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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other Worker pursuant to § 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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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, California 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 an insurance brokerage. It seeks to employ the beneficiary permanently in the United States as a customer liaison secretary. 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 and additional evidence.

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, 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 December 15, 1997. The proffered wage as stated on the Form ETA 750 is $1,800 per month, which equals $21,600 per year.

On the petition, the petitioner stated that it was established on April 29, 1988 and that it employs one worker. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since November 1990. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, counsel submitted the petitioner's 1997, 1998 and 1999 Form 1120 U.S. Corporation Income Tax Returns, and the petitioner's 2000 and 2001 Form 1120-A U.S. Corporation Short-Form Income Tax Returns.

The 1997 return shows that the petitioner declared a loss of $4,525 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $8,396 and no current liabilities, which yields net current assets of $8,396.

The 1998 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $2,365 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $8,911 and no current liabilities, which yields net current assets of $8,911.

The 1999 return shows that the petitioner declared a loss of $6,353 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $3,553 and no current liabilities, which yields net current assets of $3,553.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $9,022 during that year. The balance sheet at Part III of that return shows that at the end of that year the petitioner had current assets of $16,773 and $3,290 in current liabilities, which yields net current assets of $13,483.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $1,804 during that year. The balance sheet at Part III of that return shows that at the end of that year the petitioner had current assets of $18,922 and $3,290 in current liabilities, which yields net current assets of $15,632.

Counsel submitted 1998 and 1999 Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary $8,400 and $3,600 during those years, respectively. Counsel also submitted 1997, 2000, and 2001 Form 1099 Miscellaneous Income statements showing that the petitioner paid the beneficiary $26,640.75, $27,191.19, and $35,886.97 in non-wage compensation during those years, respectively.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, California Service Center, issued a Notice of Intent to Deny in this matter on March 25, 2003. The director stated that the evidence is sufficient to show that the petitioner paid the beneficiary more than the proffered wage during 1997, 2000, and 2001, but insufficient to show that it was able to pay the beneficiary the proffered wage during 1998 and 1999.

The Service Center also specifically stated that, if the petitioner responded to the notice, it should also provide evidence of its ability to pay the proffered wage during 2002.

In response, counsel submitted a letter, dated May 14, 2003. As to the petitioner's ability to pay the proffered wage during 1998, counsel noted that the petitioner paid salaries and wages of $8,400 and ended the year with net current assets of $8,911. Counsel further observed that the petitioner paid the beneficiary $1,935.75 as noted on a 1998 Form 1099 and paid the beneficiary's husband $9,683.13 as shown on another 1998 Form 1099. Counsel stated that those amounts, added together, equal $28,929.87 and demonstrate the petitioner's ability to pay the proffered wage during 1998.

As to 1999, counsel observes that the petitioner paid salaries and wages of $3,600 and ended the year with net current assets of $3,553. Counsel further observes that the petitioner paid commissions of $15,647, of which

$8,857.06 was paid to the beneficiary. Counsel states that the petitioner's salaries and wages, its net current assets, and its total commissions, added together, equal $15,647, which demonstrates that the petitioner had the ability to pay the proffered wage. That argument is addressed below.

Counsel submitted the 2002 joint Form 1040 U.S. Individual Tax Return of the beneficiary[1] and her husband. The corresponding Schedule L submitted with that return purports to show that the beneficiary owned and operated the petitioner during that year as a sole proprietorship, and that it returned a net profit of $6,348 during that year. The Form 1040 shows that the beneficiary and her husband declared adjusted gross income of $14,040 during that year, including the petitioner's profit.

Further, counsel submitted a 2002 Form 1120-A U.S. Corporation Short-Form Income Tax Return purportedly showing that the petitioner was a corporation during that same year that the beneficiary's tax return shows that she held it as a sole proprietorship. Counsel offered no explanation for that discrepancy.

Counsel also submitted a 2002 Form 1099 showing that the petitioner paid non-wage compensation of $30,275.82 to the beneficiary during that year. The corporate return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $3,591 during that year. Because the balance sheet at Part III of that return was not completed no information pertinent to the petitioner's year-end net current assets is available.

Finally, counsel submitted a 1999 Form 1099 showing that the petitioner paid the beneficiary $8,857.06 in non-wage compensation during that year.

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 May 10, 2003, denied the petition. The director conceded that the petitioner had demonstrated the ability to pay the proffered wage during 1997, 2000, 2001, and 2002, but stated that the evidence was insufficient to show that the petitioner was able to pay the proffered wage during 1998 and 1999.

On appeal, counsel again argued that the petitioner's ability to pay the proffered wage during 1998 is demonstrated it the fact that its total salaries and wages, its year-end net current assets, and the amounts it paid to the beneficiary and her husband in non-wage compensation during that year, added together, exceed the proffered wage.

As to 1999, counsel again argues that the petitioner's salaries and wages paid of $3,600, its year-end net current assets of $3,553, and its total commissions paid during that year of $15,647, added together, equal $22,620, and show the ability to pay the proffered wage during that year.

Counsel arithmetic and his analysis are both flawed.

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[1] The beneficiary's name appears on that form as Suwantana Laohasongkram, whereas it appears on the Form I-140 petition and the Form ETA 750 as Suwantana Sugrakanachana. This office observes that the latter is apparently the beneficiary's maiden name and the former her married name.

The proffered wage is $21,600 per year. The priority date is December 15, 1997. The petitioner must show the continuing ability to pay the proffered wage beginning on the priority date.

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, and that the beneficiary was performing the duties of the proffered position in exchange for that 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 paid the beneficiary $26,640.75 during 1997, $10,335.75[2] during 1998, $3,600 during 1999, $27,191.19 during 2000, $35,886.97 during 2001, and $30,275.82 during 2002. Those amounts exceeded the proffered wage during 1997, 2000, 2001, and 2002. During 1998 and 1999 they did not.

Counsel urges that the amounts paid as wages and non-wage compensation to the beneficiary's husband and others working for the petitioner should also be considered in determining the petitioner's ability to pay the proffered wage. Counsel's argument is unpersuasive.

For the wages and non-wage compensation to be an indication of the petitioner's ability to pay the proffered wage, they would have to have been available to use to pay that wage. This would be the case if they were paid to others performing the tasks of the proffered position, whom the beneficiary would replace upon being hired. Because the beneficiary currently works for the petitioner, and has at all salient times, this is manifestly not so. The funds paid to workers other than the beneficiary were not available to pay the proffered wage and have no place in the computation of the petitioner's ability to pay it.

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

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[2] $8,400 shown on a 1998 Form W-2 and $1,935.75 shown on a 1998 Form 1099.

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.

Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the monthly increment of the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

During 1998 the petitioner paid the beneficiary $10,335.75. The petitioner must demonstrate the ability to pay the $11,264.25 balance[3] of the proffered wage. During 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of $2,365. That amount is insufficient to pay the balance of the proffered wage. At the end of that year, the petitioner had net current assets of $8,911. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available to it with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner paid the beneficiary $3,600. The petitioner must demonstrate the ability to pay the $18,000 balance[4] of the proffered wage. During 1999 the petitioner declared a loss. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of profits during that year. At the end of that year, the petitioner had net current assets of $3,553. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available to it with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 and 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case that were not mentioned in the decision of denial.

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[3] $21,600 minus $10,335.75
[4] $21,600 minus $3,600

As was noted above, the petitioner submitted a tax return showing that the petitioner was a corporation during 2002. The petitioner also submitted a copy of the beneficiary's personal tax return. A Schedule C submitted with that return indicates that the beneficiary owned the petitioning company as a sole proprietorship during that same year. Those two facts are mutually contradictory. Counsel submitted no explanation. In the absence of an explanation, the petition may not be approved.[5]

Further, some of the petitioner's compensation was paid on a Form 1099, which is for reporting payment of non-wage compensation. Ordinarily, a secretary would not be compensated on a Form 1099, though an insurance firm's sales staff would. This raises the possibility that the beneficiary may not be working as a secretary for the firm, but may be working as an insurance salesperson, and the suspicion, at least, that the petitioner intended to continue her in that capacity if the petition were approved.

This possible scenario raises various issues. First, filing the petition with such a veiled intent would likely constitute fraud. Second, any of the payments made in the past to the beneficiary that were commissions to compensate her for sales should not have been considered in the determination of the petitioner's ability to pay the proffered wage, as they were not available to compensate a secretary. This raises the possibility that, upon further investigation, the petitioner would be found not to have demonstrated the ability to pay the proffered wage during 1997, 2000, 2001, and 2002, in addition to 1998 and 1999. Third, pursuant to 20 C.F.R. 656.20(c)(3), the stated proffered wage may not include anticipated commissions, bonuses, or other incentives, but only the amount that the petitioner is obliging itself to pay.

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.

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[5] If the beneficiary owns the petitioner as a sole proprietorship, this also raises the issue of self-petitioning. Ordinarily, a petitioner not also be the beneficiary of an employment-based visa petition.