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U.S. Citizenship and Immigration Services

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[redacted]

JUN 0 3 2005

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC-04-079-53967

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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 information storage technology 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is $67,704.00 per year. On the Form ETA 750B, signed by the beneficiary on September 23, 2003, the beneficiary claimed to have worked for the petitioner beginning in February 2000 and continuing through the date of the ETA 750B. It should be noted that the Form ETA 750 which was certified by the Department of Labor is a revised version, submitted on September 25, 2003, apparently incorporating changes required by the Department of Labor to the initial ETA 750, which had been submitted on April 30, 2001. A photocopy of the initial ETA 750 is in the record.

The I-140 petition was submitted on January 25, 2004. On the petition, the petitioner claimed to have been established in 1996, to currently have six employees, to have a gross annual income of $552,847.00. In the item for net annual income the petitioner wrote the words "enough to pay alien's salary." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 29, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a copy of the petitioner's federal tax return for 2003. The director also stated, "If the

beneficiary was employed by you in 2003, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business." (RFE, April 29, 2004, at 1).

In response to the RFE, the petitioner submitted additional evidence, but that evidence did not include a copy of the petitioner's federal tax return for 2003 nor a copy of any Form W-2 of the beneficiary. The petitioner's submissions in response to the RFE were received by CIS on July 23, 2004.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In a decision dated September 27, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. The evidence submitted on appeal does not include a copy of the petitioner's federal tax return for 2003 nor a copy of any Form W-2 of the beneficiary.

Counsel states on appeal that although the petitioner's tax returns show net losses, the petitioner's financial position is strong. Counsel asserts that the evidence satisfies the criteria in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and that the evidence thereby establishes the petitioner's ability to pay the beneficiary the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on September 23, 2003, the beneficiary claimed to

have worked for the petitioner beginning in February 2000 and continuing through the date of the ETA 750B. No Form W-2 Wage and Tax Statement of the beneficiary was submitted in evidence. The record contains copies of payroll records of the petitioner dated February 6, 2004 and July 16, 2004, but the beneficiary's name appears on neither of those payroll records.

In his brief, counsel asserts that a joint venture agreement to which the petitioner is a party is evidence of the petitioner's ability to pay the proffered wage. Counsel states that the petitioner is a 49% owner of that joint venture, and that another company is a 51% owner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel states that a copy of the joint venture agreement is attached to his brief, but no copy of that agreement was submitted on appeal, nor was one submitted in the proceedings before the director. In a letter dated November 9, 2004, the petitioner's chief executive officer refers to the joint venture, but the chief executive officer does not state details of the joint venture agreement. Counsel states that the joint venture is named "bigVault, Inc." and that the joint venture has taken over the salary obligations of the petitioner. The record contains copies of six checks payable to the beneficiary drawn on an account of "bigVault, Inc." which are dated from August 13, 2004 to October 22, 2004. The first of the checks is in the amount of $1,400.00 and the five other checks are each in the amount of $1,427.43. The total of the amounts on the six checks is $8,537.15. The record also contains a pay register report of "bigVault, Inc." dated November 5, 2004 which shows the beneficiary's salary payments for the year to date as $12,692.29. Since that amount is less than the proffered wage of $67,704.00 that figure it would fail to establish the petitioner's ability to pay the proffered wage in 2004, even if it were assumed that "bigVault, Inc." is a successor in interest to the petitioner. Moreover, the record fails to establish that "bigVault, Inc." has taken over the rights and obligations of the petitioner so as to qualify as a successor in interests. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

For the foregoing reasons, the evidence pertaining to the beneficiary's employment by the petitioner or by "bigVault, Inc." fails to establish the petitioner's ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns in the record are those for 2001 and 2002. Each shows the calendar year as the petitioner's tax year. The petitioner's tax returns show the following amounts for taxable income on line 28: -$415,788.00 for 2001; and -$424,287.00 for 2002. Since both of those

figures are negative, they fail to establish the petitioner's ability to pay the proffered wage in those years. The record before the director closed on July 23, 2004 with the submission of the petitioner's response to the RFE. The petitioner's tax return for 2003 had been requested in the RFE and it should have been available as of July 23, 2004. Nonetheless, the petitioner's tax return for 2003 was not submitted in the proceedings before the director nor has it been submitted on appeal.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$88,281.00 for the beginning of 2001; -$488,277.00 for the end of 2001; and -$841,065.00 for the end of 2002. Since each of those figures is negative, they fail to establish the petitioner's ability to pay the proffered wage during those years. As noted above, no tax return of the petitioner was submitted for 2003.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, the bank statements in the record in the instant petition are for only selected months during the relevant period. The petitioner submitted a spreadsheet purporting to show information on all of the petitioner's bank accounts for each of the months from January 2001 through August 2004, but the relationship between the figures on the spreadsheet and those on the petitioner's bank statements is unclear. The figures on the spreadsheet were compared with several of the bank statements in the record but no corresponding figures were found either for total monthly deposits or for monthly beginning or ending balances.

The record contains a copy of a line of credit agreement between the petitioner and a bank, dated February 20, 2001. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

A line of credit is not an existent loan. Moreover, the petitioner's existent loans will be reflected in the Schedule L balance sheet attached to with a corporate tax return and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not necessarily improve its overall financial position. Although lines of credit and debt are usually an integral part of a business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In the instant case, the existence of a line of credit, without further detailed documentation concerning the amount of credit used, the amount still available, the relationship of the line of credit to the Schedule L's attached to the petitioner's tax returns, and the function of the line of credit in the petitioner's business plan, is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that the years 2001, 2002 and 2003 were an uncharacteristically unprofitable years for the petitioner. The only tax returns of the petitioner in the record, for 2001 and 2002, each show substantial net losses and negative year-end net current assets.

In his decision, the director stated that the priority date of the instant petition is April 30, 2003. The director failed to note that the Department of Labor transmittal letter attached to the certified Form ETA 750 states that the priority date is April 30, 2001. As noted above, the version of the ETA 750 which was certified is a revised ETA 750 which was submitted on September 25, 2003. The initial ETA 750 was submitted on April 30, 2001. On the revised ETA 750, the date stamp appears of September 25, 2003, but the month and day are crossed out in black ink and the date April 30 is hand written in red ink. Presumably the corrections were made by a Department of Labor official. However, the corrections should have been to the entire date, including the year, not just to the month and day.

Since the director incorrectly determined that the priority date was April 30, 2003 rather than April 30, 2001, the director failed to analyze the petitioner's tax return in the record for 2001. The director correctly stated that the

petitioner's federal tax return for 2002 showed a net loss. The director also correctly summarized the balances on the bank statements which were then in the record. The director failed to calculate the net current assets from the information given on Schedule L of the petitioner's tax return for 2002.

The director's omissions in his analysis did not affect the director's decision, since, as discussed above, a complete analysis of the petitioner's tax returns for 2001 and 2002 shows that those returns fail to establish the petitioner's ability to pay the proffered wage during those years. Moreover, no copy of the petitioner's tax return for 2003 was submitted for the record, nor did the petitioner submit alternative acceptable forms of evidence for that year, such as a copy of an annual report or an audited financial statement. *See* 8 C.F.R. § 204.5(g)(2). The decision of the director to deny the petition was correct, based on the evidence then in the record.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.