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U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: WAC 02 281 52791 Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
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:

[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
for 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 financial services company. It seeks to employ the beneficiary permanently in the United States as a senior 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.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting 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 nature, for which qualified workers are not available in the United States.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $85,000 per year.

With the petition, counsel submitted a copy of audited financial statements excerpted from the petitioner's 2001 Form 10-K and a financial statement excerpted from the petitioner's Form 10-Q. Those financial statements indicate that the petitioner's net income during that year, rounded, was a loss of $241,532,000.

On December 16, 2002, the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center noted that the financial information provided does not segregate the petitioner's current assets and current liabilities and stated that the evidence must show those amounts.

In response, counsel submitted additional copies of the petitioner's 2001 financial statements. Counsel stated that those financial statements segregate the petitioner's current assets and current liabilities. Those documents do not, in fact, segregate the petitioner's current assets and current liabilities from its other assets and liabilities.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 28, 2003, denied the petition.

On appeal, counsel states, "Please see attached documentation. We areproviding [sic] additional evidence and also asserting that prior submitted information provided evidence of Petitioner's ability to pay the proffered wage." In a cover letter, counsel relies on the petitioner's total assets, net income, and cash flow as indices of the petitioner's ability to pay the proffered wage. Counsel also cited a quarterly earnings press release for the fourth quarter of 2002 and the petitioner's payroll records as additional proof of that ability.

With the appeal, counsel submits (1) printouts of content of the petitioner's website describing itself, (2) a statement by the petitioner's Principal Financial Officer, dated and notarized August 12, 2002, asserting that the petitioner's Forms 8-K, 10-K, and 10-Q contain no inaccuracies, (3) additional copies of financial statements from the petitioner's SEC submissions, (4) printouts of web content showing the quarterly earnings release to which counsel referred, above, (5) a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, (6) a printout purporting to show that the petitioner paid the beneficiary a salary of $79,981.77 between February 8, 2002 and the year's end, plus a special distribution of $1,000 and an additional amount labeled "RETRO" on that printout.

The printout also shows that the petitioner paid the beneficiary $10,111.74 from January 10, 2003 through February 7, 2003. In sum, the printout appears to indicate that the petitioner paid the beneficiary a salary of $3,269.23 for each of the two-week pay periods from February 8, 2002 through May 31, 2002, and a salary of $3,370.58 for each of the two-week pay periods from June 14, 2002 through February 7, 2003. Those semi-weekly payments equate to annual salaries of $85,000 and $87,635, respectively.

The petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return indicates that the petitioner had taxable income before net operating loss deduction and special deductions of $269,699,888 during that year.

The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel's reliance on the petitioner's total assets, net income, and cash flow as indices of the petitioner's ability to pay the proffered wage is misplaced. A petitioner's total assets are not available to pay a proffered wage, as some items included in total assets, its interest in real estate, for instance, are not expected, pursuant to the ordinary course of business, to be converted to cash. Other assets might be expected to be converted to cash, but by no set deadline. Only the petitioner's current assets, those expected to be converted into cash within the coming year, may be considered. Further, the amount of the petitioner's current assets is not available to pay the proffered wage, until is has been reduced by the amount of the petitioner's current liabilities. The petitioner's current liabilities are those that the petitioner is expected to pay within the coming year. The petitioner's current assets net of its current liabilities are its net current assets.

Initially, this office notes that counsel and the director have been unable to agree on whether the petitioner's financial statements show the petitioner's current assets and current liabilities as segregated amounts. The director requested that the petitioner provide financial data showing the amount of its current assets and current liabilities, apparently so that the director would be able to calculate the petitioner's net current assets. Counsel stated that those figures were provided on the financial statements submitted. Counsel appears to be using those phrases to mean the petitioner's total assets and total liabilities at the end of a period. That is not, however, what those phrases mean.

A corporation's current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. On the petitioner's 2001 Schedule L, its 2001 year-end current assets are shown on Schedule L, lines 1(d) through 3(d). Its year-end current liabilities are shown on lines 16(d) and 17(d). That Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets. Those statistics are unimportant during that particular year, as the petitioner declared a taxable income before net operating loss deduction and special deductions far in excess of the proffered wage during 2001. Those amounts were not shown as a separate line item on the financial statements counsel submitted.

Showing that the petitioner's gross receipts, income or cash flow exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income, which is shown on a Form 1120 U.S. Corporation Income Tax Return as taxable income before net operating loss deduction and special deductions.

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 established that it employed the beneficiary prior to April 30, 2001, the priority date, and paid the beneficiary $85,000, the proffered wage, until approximately May of 2002, when the beneficiary received a raise. The petitioner has apparently paid the beneficiary an amount equal to or greater than the proffered wage at all salient times. This office need not consider any other aspects of the petitioner's finances. The petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

This office also notes that the I-140 petition states that the petitioner employs 3,400 people. Pursuant to 8 C.F.R. § 204.5(g)(2), which is set out above, the director may accept a statement from a financial officer of a company that employs 100 or more people as evidence of its ability to pay the proffered wage. Why no such statement was submitted in this case is unknown, but given our decision based on the evidence submitted, no such statement is necessary.

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.