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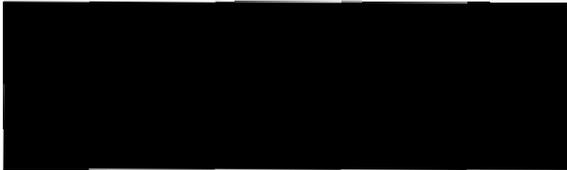
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 03 108 50726

Office: VERMONT SERVICE CENTER

Date: MAY 25 2006

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:



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

The petitioner, [REDACTED] is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found 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, the petitioner submits additional evidence and asserts that it has the financial ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who 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 priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on May 23, 2001. The proffered wage as stated on Form ETA 750 is \$65,605 per year. On Form ETA 750B, signed by the beneficiary on May 18, 2001, the beneficiary claims to have worked for the petitioner from November 2000 to the present. He also claims to have worked in India for a company with the same name from December 1998 until October 2000.

On Part 5 of the petition, filed on February 18, 2003, the petitioner claims to have been established in 1997, and to currently employ forty workers. Although the name of the petitioner is the same on the Immigrant Petition for Alien Worker (I-140) as the petitioner's name on the ETA 750, the address is different.

In support of its ability to pay the proffered salary, the petitioner submitted copies of Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. The filing company given on these tax returns bears the same name and address as those given for petitioner listed on the ETA 750, however, the identifying Internal Revenue Service (IRS) employer identification number of the I-140 petitioner does not match the number given on the tax returns, thus raising the question whether the tax returns are those of the I-140 petitioner. The record offers no clarification. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As indicated on the page 1 of the returns, the information presented is based on a fiscal year running from May 1st until April 30th of the following year. Thus, the 2000 tax return covers the period from May 1, 2000 until April 30, 2001 and the 2001 tax return presents data for the subsequent fiscal year ending April 30, 2002. The 2001 tax return encompasses the priority date of May 23, 2001, and therefore will be considered more relevant than the earlier return. The returns contain the following information relevant to taxable income before the net operating loss (NOL) deduction¹ and net current assets.

	2000	2001
Taxable income before NOL deduction	- \$ 38,729	\$ 34,184
Current Assets (Schedule L)	\$577,593	\$587,197
Current Liabilities (Schedule L)	\$300,545	\$968,492
Net Current Assets	\$277,048	- \$381,295

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible available resource to pay a certified wage.² Besides net income, CIS will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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 director denied the petition on July 16, 2004, noting that the petitioner could not meet the proffered wage of \$65,605 out of its 2001 net income of \$34,184 and that its 2001 current liabilities exceeded its current assets. The director also noted that as seven other I-140s had been filed, the petitioner should establish its ability to pay all of these prospective employees. The director also questioned the amount of time that the petitioner claimed that the beneficiary had worked for the petitioner (since 1998) compared to the date when it filed a Petition for Nonimmigrant Worker (I-129) (2000). Finally, the director also questioned the petitioner's intent to employ the beneficiary permanently as a different employer had also filed an I-129 on his behalf in 2004.

On appeal, counsel points out that the beneficiary's employment with the petitioner from 1998 to 2000 actually occurred in India with its sister company, not with the petitioner. Counsel also notes that the beneficiary never worked for the other employer that submitted an I-129 and that the beneficiary has continued to work for the petitioner as noted on pay statements submitted on appeal. Copies of fourteen 2004 payroll statements accompany the appeal. They cover a period from January 16th to July 30, 2004 and indicate that he had been paid a total of \$40,833.38. A copy of a letter, dated July 15, 2003, from Softalia-India reflects that the beneficiary also worked for it from October 2002 until July 2003. Counsel asserts on appeal that except for this period when the

¹ For the purpose of this review, taxable income before the net operating loss deduction will be treated as net income.

² 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 as accounts payable, short-term payables, and accrued expenses (such as taxes and salaries). *Id.* at 118.

beneficiary worked on a project in India for Softalia-India, he has been continuously employed by the petitioner in the United States since November 2000, and that he is paid a current salary of \$70,000, which is well above the proffered salary.

In support of the petitioner's ability to pay the proffered wage, counsel offers copies of various purchase orders and agreements as evidence of the petitioner's viability and ability to pay the proffered wage. It is noted that some of the documents reference "Softalia Ltd." and some refer to "Softalia Inc." as the vendor. Counsel further maintains that the petitioner has been paying the beneficiary the prevailing wage since hiring him in November 2000. In support of this contention, counsel provides copies of the beneficiary's Wage and Tax Statements (W-2s) issued by the petitioner. They show the following wages paid to the beneficiary:

	2001	2002	2003
Wages	\$57,612.52	\$42,175	\$32,083.37

Counsel also contends that the director's reference to the ability of the petitioner to pay all beneficiaries is shown by the approval of these petitions based on the same grounds as is maintained here; that the petitioner's ability to pay the proffered wage is established by the actual payment of the certified salary during the entire labor certification / I-140 process. In support of this assertion, counsel submits copies of five notices of approval of I-140(s), issued by the director, with all showing 2001 priority dates. The notices indicate that three petitions were approved in 2001 and two were approved in 2003. Counsel also provides copies of W-2s for three of these beneficiaries. Counsel cites a 1992 AAO case (*Matter of Quintero-Martinez*) in support of the proposition that the ability to pay a proffered wage is shown when the petitioner has been paying the proffered wage all along.

Insofar as identifying a petitioner's ability to pay a certified wage through the actual payment of such wage during a given period, counsel is correct. The evidence here, however, does not clearly establish that the petitioner has actually paid the beneficiary the proffered wage throughout the pertinent period. As referenced above, 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 may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay the certified wage during a given period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during a particular period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

As documented by the beneficiary's 2001 W-2, his wages of \$57,612.52 were \$7,992.48 less than the proffered wage. Nor did the petitioner pay the beneficiary the full proffered wage in 2002 or 2003 as indicated above. Further, the evidence shows that the petitioner did not employ the beneficiary for the full 2002 or 2003 year(s).

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 also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As mentioned above, CIS will also review a petitioner's net current assets as an alternative method of determining a petitioner's ability to pay a proffered salary as set forth on Schedule L of a corporate income tax return. 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 wages paid to other employees reached a specified level or exceeded the proffered wage is not sufficient. 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.

In this case, because of the use of a fiscal year running from May 1st until April 30th of the following year, in order to more fairly determine whether any shortfall between the actual wages paid and the proffered wage could be covered by either the petitioner's net income or net current assets as shown on the corresponding tax return, the beneficiary's wages between these dates should be reviewed. As the petitioner's monthly payroll records for the beneficiary were not provided, the beneficiary's W-2s for 2001 and 2002 must be examined in order to compare his earnings to the figures reported on the petitioner's 2001 tax return. If reviewed as a monthly average, his earnings between May and December 2001 were approximately \$38,408.32 (8 x \$4,801.04). Because the evidence indicates that his 2002 W-2 reflects about nine months of employment with the petitioner, his earnings between January and May 1, 2002 were approximately \$18,744.44 (4 x \$4,686.11). Considered together, the petitioner paid the beneficiary approximately \$57,152.76 between May 1, 2001 and April 30, 2002, or about \$8,452.24 less than the proffered wage during this period.

As the petitioner's net income of \$34,184 could cover the \$8,452.24 difference between the estimated actual wages paid to the beneficiary during the fiscal year between May 1, 2001 and April 30, 2002, the petitioner's ability to pay the proffered wage of \$65,605 would ordinarily be demonstrated for this beneficiary for that period. Similar comparisons between the beneficiary's remaining 2002 and 2003 wages cannot be made here, because the petitioner's tax returns or audited financial statements for these periods have not been submitted to the record. Although the beneficiary's wages for 2004 seem to indicate that he is receiving the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay a certified wage beginning at the priority date.

As mentioned above, this petitioner filed other I-140s on behalf of multiple beneficiaries. In such a case, it must show that it has had sufficient financial ability to pay all the proffered wages beginning at the individual priority dates. Although counsel maintains that approvals for various beneficiaries with similar priority dates were based on the payment of actual wages, the evidence submitted here does not support such a theory or permit the AAO to determine what rationale and specific documentation supported these other petitions. Some of the petitions had varying approval dates and may have been reviewed with different supporting documentation, including actual payment of the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that petitioner establish a *continuing* ability to pay the proffered

wage. In view of the foregoing, the petition will be denied based on the petitioner's failure to demonstrate its continuing ability to pay the proffered salary to the beneficiary throughout the relevant period with emphasis on the months subsequent to April 2002 through 2003, as well as to other beneficiaries it may have sponsored with the same or similar priority date.

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.