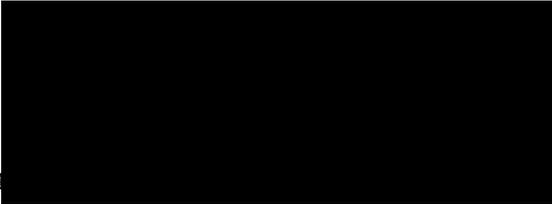


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BC

FILE: [REDACTED]  
LIN 03 136 50662

Office: NEBRASKA SERVICE CENTER

Date: OCT 26 2005

IN RE: Petitioner: [REDACTED]  
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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a marketing research 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. 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 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.

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, 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 September 24, 2002. The proffered wage as stated on the Form ETA 750 is \$55,000.00 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750; Application for Alien Employment Certification, approved by the Department of Labor; a copy of IRS Form 1120 tax return for 2001; an untitled document of checking transactions; "Employers Quarterly Federal Tax Form" (Form-941); and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director specifically requested a signed copy of the petitioner's 2002 corporate tax return, and, if the beneficiary was employed by the petitioner in 2002, a copy of the beneficiary's Form W-2 Wage and Tax Statement. The Director also stated in the request that evidence of the petitioner's ability to pay could include audited profit/loss statements, complete bank account records, and/or personnel records.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a cover letter dated September 10, 2003 summarizing the evidence presented, and, among other documents, transmitted the petitioner's 2002 corporate tax return and checking account statements.

The director denied the petition on May 11, 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.

On appeal, counsel asserts that the petitioner's net income is equal or greater than the proffered wage of \$55,000.00 per year; that the "initial" evidence demonstrates that the petitioner's net current assets are equal to or greater than the proffered wage; and, that the petitioner "... has paid or currently is paying the proffered wage." Counsel submits additional evidence, among other documents, which are one (1) earnings statement dated June 2, 2004, the petitioner's corporate tax return for 2003, and, an audited financial statement dated December 31, 2003.

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. One earnings statement dated June 2, 2004, stated that the beneficiary received wages from the petitioner, year to date, in the amount of \$20,500.00. The beneficiary is not noted on a list of employees' wage and withholding report for the quarter ending December 31, 2002, and no W-2 Wage and Tax Statements were submitted.

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). 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 the INS, now CIS, should have considered income before expenses were paid rather than net income.

The tax returns<sup>1</sup> demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$55,000.00 from the priority date of September 24, 2002:

- In 2002, the Form 1120 stated a taxable income loss<sup>2</sup> of <\$4,571.00><sup>3</sup>.
- In 2003, the form 1120 stated a taxable income of \$11,759.00.

<sup>1</sup> Since the priority date was September 24, 2002, tax returns for prior years have little probative value of the ability to pay. In 2001, the Form 1120 stated taxable income of \$22,343.00.

<sup>2</sup> IRS Form 1120, Line 28.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Based upon its taxable income for the years examined, the petitioner could not pay the 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. According to all the evidence submitted in that regard only one earnings statement was submitted for a part of a year in 2004,<sup>4</sup> which is insufficient for determining if the petitioner paid the beneficiary the proffered wage of \$55,000.00 from the priority date of September 24, 2002.

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 2002 through 2003 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.<sup>5</sup> 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 1120 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 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, the petitioner's Form 1120 return stated current assets of <\$21,597.00> and \$384.00 in current liabilities. Therefore, the petitioner had <\$21,981.00> in net current assets for 2002. Since the proffered wage was \$55,000, this sum is less than the proffered wage.
- In 2003, the petitioner's Form 1120 return stated current assets of \$26,548.00 and \$46,486.00 in current liabilities. Therefore, the petitioner had <\$20,018.00> in net current assets for 2003. Since the proffered wage was \$55,000.00, this sum is less than the proffered wage.

Therefore, for the period 2002 through 2003 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 current assets.

Counsel submitted an audited financial statement dated December 31, 2003 that stated a net profit of \$7,489.00 for year 2003. Since the proffered wage was \$55,000.00 per year, this profit figure is less than the proffered wage.

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<sup>4</sup> Indicates an annual pay rate of \$41,000.00.

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

Counsel advocates the use of the cash balance of the two business accounts to show the ability to pay the proffered wage. Counsel's 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 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.

CIS electronic database records show that the petitioner filed I-140 petitions on behalf of other beneficiaries at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner less than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

Contrary to all of counsel assertions on appeal, the petitioner's net income is not equal or greater than the proffered wage of \$55,000.00 per year. In 2002, the Form 1120 stated a taxable income loss<sup>6</sup> of <\$4,571.00>. In 2003, the form 1120 stated a taxable income of \$11,759.00. Counsel stated that petitioner's evidence demonstrated that the petitioner's "total assets"<sup>7</sup> are equal to or greater than the proffered wage. The petitioner had <\$21,981.00> in net current assets for 2002, and, the petitioner had <\$20,018.00> in net current assets for 2003. Counsel stated that the petitioner "... has paid or currently is paying the proffered wage." According to all the evidence submitted in that regard only one earnings statement was submitted for a part of a year in 2004 which is insufficient to prove that the petitioner paid the beneficiary the proffered wage from 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.

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<sup>6</sup> IRS Form 1120, Line 28.

<sup>7</sup> As indicated previously in this discussion, it is net current assets, which is the measure of liquidity that CIS reviews, not "total assets."