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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC-04-100-50711 Office: CALIFORNIA SERVICE CENTER Date: MAY 12 2006

IN RE: Petitioner:
Beneficiary: [redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Internet software developer. It seeks to employ the beneficiary permanently in the United States as a computer software engineer, applications. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits 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 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.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 27, 2001. The proffered wage as stated on the Form ETA 750 is $40.00 per hour ($83,200 per year). The Form ETA 750 states that the position requires two years of experience and a bachelor's degree in computer science.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of $800,000, and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 15, 2001, the beneficiary claimed to have worked for the petitioner since May 2000.

With the petition, the petitioner submitted its 2001 and 2002 corporate federal tax returns and internal payroll records. Counsel stated in an accompanying letter that the beneficiary is employed in H-1B nonimmigrant visa status with the petitioner and is currently being paid the prevailing wage rate.

On July 5, 2004, 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, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence pertaining to 2003 and documentation of wages paid by the petitioner to the beneficiary and other employees.

In response, the petitioner submitted its 2003 corporate federal tax return; quarterly wage reports reflecting wages paid to the beneficiary; W-2 forms issued by the petitioner to the beneficiary reflecting wages actually paid in the amounts of $39,527.41, $41,900.16, $70,258.36, in 2001, 2002, and 2003, respectively. The petitioner also submitted a letter from its chief executive officer (CEO) August 20, 2004, explaining that the petitioner's business office was closed since its employees are consultants and work at customer worksites and thus the petitioner's business address is now the CEO's home office.

The director denied the petition on October 19, 2004, finding that the evidence submitted with the petition and in response to its request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that it has made an effort to pay the prevailing wage rate at all times and that it has the ability to pay the proffered wage. On appeal, the petitioner submits W-2 forms demonstrating that the beneficiary was actually paid the proffered wage in 2004 and 2005 ($83,200 in both years), an unaudited profit and loss statement for January 2000 through December 2003, and quarterly wage reports and benefits information.

At the outset, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Additionally, there is a difference between the prevailing wage rate for H-1B purposes and the proffered wage rate for the purposes of this third preference visa petition. The AAO does not have a copy of the beneficiary's H-1B petition and thus does not know how the position for which he received a specialty occupation visa was categorized and how the Department of Labor (DOL) subsequently codified it and assigned a wage level appropriate for that position[1]. This petition contains a certified Form ETA 750A with a proffered wage rate of $83,200 for the proffered position and the description of duties that were reviewed by DOL, which categorized the position as a computer software engineer, applications and determined that the appropriate wage rate for this type of position was $83,200 in July 2003 when it required the wage be amended on the form it certified. Thus, the petitioner may have paid a different wage for the H-1B petition and still honored

[1] The AAO notes that a CIS internal database reflects that the beneficiary's H-1B petition was approved in November 2002 at a starting salary of $52,000.

its obligations under various administrative agency's laws and regulations, but it must still show that it can or could pay the proffered wage for this petition from the date it filed the Form ETA 750A in July 2001 in order to establish eligibility for approval. The petitioner was under no obligation to actually pay the beneficiary the full proffered wage from 2001 onwards for this preference visa petition's purposes and would not be until the beneficiary actually acquires lawful permanent resident status; however, actual payment of wages is evidence of a petitioner's ability to pay the proffered wage when they are actually employing the beneficiary they intend to sponsor for employment-based permanent immigration.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 established that it employed and paid the beneficiary $39,527.41, $41,900.16, $70,258.36, in 2001, 2002, and 2003, respectively. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003. Instead, the petitioner paid partial wages, which are $43,672.59 less than the proffered wage in 2001, $41,299.84 less than the proffered wage in 2002, and $12,941.64 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage. The petitioner demonstrated its continuing ability to pay the proffered wage in 2004 and 2005 because it paid the beneficiary the full 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, CIS will next examine 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage of 43,672.59 in 2001, $41,299.84 in 2002, and $12,941.64 in 2003.

In 2001, the Form 1120S stated net income[2] of -$3,077
In 2002, the Form 1120S stated net income of -$1,077.
In 2003, the Form 1120S stated net income of $3,890.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. As noted earlier, the petitioner demonstrated its ability to pay the proffered wage in 2004 and 2005 because it paid the beneficiary the proffered wage in those years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 2001 were -$10,785.
The petitioner's net current assets during 2002 were -$10,523.
The petitioner's net current assets during 2003 were -$6,692.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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[2] Ordinary income (loss) from trade or business activities as reported on Line 21.

[3] 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.

The petitioner's statement and evidence on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.