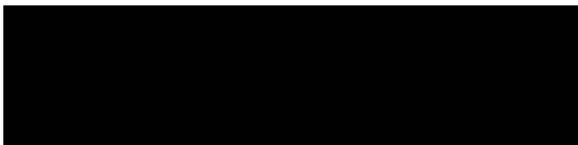
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 16 2006  
EAC 03 173 54538

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as an applications software engineer. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 3, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. 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 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 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$85,000 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter*

appeal includes copies of the petitioner's 2001 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, a copy of the petitioner's 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of the beneficiary's 2003 and 2004 Forms W-2, Wage and Tax Statements, a copy of a payroll record for the beneficiary showing earnings of \$80,340 as of November 30, 2004, and copies of the petitioner's 2001 through 2003 bank statements from four different banks, First Union, Fleet, Dime, and Wachovia<sup>2</sup>. Other relevant evidence in the record includes copies of the beneficiary's 2001 and 2002 Forms W-2 and a copy of the petitioner's payroll record for the beneficiary for the period February 1, 2003 through February 25, 2003 showing earnings of \$6,864 for that period. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net income of -\$1,834, \$3,020, and \$50,052, respectively. The petitioner's 2001 through 2003 Forms 1120 also reflect net current assets of \$6,639, -\$6,769, and \$44,150, respectively.

The petitioner's 2004 Form 1120S reflects an ordinary income or net income of \$52,294 and net current assets of \$100,428.

The beneficiary's 2001 through 2004 Forms W-2 issued by the petitioner reflect wages earned of \$71,840, \$33,070, \$66,264, and \$87,360, respectively.

The petitioner's 2001 through 2003 bank statements reflect balances ranging from a low of \$343.07 to a high of \$46,020.26.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$85,000 based on its bank statements, gross revenue, and amount of salaries paid. Counsel further claims that its low profits in 2001 were the result of the events of September 11 and the sluggish economy. Counsel cites two non-precedent decisions and *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his claims.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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*of Soriano*, 19 I&N Dec. 764 (BIA 1988).

It is noted that the banks, First Union and Fleet have the petitioner's address as [REDACTED]

[REDACTED] Dime has the petitioner's address as [REDACTED]

[REDACTED], and Wachovia has the petitioner's address as [REDACTED] and [REDACTED]

[REDACTED] While there is no explanation as to why the banks have three different addresses, all three appear to belong to the petitioner

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 April 27, 2001, the beneficiary claims to have been employed by the petitioner from January 2000 until the present. In support of petition, the petitioner submitted copies of the beneficiary's 2001 through 2004 Forms W-2 which reflect wages earned of \$71,840 or \$13,160 less than the proffered wage of \$85,000 in 2001, \$33,070 or \$51,930 less than the proffered wage of \$85,000 in 2002, \$66,264 or \$18,736 less than the proffered wage of \$85,000 in 2003, and \$87,360 or \$2,360 more than the proffered wage of \$85,000 in 2004. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.<sup>3</sup> 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

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

current assets. The petitioner's net current assets in 2001 through 2004 were \$6,639, -\$6,769, \$44,150, and \$100,428, respectively. The petitioner could not have paid the difference between the actual wages paid to the beneficiary and the proffered wage in 2001 and 2002 from its net current assets.

Counsel contends that the petitioner has established its ability to pay the proffered wage based on its gross revenues and the amount of salaries paid. However, CIS will not consider the petitioner's gross revenues without also considering its expenses. As explained above, when determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's taxable income before net operating loss deduction and special deductions, ordinary income, or net income. CIS will next examine the petitioner's net current assets to determine the petitioner's ability to pay the proffered wage. In this case, the petitioner has established its ability to pay the proffered wage only in the years 2003 and 2004.

Counsel urges that the petitioner's bank statements be considered when determining its ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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 statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel asserts that CIS should consider the fact that the petitioner is a young company and that its negative net income in 2001 was due to the events of September 11 and to the sluggish economy. However, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. Furthermore, the assertions of counsel 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, while CIS understands that the petitioner is a young company, CIS may not ignore the fact that the petitioner did not have the ability to pay the proffered wage of \$85,000 at the time of the priority date of April 30, 2001. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided four tax returns. Only two of these tax returns (2003 and 2004) demonstrate that the petitioner has the ability to pay the proffered wage. However, they are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

It is noted that the petitioner has filed other Immigrant Petitions for Alien Workers (Forms I-140) for two more workers, using the same priority date, reflected on a Form ETA 750 (already approved). Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. If the wages for the other beneficiaries were the same as the current beneficiary ( $\$85,000 \times 3 = \$255,000$ ), then the petitioner has only established its ability to pay the proffered wage in 2004, as the petitioner actually paid the proffered wage to the beneficiary that year.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above and the assertions of counsel on appeal, the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed