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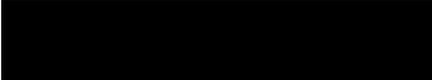
Date:

**JUL 19 2005**

WAC-03-007-53488

IN RE:

Petitioner:



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:



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, 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 dismissed.

The petitioner is a computer consultant. 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, accompanied the petition. 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.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 17, 2000. The proffered wage as stated on the Form ETA 750 is \$68,610.00 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 1999.

On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income “in excess of [\$250,000],” and to currently employ 3-4 workers<sup>1</sup>. In support of the petition, the petitioner submitted its Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2000 and 2001.

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 April 3, 2003, 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

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<sup>1</sup> In later correspondence, the petitioner corrected that number to 9.

specifically sought evidence from 2000 onwards, any evidence of wage payments from the petitioner to the beneficiary, quarterly wage reports, and payroll summaries.

In response, the petitioner submitted its Forms 1120S corporate tax returns for the years 2000, 2001, and 2002. The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Net income	-\$3,400	-\$121,144	-\$46,510
Current Assets	\$37,494	\$23,040	\$14,549
Current Liabilities	\$2,574	\$48,939	\$32,775
Net current assets	\$34,920	-\$25,899	-\$18,226

In addition, counsel submitted copies of the petitioner's quarterly wage reports and Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2000, 2001, and 2002. The Forms W-2 reflect wages of only \$7,656 in 2000<sup>2</sup>, \$40,600 in 2001, and \$41,922.19 in 2002, which is \$60,954 less than the proffered wage in 2000, \$28,010 less than the proffered wage in 2001, and \$26,687.81 less than the proffered wage in 2002. The petitioner also submitted a contract between itself and a third-party client reflecting that the beneficiary would be placed at the third-party client's worksite for a period of one year, with a thirty-day notice cancellation clause, for which the petitioner would be compensated \$38 per hour for each hour the beneficiary worked for the third-party client<sup>3</sup>.

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 August 5, 2003, denied the petition, noting the petitioner's negative net income and negative net current assets, even considering wages already paid to the beneficiary.

On appeal, counsel asserts that the petitioner's continuing ability to pay the proffered wage beginning on the priority date is illustrated by the total wages it pays its employees and that its cash flow should be considered instead of the director's analysis, which "does not meet generally accepted accounting principles [(GAAP)]." Counsel cites to no legal authority in his brief.

The petitioner submits a letter from [REDACTED] a certified public accountant, who understood the director's decision to mean that the total proffered wage would be reduced from the petitioner's net income, instead of acknowledging wages already paid, and that this results in a double counting expenses in violation of GAAP. Mr. [REDACTED] also asserts that a company's net income merely reflects "taxation minimization" and has no "rational relation" to a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date. Mr. [REDACTED] also states that an S corporation is supposed to show losses so that it gets a "tax subsidy" or offset from losses with other income of its investors. Mr. [REDACTED] states that the petitioner's financial strength is not revealed by its net income because it is derived after deducting for depreciation and salary expenses, and that Internal Revenue Services (IRS) regulations permit for the carrying forward of losses so that the petitioner would

<sup>2</sup> W-2 forms issued to the beneficiary from [REDACTED] in 1999 and 2000 are also in the record of proceeding but the AAO cannot ascertain [REDACTED] relationship to the petitioner. The AAO notes that the petitioner elected to be an S corporation as of November 2000, but no documentation contained in the record of proceeding, as currently constituted, confirms that [REDACTED] was the predecessor entity to the petitioner.

<sup>3</sup> The proffered wage is \$33.00 per hour.

end up with positive net income over the course of years. Finally, Mr. [REDACTED] states that GAAP and IRS regulations “recognize that the breaking of the accounting data in tax years is an artificial exercise and results in distortions of data and does not reflect the true financial picture of the company,” and states that the petitioner’s revenue sources, such as contracts with customers are “in the works” and not recognized under the accrual method of accounting. He states that the petitioner’s marketing efforts, as a start-up company, are thus not realized through its tax returns. Mr. [REDACTED] cites to no specific citation of the Internal Revenue Code, Congressional legislation, or immigration legal authorities in his letter.

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 \$7,656 in 2000, \$40,600 in 2001, and \$41,922.19 in 2002, which is \$60,954 less than the proffered wage in 2000, \$28,010 less than the proffered wage in 2001, and \$26,687.81 less than the proffered wage in 2002. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage<sup>4</sup>.

Contrary to counsel’s and Mr. [REDACTED] assertions, 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.

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

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<sup>4</sup> The director’s decision was unclear concerning this evaluation, which apparently led Mr. [REDACTED] and counsel to assume that the director was not accounting for wages actually paid.

are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> 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 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 has not demonstrated that it paid the full proffered wage to the beneficiary in 2000. In 2000, the petitioner shows negative net income and net current assets of only \$34,920, which is less than the remaining proffered wage of \$60,954, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. Likewise, in both 2001 and 2002, the petitioner shows negative net income and negative net current assets, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. While the petitioner files taxes as an S corporation, Mr. ██████ point about S corporation losses and investor income does not appear to overcome the petitioner's financial showing in its tax returns since there is no evidence in the record of proceeding that its losses were offset by investor income. Mr. ██████ did not cite to legal authority for this premise.

Additionally, reviewing the totality of circumstances in this case, a decision cannot be made in the petitioner's favor for a number of reasons. As Mr. ██████ concedes, the petitioner is a start-up company and its marketing efforts have not been realized. In prior counsel's cover letter accompanying the filing of the petition, he asked CIS to "take note that the petitioner was not incorporated until 11/1/00 and consequently, the petitioner's gross income for the year 2000 is low." Additionally, the petitioner's representative, Mr. ██████ (Mr. ██████ in a letter responding to the director's request for evidence, explained that the petitioner could not hire as many workers as it had intended because of the weakened U.S. economy resulting in the "elimination of several positions." Mr. ██████ also stated that "[w]e are currently beginning to experience revenue growth due to a stabilized economy and specifically, improvement in the software sector." The priority date is one week after the petitioner incorporated. The petitioner's and its representatives' assertions that its financial status is improving does not reflect financial viability and eligibility for the immigrant benefit sought. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has simply failed to set forth evidence of a strong financial showing that it has the continuing ability to pay the proffered wage beginning on the priority date.

Finally, the AAO noted the contract between the petitioner and the third-party client submitted in response to the director's request for evidence. The contract was for a one-year duration with a provision permitting either party to cancel the contract with 30 days notice, and was entered into in January 2003. Because of the date it was entered into, the contract would not assist the petitioner establish its continuing ability to pay the proffered wage beginning on the priority date since the contract's revenue generating ability did not commence until three years after the priority date. The contract is not strong evidence of the petitioner's continuing ability to pay because it could be cancelled so quickly, and it is thus an unreliable source of continuous income. Additionally, the contract

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<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

would only realize a \$5.00 profit per hour for the petitioner, and the record of proceeding does not contain evidence about the expenses associated with employment of the beneficiary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, or 2002. Therefore, the petitioner has not established that it 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.