U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-02-142-53246 Office: VERMONT SERVICE CENTER Date: AUG 25 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 computer software consulting firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 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. The petition's priority date in this instance is September 22, 1997. The beneficiary's salary as stated on the labor certification is $65,100 per year.

With the initial petition, prior counsel submitted the petitioner's 1997 through 1999 Form 1120 U.S. Corporation Income Tax return as well as the petitioner's 2000 Form 1120S U.S. Corporation Income Tax Return for an S Corporation. The tax return for 1997 reflected a taxable income before net operating loss deduction and special deductions of $7,812. The tax return for 1998 reflected a taxable income before net operating loss deduction and special deductions of -$45,458. The tax return for 1999 reflected a taxable income before net operating loss deduction and special deductions of -$10,953. The Form 1120S for 2000 reflected ordinary income of -$68,391. The petitioner did not submit Schedule L for 1997, 1999, or 2000.

In a request for evidence (RFE), dated June 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. The RFE further requested evidence that the beneficiary possessed the required qualifications for the position.

In response to the RFE, counsel submitted documentary evidence attesting to the credentials verification as confirmed by Globe Evaluation Service that the beneficiary has a Bachelor of Science Degree in Electronic Engineering. Counsel resubmitted the petitioner's 1997 through 2000 tax returns including Schedule L of the returns. Schedule L of the 1997 tax return reflected current assets of $545,654; current liabilities of $457,836; and net current assets of $87,818. Schedule L for 1998 reflected year-end current assets of $542,020; year-end current liabilities of $672,797; and year-end net current assets of -$130,777. Schedule L for 1999 reflected year-end current assets of $804,951; year-end current liabilities of $524,637; and year-end net current assets of $280,314. This schedule, however, is not consistent with the years before and after. For example, it reflects current assets for the beginning of 1999 as $1,638,217, far above the year-end numbers listed on the 1998 Schedule L. Moreover, Schedule L for 2000 reflects current assets of only $383,064 for the beginning of 2000, far below the year-end current assets listed on the 1999 return. The record contains no explanation for these discrepancies. Finally, Schedule L for 2000 reflected current assets of $726,044; current liabilities of $1,390,784; and net current assets of -$664,740.

Counsel submitted the petitioner's 2001 Form 1120S U.S. Income Tax return for an S Corporation. The return for 2001 reflected an ordinary income of $41,802. Schedule L of the return reflected current assets of $617,006; current liabilities of $342,854; and net current assets of $274,152.

Counsel also submits Form 1099-MISC Miscellaneous Income tax form for the years 1997 through 2000 indicating that the petitioner paid the beneficiary $39,999.96 during 1997; $42,608.88 during 1998; $46,323.77 during 1999; and $47,095.92 during 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits evidence that the petitioner had additional funds in a Prudential Securities Financial Command Account. Counsel also submits evidence that the account had a net worth of $225,705.46 as of March 31, 1997; $301,687.58 as of March 31, 1998; $276,188.27 as of March 31, 1999; $359,627.18 as of March 31, 2000; and $387,614.60 as of March 31, 2001.

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 employed and paid 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 did not establish that it employed and paid the beneficiary the full proffered wage in any year. Rather, the difference between the proffered wage and wages paid are as follows: $25,100.04 in 1997, $22,491.12 in 1998, $18,776.23 in 1999, and $18,004.08 in 2000.

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 next examine the net income figure 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 (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 the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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. The petitioner's net income for all years 1997 through 2000 is less than the difference between the proffered wage and the wages paid as will be set forth below.

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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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, any consideration of assets, including cash, 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.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 current assets. As set forth in the chart below, the petitioner's net current assets during the years in question do not demonstrate the petitioner's ability to pay the proffered wage as of the priority date and continuing. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

	1997	1998	1999	2000
Net income:	$7,812	-$45,458	-$10,953	-$68,391
Net current assets:	$87,818	-$130,777	$280,314[2]	-$664,740
Difference between proffered wage and wages paid:	$25,100	$22,491	$18,776	$18,004

The petitioner's net income is insufficient in all years. Even if we did not consider the discrepancies relating to the petitioner's 1999 schedule L, discussed above, the petitioner's net current assets cannot establish its ability to pay the proffered wage in 1998 and 2000.

Finally, counsel's reliance on the balances in the petitioner's bank account 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, and most significantly in this case, 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 cash specified on Schedule L that has been considered above in determining the petitioner's net current assets.

After a review of the evidence it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

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[1] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[2] While the petitioner's net current assets in 1999 appear sufficient to pay the difference between the proffered wage and wages paid, the discrepancies discussed above diminish the credibility of the petitioner's schedule L for that year. *See generally Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).