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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

[redacted]

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FILE: EAC 01 135 52575 Office: VERMONT SERVICE CENTER Date: DEC 23 200

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: SELF-REPRESENTED

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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, and reaffirmed its decision in response to the petitioner's first motion to reopen and reconsider. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a graphic design firm. It sought to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner sought to employ the beneficiary permanently in the United States as a senior graphic designer. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

On January 9, 2002, the director denied the petition, determining that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage of $44,532.80 beginning on the priority date of the visa petition, November 5, 1997.

The AAO dismissed the petitioner's appeal on July 12, 2002. The AAO reviewed the financial information contained in the petitioner's partnership federal tax returns for 1998 through 2000, as well as accompanying bank statements, and concluded that the petitioner was unable, during those fiscal years, to pay the proffered wage out of its net income. The AAO noted that in each pertinent year, the petitioner's tax returns showed that the petitioner had insufficient net income to cover the proffered wage.

On June 5, 2003, in response to the petitioner's motion to reopen and reconsider, the AAO reaffirmed its decision of July 12, 2002, concluding that the petition must remain denied. In reaching this conclusion, the AAO considered the additional evidence submitted by the petitioner, consisting of its 2001 federal tax return and its 2001 bank account statements.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

In this case, although the petitioner's motion is styled as a "Motion to Reopen/Reconsider," the petitioner does not state new facts to be provided and does not submit affidavits or other documentary evidence. It only submits the motion and a copy of the June 5, 2003, AAO decision [redacted] the president of the petitioning business, asserts that the petitioner's reported gross income on its 2001 tax return and 2001 bank deposits should be combined to demonstrate the petitioner's ability to pay the proffered wage of $44,532.80. As Mr [redacted] is asking for reevaluation of existing evidence, his motion will be treated as a motion for reconsideration.

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *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 [Citizenship and Immigration Services (CIS)].

Mr. [redacted] presents the same argument in this motion to reconsider that was advanced in the first motion. He suggests that a combination of bank deposits and the petitioner's gross income (minus its declared net income loss) should be used to calculate the petitioner's ability to pay the proffered wage in 2001. No legal authority is cited to support this view, and the AAO finds it unpersuasive. It is noted that in reviewing a petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, as asserted by the petitioner, a combination of other figures extrapolated from bank statements and the petitioner's 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 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.

It is further noted that as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] It represents a measure of a petitioner's liquidity and a possible resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a petitioner'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. In this case, the AAO notes that the petitioner's net current assets from 1997 to 2001 were $2,871, $15,079, $14,370, $11,336, and $14,452, respectively.

As indicated by the underlying record and in the previous AAO appellate decision and in response to the petitioner's first motion, the petitioner declared a loss of net income in all but one of the relevant years. From 1997 to 2001, it reported net income of $13,616, -$12,061, -16,936, -25,003, and -$16,814, respectively. No salaries and wages and no payments to partners were also reported in each year. Further,

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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.

the petitioner's net current assets in each year, as shown on its federal income tax returns, were all far short of the proffered wage of $44,532.80.

Mr. [redacted] reliance on the petitioner's bank statements 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. Bank statements show only a portion of a petitioner's financial status and do not reflect other encumbrances that may affect its ability to pay the proffered salary. As noted in the AAO's previous decisions, to the extent the bank statements represent the same period covered by the petitioner's tax returns, 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 already been considered in determining the petitioner's net current assets. It must also be concluded that the six additional 2002 bank statements contained in the record, showing balances from $41.35 to $7,606.82, do not, by themselves, demonstrate a sustainable ability to pay.

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decisions. The petitioner has not demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

An additional issue was overlooked in the previous decisions. It is noted that the beneficiary of this petition is also a partner in the petitioning business. The 1997 tax return indicates that he owned 1/3 of the petitioner. By 2001, the partnership tax return reflects that he held a 50% share of the petitioning business.

Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Although this motion has been decided on other grounds, the observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this beneficiary.

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 motion to reconsider is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.