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ADMINISTRATIVE APPEALS OFFICE
WASHINGTON, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a designer, manufacturer, and marketer of integrated circuits. It seeks to employ the beneficiary permanently in the United States as a technical writer. 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, the counsel submits a brief and additional evidence.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for granting preference classification to qualified immigrants who are sought by a United States employer, will substantially benefit the national economy, cultural or educational interests, or welfare of the United States, and who are members of the professions holding advanced degrees or who possess exceptional ability in the sciences, arts, or business

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either 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 the Service.

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 September 21, 2001. The proffered wage as stated on the Form ETA 750 is $34.97 per hour, which equals $72,737.60 per year.

The petition states that the petitioner has 60 employees.[1] With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner

[1] As was stated above, a petitioner who employs 100 or more people need not necessarily provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage. Although the petitioner is far short of this threshold number, this office notes that it has a considerable number of employees.

declares taxes pursuant to a fiscal year beginning on May 1 of the nominal year of the tax return and ending on April 30 of the following year. The return also shows that during the fiscal year from May 1, 2000 to April 30, 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of $25,360,095. This office notes, however, that the priority date is September 21, 2001. As such, indices of the petitioner's financial condition during that fiscal year are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On February 24, 2003, the California Service Center issued a Request for Evidence in this matter. The Service Center incorrectly stated that the petitioner had provided its 2001 tax returns. The Service Center stated that the evidence submitted did not appear to demonstrate the petitioner's ability to pay the proffered wage. The Service Center also specifically requested copies of the 2001 and 2002 Form W-2 wage and tax statements showing the amounts the petitioner paid to the beneficiary during those years. Finally, the Service Center requested that the petitioner provide "the beneficiary's last three earnings statements that indicate that the petitioner is currently being paid the proffered wage."

In response, counsel submitted a letter, dated March 17, 2003. In that letter, counsel stated that, "As of January 21, 2003, the [petitioner's] net revenue was $11,207,000 and [its] net income was $314,000 with cash equivalents of $21,918,000." In support of those assertions, counsel submitted a printout of content from the petitioner's Internet website. That content includes the petitioner's unaudited condensed consolidated balance sheets.

Counsel also asserted that the petitioner has employed the beneficiary since March of 2001 at a salary of $50,000 per year. In support of that assertion, counsel submitted the petitioner's 2001 and 2002 Form W-2 Wage and Tax Statements. The 2001 W-2 form states that the petitioner paid the beneficiary $40,777.86 during that year. The 2002 W-2 form states that the petitioner paid the beneficiary $53,926.38.

In the decision on this matter, the director noted that the wages paid to the beneficiary during 2001 and 2002 were less than the proffered wage. The director incorrectly stated that the petitioner had been instructed to provide a copy of its 2001 income tax return but had failed to do so. In the absence of that requested tax return and the petitioner's 2002 tax return, the director stated that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director denied the petition on May 29, 2003.

On appeal, counsel submits a brief. In the brief, counsel questioned whether the director considered the evidence provided, and asserted that it demonstrates the petitioner's ability to pay the proffered wage. Counsel also stated that demanding the petitioner's 2002 tax return when it was not yet available was inappropriate. Counsel cited the language of 8 C.F.R. § 204.5(g)(2) for the proposition that Federal tax returns are not the only evidence that may be considered. Counsel also observed that *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986), which was cited in the decision of denial, states only that CIS, then the INS, "could" rely on a petitioner's tax returns as evidence of its ability to pay the proffered wage, rather than that it "should" do so.

With the brief, counsel submits (1) a copy of the petitioner's Form 10-K filed with the Securities and Exchange Commission for the fiscal year ending April 28, 2002, (2) more web content, including the

petitioner's unaudited condensed consolidated balance sheets as of April 30, 2002 and April 30, 2003, (3) the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, (4) a copy of what purports to be a non-precedent decision of this office, (5) a copy of the petitioner's consolidated balance sheets for the fiscal years ending April 30, 2002 and April 30, 2003, (6) a copy of a May 9, 2000 memorandum from the INS, now CIS, Executive Associate Commissioner of the Office of Field Operations stating that the beneficiary of an employment-based visa need not work for the sponsoring employer, the petitioner, before receiving permanent resident status.

The petitioner's 2001 return shows that during the fiscal year from May 1, 2001 to April 30, 2002, the petitioner declared a loss of $5,719,754 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that the petitioner ended that fiscal year with current assets of $48,085,914 and current liabilities of $12,038,185, which yields net current assets of $36,050,729.

Contrary to the director's assertion in the decision of denial, as well as the implication of counsel on appeal, the Request for Evidence did not request that the petitioner provide its 2001 and 2002 tax returns. It erroneously stated that the petitioner had provided its 2001 return. It did not mention the 2002 return. No issue of failure to provide requested evidence exists in this case. The sole issue is whether the evidence provided shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 submitted W-2 forms showing amounts it paid the beneficiary during the 2001 and 2002. During 2001 the beneficiary received $40,777.86. During 2002 W-2 she received $53,926.38. The priority date is September 21, 2001. The proffered wage is $72,737.60 per year. The petitioner has paid the beneficiary a large portion of the proffered wage since hiring her, but not all. This office must consider whether the petitioner is able to pay her the remainder, which was $31,959.74 during 2001 and $18,811.22 during 2002.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As was noted above, CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, (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). In *K.C.P. Food Co., Inc. v. Sava,* the court held that CIS, then the Immigration and Naturalization Service, 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, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh,* 719 F. Supp. at 537. *See also Elatos Restaurant Corp. v. Sava,* 632 F. Supp. at 1054.

Comparison of the beneficiary's W-2 forms with the petitioner's tax returns is complicated because the petitioner reports taxes pursuant to a fiscal year, whereas W-2 forms report payments based on the calendar year. However, during its 2001 fiscal year[2] the petitioner declared a loss. The petitioner was unable, therefore, to pay any portion of the proffered wage out of its income during that fiscal year.

If the petitioner's net income during a given year period, if any, added to the wages paid to the beneficiary during that year, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage. In this case, the petitioner ended its 2001 fiscal year with net current assets of over $36 million. The petitioner was manifestly able to pay the $31,959.74 balance of the proffered wage out of that amount.

The 2002 tax return was never requested. Further, counsel states that, as of the date of the Request for Evidence, it was not yet available.[3] For both of those reasons, the petitioner may not fairly be penalized for failing to provide it.

The petitioner has submitted evidence sufficient to demonstrate that it has had the continuing ability to pay the proffered wage beginning on the priority date. In view of that finding, this office is not obliged to address counsel's additional evidence and points on appeal. 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. The petition is approved.

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[2] This office notes that the 2001 fiscal year included the priority date.

[3] Because the request for evidence was issued on February 24, 2003 and the petitioner's 2002 fiscal year ended on April 20, 2003, this office takes notice of the fact that counsel's assertion is obviously correct.