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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 07 2006**
WAC 05 209 50757

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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 sustained and the petition will be approved.

The petitioner is a computer software services company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. Counsel asserts that the "taxable income" figure is a useless number for purposes of determining ability to pay as taxpayers reduce their incomes by items as permitted by the Internal Revenue Service (IRS). For the reasons discussed below, this assertion runs counter to numerous federal court decisions. Nevertheless, counsel correctly asserts that the director made a material factual error in determining that the petitioner had not accounted for the wages of 16 employees on its tax returns.

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 Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on May 25, 2005. The proffered wage as stated on the Form ETA 750 is \$68,973 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 1, 2003.

On the petition, the petitioner claimed to have an establishment date in 1984, a gross annual income of \$1.2 million, and 16 employees. The petitioner did not list its net annual income as requested on the form. In support of the petition, the petitioner submitted an unaudited profit and loss statement reflecting a net loss of \$25,578.48 from April 1, 2004 through March 31, 2005. The petitioner also submitted its 2003 Form 1120, U.S. Corporation Income Tax Return, for April 1, 2003 through

March 31, 2004, reflecting a taxable income before net operating loss deduction and special deductions of \$18,154, current assets of \$103,036, current liabilities of \$428,188 and net current assets of (\$325,152). While the petitioner only listed \$55,877 in salaries and wages, it listed \$204,300 in compensation of officer and \$397,094 in cost of labor (Schedule A).

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 October 12, 2005, the director requested additional evidence pertinent to that ability for 2000 through 2004. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested quarterly wage reports, the beneficiary's Form W-2 for 2003 and 2004 and the petitioner's tax return for "the year 2003 & 2004."

In response, counsel noted that the priority date is May 25, 2005 and that the petitioner need not establish its ability to pay prior to that date. The petitioner submitted its tax returns for April 1, 2004 through March 31, 2005. The tax return reflects a taxable income of \$1,354, current assets of \$124,882, current liabilities of \$475,314 and net current assets of (\$350,432). While the petitioner listed only \$41,370 in salaries and wages, it listed \$176,675 in compensation of officers and \$411,869 in cost of labor (Schedule A). The petitioner also submitted quarterly wage and withholding reports for the last quarter of 2004 through the third quarter of 2005 and the beneficiary's 2004 Form W-2. The quarterly wage reports and Form W-2 Wage and Tax Statements reflect that the beneficiary earned \$56,254.82 in 2004, \$15,432 in the first quarter of 2005, \$15,822.12 in the second quarter of 2005 and \$17,190 in the third quarter of 2005.

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 November 21, 2005, denied the petition. In the decision, the director incorrectly listed the petitioner's taxable income for the accounting period ending March 31, 2003 as \$3,405, the amount of net operating loss deduction. As discussed above, the taxable income before net operating loss deduction and special deductions was \$18,154. The director also reviewed the salaries and wages entry on the petitioner's tax returns, without reviewing compensation of officers or cost of labor entries, and determined that it could not account for paying 16 employees minimum wage. The director further determined that the beneficiary's Form W-2 for 2004 was not credible as it conflicted with the total wages paid in that year. Once again, the director failed to take into account the petitioner's cost of labor entries. Finally, the director concluded that the removal of names and social security numbers of employees other than the beneficiary from the petitioner's quarterly wage reports precluded a material line of inquiry. Specifically, the director reiterates his conclusion that the wages and salaries reported on the petitioner's tax returns are inconsistent with 16 employees and asserts that without the names and social security numbers, it cannot be determined the number of employees or how much each earned. This conclusion is unexplained, as the petitioner did not omit the wages of each employee.

On appeal, counsel asserts that "taxable income" is a meaningless figure. Rather, counsel asserts that the director should have used the petitioner's gross receipts or sales as the relevant figure. Counsel further notes, correctly, that wages and salaries can be listed on three separate lines on a tax

return, including cost of labor on Schedule A. Counsel then prorates the proffered wage for the period after the priority date and deducts the wages actually paid during that period to determine that the petitioner need only demonstrate an ability to pay an additional \$624 in 2005. The petitioner submits IRS publications, a statement from a certified public accountant, an October 2005 bank statement and IRS data confirming the beneficiary's 2004 wages as provided on the 2004 Form W-2 submitted in this proceeding.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 did not establish that it employed and paid the beneficiary the full proffered wage in 2005. We will consider counsel's request to prorate the proffered wage below.

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). 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. Counsel makes no attempt to distinguish any of these cases. As such, counsel's assertion that the director should have considered the petitioner's gross income is not persuasive.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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.

While the petitioner submitted the required initial evidence, that evidence does not cover the priority date. The evidence does, however, reflect a recent positive net income and a high payroll. Regarding the salient portion of 2005, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. In this matter, however, the petitioner has provided evidence of the beneficiary's wages by quarter, allowing reasonable prorating. We are persuaded by this evidence, in addition to the bank statements submitted, that the petitioner has now established its ability to pay the proffered wage as of May 25, 2005.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

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

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.