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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]

FILE: EAC 02 043 51501 Office: VERMONT SERVICE CENTER Date: NOV 29 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]

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a 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 brief 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 March 1, 2001. The proffered wage as stated on the Form ETA 750 is $79,872 per year.

On the petition, the petitioner stated that it was established on 1996, that it employs four workers, and that it has a gross annual income of $101,440. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Woodbridge, New Jersey.

In support of the petition, counsel submitted a 2000 Form W-2 showing that the petitioner paid the beneficiary $29,820 during that year. Because the priority date is March 1, 2001, however, evidence pertinent to prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 23, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of annual reports, federal tax returns, or audited financial statements pertinent to the year 2000.[1]

In response, counsel submitted the first pages of the petitioner's 1999 and 2000 Form 1120S, U.S. Income Tax Returns for an S Corporation. As was noted above, because the priority date is March 1, 2001, however, evidence pertinent to the petitioner's financial condition during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submitted portions of six monthly statements of a bank account held by the petitioner showing that account's balance at the end of those six months.

On July 16, 2001 the Service Center issued another copy of the request for evidence to counsel.[2] In response, counsel submitted a letter from the petitioner's president. That letter states that the petitioner is paying, and contemplates continuing to pay, the petitioner $84,000 per year, an amount greater than the proffered wage. That letter stated that the petitioner hired the beneficiary on October 1, 2000. The letter did not state when the $84,000 salary became effective.

In support of the assertion that the petitioner was then paying the beneficiary $84,000, counsel submitted a pay statement, dated August 1, 2002, showing that the petitioner was then paying the beneficiary $7,000 per month, which equals $84,000 per year. In a cover letter, counsel argued that the fact that the beneficiary is on the payroll at $84,000 demonstrates that the petitioner is able to pay the proffered wage.

Counsel also submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return states that the petitioner declared a loss of $19,470 as its ordinary income during that year. The corresponding Schedule B shows that at the end of that year the petitioner had current assets of $10,623 and current liabilities of ($506), which yields net current assets of $11,129.

Counsel also submitted the 2000 and 2001 joint Form 1040 U.S. Individual Income Tax Return of the beneficiary and his wife including corresponding W-2 forms. The W-2 forms show that the petitioner paid the beneficiary $29,820 during 2000 and $49,127.61 during 2001.

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 December 31, 2002, denied the petition.

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[1] Why the Service Center requested evidence pertinent to 2000 is unclear.

[2] Why the request was issued a second time is unclear.

On appeal, counsel submits pay statements for May 5, 2002, July 1, 2002, August 1, 2002, September 1, 2002, October 5, 2002, November 8, 2002, December 6, 2002, and December 31, 2002. The pay statements for May 5, 2002 and July 1, 2002 indicate that the petitioner then paid the beneficiary $4,560 per month, or $54,720 per year. The remaining pay statements indicate that the petitioner was then paid $7,000 per month, or $84,000 per year.

Counsel also submitted a 2002 W-2 form showing that the petitioner paid the beneficiary $56,120 during that year.

Counsel asserts that the petitioner raised the beneficiary's salary to $84,000 during August of 2002. That assertion appears to be consistent with the amounts shown on the pay statements and W-2 forms in this case. Counsel implies that this raise demonstrates the petitioner's ability to pay the proffered wage.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate the ability to pay the proffered wage beginning on the priority date, March 1, 2001, and continuing until the beneficiary receives legal permanent resident status. That the petitioner has paid the beneficiary an amount equal to $84,000 since August of 2002 does not clearly show the ability to pay the proffered wage since March 1, 2001.

Counsel's reliance on bank statements to show the ability to pay the proffered wage in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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, 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 returns.

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 has established that it employed and paid the beneficiary $29,820 during 2000, $49,127.61 during 2001, and $56,120 during 2002. None of those amounts are equal to or greater than the annual amount of the proffered wage.

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. 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, 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $79,872 per year. The priority date is March 1, 2001.

During 2001 the petitioner paid the beneficiary $49,127.61. The petitioner must demonstrate the ability to pay the $30,744.39[3] balance of the proffered wage. During 2001 the petitioner declared a loss of $19,470. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income. The petitioner ended that year with net current assets of $11,129. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary $56,120. That amount is $23,752 less than the proffered wage. The more recent request for evidence in this case was issued on July 16, 2001. On that date the petitioner's 2002 tax return was clearly unavailable. The decision in this matter was issued on December 31, 2002. On that date, the petitioner's 2002 tax return was still unavailable. The petitioner was not required to provide its 2002 tax return or any other evidence of its ability to pay the proffered wage during 2002. Whether the petitioner was able to pay the proffered wage during 2002 shall form no part of today's decision.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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[3] $79,872 - $49,127.61

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.