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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 07 2007
EAC-05-198-50731

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 Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a computer consulting company. 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 Department of Labor (DOL). The director determined that the petitioner had not established its 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 19, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 who are members of the professions.

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 C.F.R.. § 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).

The instant petition is for a substituted beneficiary.[1] The original Form ETA 750 was accepted on February 4, 2002. The proffered wage as stated on the Form ETA 750 is $62,000 per year. The Form ETA 750 states that the position requires four years of college, a bachelor's degree or foreign equivalent in computer science or related field, and two years of experience in the job offered or in the related occupations of computer programming, systems analysis, software development or related field. The I-140 petition was submitted on June 27, 2005. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of $3.5 million, and to currently employ 10 workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the substituted beneficiary on June 21, 2005, the beneficiary claimed to have worked for the petitioner since May 2005.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[2]. Relevant evidence in the record includes the petitioner's corporate federal tax returns for its fiscal years 2001 through 2004, financial statements as of March 31, 2004 and December 31, 2005, a bank statement for the petitioner's account, the beneficiary's 2005 W-2 form issued by the petitioner, paystubs and payroll records for 2005 and 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner has established its continuing ability to pay the proffered wage from the priority date to the present through paying the proffered wage and its net income or net current assets.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay 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 during a given period, 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 submitted the beneficiary's W-2 forms issued by Hewlett Packard Company for

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[1] An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[2] 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

2002, 2003 and 2004, and issued by the petitioner for 2002 and 2005, the beneficiary's paystubs from May 2005 to January 2006, and the petitioner's payroll records for the beneficiary for 2005. The wages paid by another employer, Hewlett Packard Company, cannot be used in determining the petitioner's ability to pay the proffered wage in the instant case. The W-2 forms for 2002 and 2005 issued by the petitioner show that the petitioner paid the beneficiary $3,978 in 2002 and $53,930.45 in 2005. The petitioner's payroll records and the beneficiary's paystubs show that the petitioner has been paying the beneficiary at the level of $3,461.54 biweekly since May 27, 2005, which is greater than the proffered wage rate. The petitioner established that it was currently paying the proffered wage.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since May 2005, according to the language in Interoffice Memorandum from William R, Yates, Associate Director for Operations on May 4, 2004 (Mr. Yates' memorandum), HQOPRD 90/16.45, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that Mr. Yates makes it clear for a positive ability determination where "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Counsel urges CIS to consider the wage rate paid since May 2005 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 4, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005 and 2006, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Therefore, the petitioner is still obligated to demonstrate that it could pay the full proffered wage of $62,000 in 2003 and 2004, and the difference of $58,022 in 2002 and $8,069.55 in 2005 between wages actually paid to the beneficiary and 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). On appeal, counsel asserts that the petitioner had a gross profit of $2.1 million in 2002, $1.8 million in 2003 and $1.2 million in 2004, and that the petitioner had the ability to pay the proffered wage with these gross profits. Counsel's reliance on the petitioner's gross profits is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. Counsel argues that the Yates' Memorandum does not instruct adjudicators to look to a company's taxable income as the determinative factor, and therefore, the petitioner's gross profit, not its taxable income, is the more appropriate measure of its ability to pay. However, nor does the Yates' Memorandum instruct adjudicators to look to a company's gross profit as the determinative factor. Instead the memo expressly indicates "net income" as a measure of ability to pay.

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 record contains copies of the petitioner's Form 1120 US Corporation Income Tax Return for its fiscal years 2001 through 2004. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year runs from April 1 to March 31. The priority date in the instant case is February 4, 2002, and therefore, the petitioner's 2001 (covering from April 1, 2001 to March 31, 2002) tax return is the tax return for the year of the priority date. The record before the director closed on October 6, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax return for its fiscal year 2005 was not due yet. Therefore, the petitioner's tax return for its fiscal year 2004 is the most recent available tax return for the instant case. The petitioner's tax returns for its fiscal years 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date:

In the fiscal year 2001 (4/1/01-3/31/02), the Form 1120 stated a net income[3] of $(13,390).
In the fiscal year 2002 (4/1/02-3/31/03), the Form 1120 stated a net income of $11,283.
In the fiscal year 2003 (4/1/03-3/31/04), the Form 1120 stated a net income of $8,797.
- In the fiscal year 2004 (4/1/04-3/31/05), the Form 1120 stated a net income of $17,744.

[3] Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

Therefore, for the fiscal years 2001, 2003 and 2004, the petitioner did not have sufficient net income to pay the beneficiary the full proffered wage of $62,000 per year; for the year 2002, the petitioner did not have sufficient net income to pay the difference of $58,022 between wages actually paid to the beneficiary and the proffered wage that year.

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.[4] 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 its fiscal year 2001 were $(29,308).
The petitioner's net current assets during its fiscal year 2002 were $(15,734).
The petitioner's net current assets during its fiscal year 2003 were $(8,645).
- The petitioner's net current assets during its fiscal year 2004 were $5,757.

Therefore, for the fiscal years 2001 through 2004, the petitioner did not have sufficient net current assets to pay the full proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140)[5]. This immigrant petition was filed on June 23, 2005 with the priority date of March 21, 2001, and approved on November 15, 2005. The beneficiary of this approved petition filed Form I-485 adjustment of status application[6] on February 27, 2006 and the I-485 application is still pending. Therefore, the petitioner is still obligated to demonstrate that it had sufficient net income or net current assets to pay the beneficiary of the approved petition the proffered wage from its priority date of March 21, 2001 to the present as well as to pay the instant beneficiary the proffered wage of $62,000 from the priority date of February 4, 2002 to the present. The record of proceeding in the instant case does not contain any evidence showing that the petitioner had sufficient funds to pay both proffered wages in the relevant years.

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[4] 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.

[5] EAC-05-191-51324.

[6] EAC-06-105-52171.

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, its net income, or its net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. On appeal counsel asserts that the petitioner maintains its books and records using the accrual method of accounting, while it filed its tax return on a cash basis, and therefore, the petitioner's accounts receivable are not included on its income tax return balance sheet. Counsel submits letters and financial statements from the petitioner's accountant showing that the petitioner's current assets exceed its liabilities using the accrual method of accounting. In the instant case, the petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

In addition, the financial statements submitted in the record of the instant case were not audited. 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 are 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.

Counsel argues that the petitioner continues to have significant cash on hand, which is more than sufficient to meet the proffered wage, and submits a bank statement showing the petitioner had a balance of $307,437.90 in its money market savings account with Bank of America as of February 15, 2006. However, counsel's reliance on the balance 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 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also urges CIS consider that the petitioner continues to generate substantial revenues and that the beneficiary's proposed employment would add the petitioner's revenue. However, no detail or documentation has been provided to explain how the beneficiary's employment as an indication that the petitioner will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

On appeal counsel also suggests CIS considering longevity of the business. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1993 and employs approximately 10 employees. Their gross income has always been above $3.7 million and they pay salaries and wages of $1 million per year averagely. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The evidence submitted in the record demonstrates that the petitioner could pay the proffered wage from the priority date and counsel's assertions on appeal overcome the ground of the director's denial. The decision of the director must be withdrawn.

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 met that burden.

ORDER: The appeal is sustained. The decision of the director is withdrawn. The petition is approved.