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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 283 54077 Office: VERMONT SERVICE CENTER Date: SEP 0 9 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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 a dry cleaner. It seeks to employ the beneficiary permanently in the United States as a dry cleaner/tailor. 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 additional evidence and asserts that the petitioner has established its continuing financial ability to pay the proffered wage.

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 the granting of 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 the granting of 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 February 13, 2001. The proffered wage as stated on the Form ETA 750 is $11.47 per hour, which amounts to $23,857.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1998. A letter from the general manager of the petitioner confirms the alien's employment.

On the petition, the petitioner claims to have been established in 1990, to have a gross annual income of approximately $251,000, and to currently employ seven workers.

In support of its continuing ability to pay the proffered wage, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. This tax return shows that the petitioner declared a net income of $21. Schedule L of the tax return reflects that the petitioner had $24,638 in current assets and $64,000 in current liabilities, resulting in -$39,362 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets and current liabilities are shown on Schedule L. 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.

In addition to its 2001 corporate tax return, the petitioner initially submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It shows that a company called "Compensation Solutions, Inc." paid her $14,305.00 in wages. The petitioner's original submission of documentation also included a letter from the petitioner's president [redacted] to counsel, informing him that the petitioner uses a company called "Compsolutions for all our payroll needs and accounting for government tax paying and reporting."[2]

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 22, 2003, the director requested additional evidence pertinent to that ability. The director requested the petitioner to submit additional evidence to show its ability to pay the proffered salary as of February 13, 2001 and continuing until the present. The director specifically requested that the petitioner also provide copies of the beneficiary's W-2s for 2000 and 2001, if the petitioner employed the beneficiary, as well as a copy of the petitioner's quarterly federal tax returns for the relevant period. The director further inquired if the position that the beneficiary was filling was a new position and to identify any former employee who occupied the position.

In response, the petitioner, through counsel, submitted a copy of the beneficiary's W-2 for 2002. It shows that she received $15,500 in wages. The employer's name on the W-2 is Compensation Solutions. Counsel also submitted copies of W-2s of a worker named [redacted] who received wages of $9,828 from Compensation Solutions in 2001, and $7,632 from the same entity in 2002. Counsel's transmittal letter accompanying these submissions states [redacted] previously filled the position offered until June 1998, when she changed her job to that of a presser, whereupon the beneficiary became a dry cleaner/tailor.

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 29, 2003, denied the petition. The director noted that the petitioner's net income and net current assets as shown on its 2001 tax return were insufficient to meet the proffered wage. The director also observed that the beneficiary's W-2s

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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] The documents submitted to the record with the petition and on appeal establish that "Compensation Solutions, Inc." and "CompSolutions" are the same company.

showed that she was paid wages by Compensation Solutions as the employer and that the evidence failed to establish that the petitioner and Compensation Solutions are the same entity.

On appeal, counsel contends that when the alien's W-2 and the petitioner's 2001 tax return are considered together, it establishes sufficient income to pay the alien's proposed wage offer.

At the outset, counsel claims that depreciation should be added to the petitioner's net income in considering its financial ability to pay the proffered wage. When reviewing a petitioner's ability to pay a proffered salary, Citizenship and Immigration Services (CIS) examines 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). 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.

Besides net income, as noted above, CIS will also consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. In the instant matter, as set forth above, the petitioner's declared net income in 2001 was $21. Its net current assets were -$39,362. Neither its net income, nor its net current assets were sufficient to cover the beneficiary's proffered salary of $23,857.60 in 2001.

To the extent that a petitioner may have actually employed and paid wages to the alien, those amounts may also be considered. If the petitioner demonstrates through credible documentation that it has actually paid the full proffered wage to the alien, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted W-2s issued by Compensation Solutions.[3] The petitioner's 2001 tax return shows that it paid no salaries or wages and declared no labor costs, but spent $89,877 for "leased employees." The beneficiary's salary is not shown as a segregated amount. Even when considering counsel's hypothesis that the wages paid to the beneficiary by Compensation Solutions should be considered as the funds of the petitioner,[4] the difference of $9,552.60 between the 2001 actual wages paid and the proffered wage could not be covered by either the petitioner's net income or its net current assets in 2001.

The beneficiary actually received wage payments in 2002 in the amount of $15,500, or $8,357.60 less than the proffered wage. As the petitioner did not provide any information or explanation why it failed to submit any evidence related to its financial status for any year but 2001, no further comparison can be made. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered wage as of the visa priority date through federal tax returns, audited financial statements, or annual

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[3] The employer identification number of the petitioner and Compensation Solutions is not the same.

[4] It has not been established that Compensation Solutions and the petitioner should be considered the same employer. *See* discussion, *infra.*

reports. Based on the financial documentation submitted, it cannot be concluded that the petitioner has established a continuing ability to pay the proffered wage as of the visa priority date.

The basis for the director's inquiry as to whether the position the beneficiary is filling is a new position is that if the proffered position is not a new position, it would imply that the beneficiary would be merely replacing a worker who has left the organization and strengthen the validity of the job offer by showing that the beneficiary would not represent an additional wage expense. In this case, as suggested by the record, the beneficiary's position became available not because Ms. McKinney left the organization, but because she changed positions within the petitioner's organization.

Beyond the decision of the director, the more significant issue raised by the evidence submitted in support of the petition and appeal and indirectly referenced by the director's decision, is the nature of the relationship between the petitioner and Compensation Solutions. This affects whether the petitioner or Compensation Solutions can be considered to be the beneficiary's actual employer. The record indicates that the beneficiary has been compensated by Compensation Solutions for work performed at the petitioner's site. In support of the claim that the W-2s issued by Compensation Solutions should be considered as the petitioner's funds, counsel resubmits a copy of [redacted] letter describing Compensation Solutions as an accounting and payroll-servicing firm. Counsel also submits an unsigned letter, dated August 1, 2003, from Compensation Solutions to the Internal Revenue Service (IRS) informing it that beginning "[July 6, 1998,] [the petitioner] partnered with [redacted], a Professional Employer Organization (PEO). [The petitioner] no longer compensates any employee and therefore no longer has the responsibility to file Quarterly State or Federal tax forms." The letter concludes by stating that the petitioner has indicated that they have filed a final Form 941.

Counsel submits two more documents that relate to the relationship between the petitioner and Compensation Solutions. In an undated letter fro[redacted] to counsel [redacted] states that "Compsolutions" acts as a fee-based human resources entity for small companies and that it assumes all payroll functions, workers compensation claims, insurance queries, legal questions, and federal obligations of corporations. Finally, on appeal, counsel submits a copy of a "Notification of Employment" signed by the beneficiary on October 2, 1999. It advises the beneficiary that COMPSolutions (CSI)[5] has entered into a staffing arrangement with her current employer and that she is now a leased employee whose daily functions and duties will be directed by the client company, but who will be considered CSI's employee for all payroll, workers compensation, and unemployment compensation issues. If her work assignment at the client company ends, she is to report to CSI within three days and failure to do so may be considered a voluntary departure. The documents submitted on appeal fail to include a copy of the agreement between CSI and the petitioner, which might further clarify the relationship.

The regulation at 20 C.F.R. § 656.30(2) provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. If the employer/employee relationship changes, the validity of the approved labor certification may be affected. The regulation at 20 C.F.R. § 656.3 also provides a definition of an employer:

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[5] The AAO accepts that CSI, Compsolutions, and Compensation Solutions are the same.

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In *Matter of Smith,* 12 I&N Dec. 772, (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with fringe benefits. Client firms were billed by the petitioner for the services provided them. The petitioner was responsible for making contributions to the employee's social security, unemployment insurance programs, and worker's compensation, as well as for withholding state and federal income taxes. It was determined that the petitioner qualified as the actual employer of the beneficiary. *Id.* at 773.

In *Matter of Ord,* 18 I&N Dec. 285 (Reg. Comm. 1992) involving a non-immigrant petition, the regional commissioner concluded that permanent employment is demonstrated when a constant pool of employees are available for temporary assignments. *Id.* at 287. The regional commissioner further found that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286.

In this case, while there is no indication that the beneficiary receives fringe benefits from CSI, it is clear from the W-2s and the notification of employment, signed by the beneficiary, that CSI is responsible for paying her and making the necessary social security and state and federal tax withholdings, as well entering into staffing arrangements with client companies. As of October 2, 1999, the beneficiary was no longer directly employed by the petitioner, but became a leased employee, in conformance with the terms of the Notification of Employment. Moreover, according to the CSI letter submitted to the IRS, the petitioner no longer has any obligation to file the employer quarterly state or federal tax forms.

Although the ability to pay the proffered wage has not been established as set forth above, it is further observed that the evidence points more to CSI as the actual employer of the beneficiary, rather than the petitioner. The regulation at 8 C.F.R. § 204.5(g) does not contemplate multiple or co-employers as the petitioning prospective U.S employer of an alien beneficiary. To be a valid job offer and establish the beneficiary's eligibility for a third preference classification, the job offer must be based on an offer of full-time permanent employment and the petitioner must qualify as the actual employer[6] of the beneficiary. In this case, the evidence does not clearly support the conclusion that the petitioner can be considered an actual employer. For this additional reason, the petition is not eligible for approval.

Based on a review of the evidence in the record, consisting of the petitioner's tax return and the W-2s, as well as the evidence and argument submitted on appeal, it is concluded that the petitioner failed to submit evidence

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[6] In some circumstances, a petitioner may also qualify as a successor-in-interest to the original employer named on the approved labor certification. The petitioner has the burden to show that it has assumed the all the rights, duties, obligations, and assets of the original employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

sufficient to demonstrate that it had the ability to pay the proffered wage. It is further noted that the evidence is problematic in establishing the petitioner as the actual employer of the beneficiary. Therefore, the petitioner has not established that the elements for the approval of the petition at the time of the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.