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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 04 113 51041 Office: VERMONT SERVICE CENTER Date: MAY 18 2006

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, Chief
Administrative Appeals Office

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

The petitioner is a computer science, engineering and intellectual technology corporation. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

The petitioner has been in business according to the petition since 1995, and, it employs 8 individuals.

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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. 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 2, 2001. The proffered wage as stated on the Form ETA 750 is $79,872.00 per year. The Form ETA 750 states that the position requires one year's experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax return for 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on October 21, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel has submitted the following documents to accompany the appeal statement: the petitioner's U.S. federal tax returns for 2000, 2001, 2002, and 2003; approximately 10 bank statements; approximately 10 pay statements for the beneficiary; one W-2 Wage and Tax statement for 2002 for [redacted] and, a statement from petitioner's accountant.

On appeal, counsel asserts the petitioner is submitting the above-mentioned evidence, and, the petitioner recites the financial data found there, principally the gross incomes, salaries and amounts paid to outside contractors. For tax year 2004, the petitioner asserts the financial data for ten months of year 2004.

The petitioner asserts that " ... If we have employees with the right skills-set, we do not have to rely on the outside subcontractors to get the work done ...."

The petitioner asserts that the totality of its financial history (gross annual income, net income, salary expense, "non-w2" consultants, and salary paid the beneficiary) evidences its ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary from August 2003. Based on the pay statements submitted, the petitioner paid the beneficiary $31,666.70 in 2004 (wages to November 3, 2004).

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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).

The petitioner asserts that gross annual income and net income evidences its ability to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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.

The tax returns[1] demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $79,872.00 per year from the priority date of July 2, 2001:

- In 2001, the Form 1120S stated taxable income[2] of $51,689.00.
- In 2002, the Form 1120S stated taxable income of $48,648.00.
- In 2003, the Form 1120S stated taxable income of $42,355.00.

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. There was insufficient data submitted to make this determination.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2000 through 2001 for which the petitioner's tax returns are offered for evidence.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

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[1] Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 2000, the petitioner stated taxable income of $94,965.00.

[2] IRS Form 1120S, 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2001, petitioner's Form 1120S return stated current assets of $85,791.00 and $50,000.00 in current liabilities. Therefore, the petitioner had $35,791.00 in net current assets. Since the proffered wage is $79,872.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of $50,124.00 and $37,250.00 in current liabilities. Therefore, the petitioner had $12,874.00 in net current assets. Since the proffered wage is $79,872.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[4] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner asserts that " ... If we have employees with the right skills-set, we do not have to rely on the outside subcontractors to get the work done ...." There is insufficient evidence in the record of proceeding to determine the business model of the petitioner,[5] such as the length of projects, the ratio of employees to contractors and subcontractors, to make a determination either for or contrary to this statement. The petitioner has not submitted W-2 statements for its eight employees but it has submitted one MISC-1099 statement for 2002 for [redacted] Petitioner's accountant lists sums paid from 2000 to subcontractors.

Counsel has not through documentation of work projects using cancelled checks, paid invoices, certificates of completions and their schedules, has come forward with evidence to determine what portion of petitioner's jobs from 2001 through 2003 have entailed a programmer analyst necessitating the employment of the beneficiary. The documentation that counsel lays out is not persuasive that subcontractors accounted for contract costs with programmer analyst duties predominant. The petitioner has not provided a standard for the evaluation of such savings. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a programmer analyst will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The petitioner advocates the use of the cash balance of the business accounts to show the ability to pay the proffered wage. Reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's

[4] 8 C.F.R. § 204.5(g)(2).

[5] *See, Vizcaino v. Microsoft Corp.*, 173 F.3d 713, 723-24 (9th Cir. 1999) finding that temporary worker agency employment does not preclude a common law employment relationship with the borrowing company (Microsoft), and concluding that determination of whether temps were Microsoft employees is based "not on whether they were also employees of an agency but rather on application of the *Darden* decision (*Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) factors to the relationship with Microsoft"), *amended by, rehearing denied*, 184 F.3d 1070 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) it is now a common industry practice for employers to limit a temporary worker's assignment to a limited number of months to prevent the imposition of the payment of certain benefits required to be paid long-term temporary and contract workers, for example, stock options, to provide non-discriminatory treatment between its regular employee and the long term temporary workers.

ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner asserts that the salary expense paid evidences its ability to pay the proffered wage. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.