U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 03 2004
SRC 01 273 54280

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 § 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and the denial was affirmed on a motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal from the motion to reopen and reconsider will be sustained, and the petition will be approved.

The petitioner is a software development, implementation, and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. 204.5(d). The petition's priority date in this instance is December 29, 2000. The beneficiary's salary as stated on the labor certification is $70,000 per year.

Counsel initially submitted the 1997 Form 1120, U.S. Corporation Income Tax Return, of Soft Pros, Inc. (old Soft Pros), with an employer identification number of 58-2078036 (EIN 036). In addition, the 1998 Form 1120 of Capricorn Systems, Inc. (old Capricorn) reflected EIN 59-3067912 (EIN 912). Also, a certified public accounting firm (KPMG) offered, for the calendar year ending December 31, 1997, audited, combined financial statements of, presumably, old Capricorn and old Soft Pros (1997 audited, combined financial statement). In the final analysis, these documents before the priority date are inconsequential.

The Georgia Superior Court's Consent Order, filed January 11, 2000 (the Georgia decree), divided and dissolved two (2) entities and created two (2) new entities. One was the petitioner, spelled as Softpros, Inc. in the ETA 750, though rendered as SOFTPROS, INC. in the Immigrant Petition for Alien Worker (I-140).

The director determined that there was insufficient evidence of the petitioner's ability to pay the proffered wage. In a notice of request for information (RFE), dated March 19, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specified the petitioner's federal income tax returns, audited financial statements, or annual reports from the priority date "until the most recent date for which the petitioner can reasonably be expected to have documents." The RFE, moreover, exacted documentation and an

explanation of the relationship between [redacted]. The AAO understands that the petitioner is Softpros, Inc., further described below.

In response to concerns about the petitioner's ability to pay the proffered wage, the petitioner offered an audited, combined financial statement for two (2) other entities, Georgia [redacted] and SPI, Inc during a period ending December 31, 1999 (1999 audited, combined financial statement). The 1999 financial statement claimed to be prepared according to generally accepted auditing standards, but it had no profit and loss statement or note about its absence. In any event, the 1999 audited, combined financial statement established no resources available to pay the proffered wage as related to the priority date.

The 2000 Form 1120 for Softpros, Inc. did not appear in the response to the RFE, though the petitioner's senior business analyst, [redacted] (SKD), asserted its transmittal. SKD offered the Wage and Tax Register, prepared by ADP Southeast M/A, for the quarter ending December 31, 2001 (ADP2001Q4), but did not establish the application of the ADP2001Q4 to the priority date. The ADP2001Q4 does not claim to be a filing for an employer's quarterly wage report and appeared to be merely an internal document that might, sometime, be used that way. It reflects the EIN 58-2518052 (EIN 052) for Softpros, Inc. It listed wages of the beneficiary as $64,930.66, less than the proffered wage.

Without the federal tax returns, audited financial statements, or annual reports for 2000 and 2001, the director concluded that Citizenship and Immigration Services (CIS), formerly the Service or INS, could not determine the petitioner's ability to pay the proffered wage and denied the petition in a decision dated May 6, 2002.

On June 7, 2002, counsel filed a motion to reopen and reconsider (MTR). The petitioner and counsel, again, averred that they were submitting the 2000 Form 1120 of SoftPros, Inc., but there was none. The record of a federal tax return, as constituted on the MTR, contained merely one (1) page of detail of line 26 of page 1 of a 2000 Form 1120 and one (1) page with Parts V and VI only of a Form 4562 (2000 Form 1120 fragments). The effect of other submissions appears in the discussion of the appeal.

In a decision dated March 25, 2003 (MTR decision), the director observed that the ownership and control of SoftPros, Inc. is irrelevant, since the petitioner did not supply the documentation of its finances. In the MTR decision, the director determined that the petitioner had not yet provided its federal income tax return, audited financial statement, or annual report for 2000 or 2001 and, also, that the MTR did not establish new facts to overcome the basis of the May 26, 2002 decision. The director dismissed the MTR and denied the petition.

On the appeal from the dismissal of the MTR, the petitioner presents its 2000 and 2001 Forms 1120, referencing EIN 052. The petitioner customarily requested extensions until September of the year following the taxable year. The petitioner filed Form 1120 for 2001 on September 11, 2002, so it was not available for the filing of the MTR, June 7, 2002, and the petitioner presented it on appeal.

In respect to the priority date, December 29, 2000, only two days prior to the end of the year, the petitioner had already, on its MTR, offered its check and payroll record for the wages of the beneficiary at the priority date. Federal taxable wages to the beneficiary for the semi-monthly period ended December 31, 2000 were $3,149.76. Selective evidence is normally unpersuasive, but this offer of proof aptly addresses the nettlesome year-end period in this case. The annualized amount of $75,594.24 is equal to or greater than, the proffered wage and, in these circumstances supports, if weakly, the payment of the proffered wage to the beneficiary at the priority date. Prorating generally can provide an inadequate analysis as CIS will not consider 12 months of wages paid or net income towards a lesser period for which the petitioner must show an ability to pay the proffered wage. Where

the petitioner begins paying the beneficiary the full proffered wage on the priority date, however, such evidence is more persuasive.

Net current assets for 2001, however, validate the offer of proof for 2000.[1] As reported in Schedule L of Form 1120, current assets of $1,189,260 minus current liabilities of $1,055,367, reflect a difference, for net current assets, of $133,901, greater than the proffered wage.

Consequently, the AAO finds the 2000 wages paid to the beneficiary, in relation to the priority date, are equal to, or greater than, the proffered wage. Net current assets establish the petitioner's ability to pay the proffered wage in 2001 and continuing until the beneficiary obtains lawful permanent residence.

The proceedings contain a great deal of other evidence. While several items did not comply with requirements of 8 C.F.R. § 204.5(g)(2), the overall record now supports the approval of the petition.

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 from the denial of the motion to reopen and reconsider is sustained, and the petition is approved.

---

[1] Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, such as Form 1120, 1120S, or 1065. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.