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: OCT 1 3 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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 international freight forwarder. It seeks to employ the beneficiary permanently in the United States as a trade 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 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.

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 April 27, 2000. The proffered wage as stated on the Form ETA 750 is $2,454.40 per month, which equals $29,452.80 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 8 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. Counsel also provided the petitioner's 2001 compiled financial statements. The tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $11,383 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $137,286 and current liabilities of $125,156, which yields $12,130 in net current assets.[1]

[1] A discussion of the line items which constitute current assets, current liabilities and, hence, net current assets, follows.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 9, 2003, 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 noted that the evidence should cover 2000, 2001, and 2002. The Service Center also specifically requested California Form DE-6 Wage and Withholding Reports for the previous four quarters.

In response, counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return and an additional copy of its 2001 return. Counsel submitted a Form 7004, dated March 17, 2003, in which the petitioner requested an extension of time during which to file its 2002 tax return. Counsel submitted the requested DE-6 forms for the last three quarters of 2002 and the first quarter of 2003.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $19,916 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $381,347 and current liabilities of $329,328, which yields net current assets of $52,019.

The DE-6 forms show that the petitioner employed between six and ten workers during those four quarters, but did not employ the beneficiary.

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 July 16, 2003, denied the petition.

On appeal, counsel submits a brief. Counsel also submits a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $20,723 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $435,122 and current liabilities of $386,965, which yields net current assets of $48,157.

Counsel submits a letter from the petitioner's accountant. The accountant states that the correct computation of net current assets is to subtract total liabilities from current assets. The accountant offers no authority for that formula, which is, in fact, a misstatement. Net current assets are computed by subtracting **current liabilities** from current assets.[2] In his computation of net current assets, however, the accountant used the petitioner's current liabilities rather than its total liabilities. This office believes, therefore, that the accountant's misstatement was a momentary lapse, rather than a lack of understanding of the computation of net current assets.

In his computation of the petitioner's current assets, however, the accountant included the petitioner's loans to shareholders. (Schedule L, Line 7d) That line item is generally not included in the computation of current assets.

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[2] *See for example* Accounting Research Bulletin 43, Chapter 3, Section A.

In his brief, counsel argued that, because the petitioner's 2002 Schedule L shows that the loans to shareholders were paid during the following year they were correctly included among the petitioner's net current assets during 2001. Counsel also noted that, on the unaudited financial statements referred to above, they were carried as a current asset.

Whether or not the loans were subsequently repaid, or otherwise recompensed or forgiven, does not influence whether they should, in the previous year, have been treated as current. The term "current assets" is used to designate cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, generally a year.[3] Loans to shareholders are not, generally, a current asset.[4] Counsel's argument for considering them as current in this case, despite that general rule, is unconvincing.

As to 2002, counsel argues that the petitioner's income, added to its net current assets, is sufficient to pay the proffered wage. That is not a correct calculation for demonstrating ability to pay the proffered wage.

Net current assets are the difference between a corporation's current assets and its current liabilities. Net current assets may properly be considered in determining a 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 proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not correctly added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

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 did not establish that it employed and paid the beneficiary.

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

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[3] Accounting Research Bulletin 43, Chapter 3, Section A, Paragraph four.

[4] Whether loans to shareholders should be considered an asset at all is also open to question, at least in some situations. This is particularly true in the case of a loan which results from the purchase by a shareholder of stock, or which is otherwise secured by stock, options, or other equity instruments in the company. The purchase price of the stock is in the form of a note to the company, and the note is secured by the shares thus "purchased." The transaction results in no net gain to the company, but is carried as an asset. Such a note might not be considered a true asset but, rather, a contra-equity item. That distinction is not crucial to the decision in this matter, however, given the decision not to treat loans to shareholders as a current asset.

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*, the court held that CIS, then the Immigration and Naturalization Service, 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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.

As noted above, however, the petitioner's total assets 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 $29,452.80 per year. The priority date is April 27, 2000.

During 2000, the petitioner had taxable income before net operating loss deduction and special deductions of $19,916. That amount is insufficient to pay the proffered wage. The petitioner ended the year, however, with net current assets of $52,019. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of $11,383. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of $12,130. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage during that year. The petitioner has failed to demonstrate the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of $20,723. That amount is insufficient to pay the proffered wage. The petitioner ended the year, however, with net current assets of $48,157. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

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.

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.