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U.S. Citizenship
and Immigration
Services

RB



FILE: WAC 02 214 52625 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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
Robert P. Wiemann, Director
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 remanded for further consideration.

The petitioner is a software and consultancy company. 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, accompanies the petition. The petitioner wishes to substitute the beneficiary for the alien listed on the Form ETA 750. 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 are members of the professions.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 11, 2000. The proffered salary as stated on the labor certification is \$58,500 per year.

With the petition, counsel provided a letter stating that the petitioner, [REDACTED], was a successor-in-interest to [REDACTED] (formerly named [REDACTED]).

[REDACTED] Counsel failed, however, to submit evidence of the petitioner's ability to pay the proffered wage. On October 19, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage from 1999 and continuing to the present. The director specifically requested that the

evidence be in the form of copies of annual reports, audited financial statements, or signed federal income tax returns with all schedules, attachments, and statements. The director also informed the petitioner that if it had one hundred or more employees, it might instead provide a statement from a financial officer of the organization that establishes the petitioner's ability to pay the proffered wage. On May 28, 2003, the director denied the petition stating that CIS had not received the requested information, and, therefore, the petition was considered abandoned. On June 6, 2003, the petitioner, through counsel, filed a motion to reopen providing evidence that CIS had received the requested information on December 19, 2002. On July 11, 2003, the director granted the motion.

In response to the request for evidence of October 19, 2002, counsel provided a complete copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return for fiscal year March 9, 2001 through March 31, 2001, a complete copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return for fiscal year April 1, 2001 through March 15, 2002, a statement indicating that the petitioner, [REDACTED] was acquired by [REDACTED] on July 1, 2002, a letter from [REDACTED] Vice President and CFO of [REDACTED] stating that it currently has a workforce of approximately 8,000 employees with an annual net income in 2001 of \$17.387 million, and a financial statement for [REDACTED] Inc. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$212,681 and net current assets of \$3,293,995. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$3,030,683 and net current assets of \$5,760,070.

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. On July 11, 2003, the director denied the petition.

On appeal, counsel submits a brief, previously submitted evidence, and a letter from [REDACTED] Vice President, of the petitioner, [REDACTED] stating that it has a workforce of over 350 employees and the ability to pay the salaries of the individuals filed for under the I-140 petitions pending with the California Service Center. Counsel states:

Analysis of 2000 Tax Return

1. The 2000 tax return is for the period of March 9 to March 31, 2001. A total of 22 days.

In these 22 days, the net income is \$212,681. On this basis, for 365 days, the net income would be close to 3.5 MILLION.

2. There is no negative cash balance. The total assets are \$19,744,932 as seen on Line 15 of page four of the form 1120 – the corporate tax return, and the liabilities are only \$7,308,136, thus leaving a NET ASSETS of \$12,436,796 (total of line 22, 23, and 25).

Analysis of 2001 Tax Return

1. The net income is a positive number. The real net income is \$3,231,702 on page four of form 1120, on schedule M-1, line 1.

Since the company was merged on March 15, 2002, there was a one-time stock option compensation cost of \$4.8 million plus related costs totaling \$6,025,000 as reflected on line 8b on Schedule M-1. This one time charge is reflected on the page immediately following the balance sheet page. Because of this one time charge of \$6,025,000 there is a loss on the tax return of \$3,030,683 as reflected on page one of the tax return and on Line 10 of Schedule M-1.

2. The NET ASSETS as of March 15, 2002 are upwards of \$22 million. The total assets on page four of the form 1120 for 2001 are \$38,729,979, and the total liabilities on the same page on line 16, 18, and 21 are \$16,303,458, thus leaving a net assets balance of \$22,426,521.

* * *

The petitioner in this instant has established that the salary offered of \$58,500 annually CAN BE PAID. The priority date on the Labor Certification approved and I-140 filed is April 11, 2000.

In addition to the above, the officer adjudicating the I-140 mentioned that the Tax Returns/Annual Statement for 2002 was not included. We would like to refer to the first Para of this Motion wherein we filed along with an RFE, on case number [REDACTED] [REDACTED] documentation to evidence a "Successor in Interest" to [REDACTED] please see the letter and receipt for the [REDACTED] filing. In that package the Annual Reports from 1998 through 2003 along with a letter indicating they have the Ability to Pay the proffered wage was included. [REDACTED] have [sic] over 8000 employees. At the time of the adjudication of the pending I-140 this was not taken into consideration. We have attached copies for your reference in Exhibit 3 along with the filing receipt.

The I-140 in this instant case under SignalTree Inc. WAS WRONGLY DENIED and should be immediately approved.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 and 2001.

As an alternative 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, 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 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 CIS 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 also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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. 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. The petitioner's net current assets during 2000 were \$3,293,995. The petitioner could have paid the proffered wage in 2000 from its net current assets. The petitioner's net current assets during 2001 were \$5,760,070. The petitioner could have paid the proffered wage in 2001 from its net current assets.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$212,681 and net current assets of \$3,293,995. The petitioner could pay the proffered wage from either its taxable income or its net current assets in 2000.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$3,030,683 and net current assets of \$5,760,070. The petitioner could pay the proffered wage from its net current assets in 2001.

While it appears that the petitioner, [REDACTED] and its successor-in-interest, [REDACTED] could pay the proffered wage from the priority date and continuing to the present, the labor certification was issued to [REDACTED] subsequently named [REDACTED] Inc. In order to maintain the original priority date, a successor-in-interest between [REDACTED] and [REDACTED] must be established, and it must be demonstrated that [REDACTED] had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of [REDACTED] to pay the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In addition, in a letter dated June 20, 2002, counsel states that [REDACTED] "purchased significantly all of the assets and liabilities of [REDACTED] a California Corporation." However, later in that same letter, counsel states, [REDACTED] changed the name of the Company to [REDACTED] Inc." These statements make it unclear as to whether [REDACTED] is actually a successor-in-interest to [REDACTED] or if [REDACTED] and [REDACTED] are one and the same company. 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). It is noted that the director failed to request evidence pertaining to the question of successor-in-interest or that the original petitioner [REDACTED] had the ability to pay the proffered wage. In addition, counsel has indicated in his brief that the petitioner has filed additional petitions with CIS. There is no evidence in the record of how many additional petitions were filed with CIS, and it does not appear that the director considered this factor in his decision. If additional petitions were filed during the year of the priority date and subsequently, then the petitioner must show that it had the ability to pay all of the wages for those years.

Furthermore, it is also noted that Part B of the amended ETA 750 is not in the record of proceeding. Part B must be completed and signed by the current beneficiary.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the successor-in-interest between [REDACTED] and [REDACTED] and, of the original petitioner's, [REDACTED] Inc., ability to pay the proffered wage, an original completed and signed Part B of Form ETA 750 for the current beneficiary, a list of all petitions filed with CIS for the year of the priority date and continuing to the present, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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ORDER: The director's July 11, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.