U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 24 2006

EAC 03 183 51206

IN RE: Petitioner: [redacted]
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:

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

The petitioner is a records and information management company. It seeks to employ the beneficiary permanently in the United States as a records and information management systems director. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

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. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Form ETA 750 is $109,000 per year. On Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claims to have worked for the petitioner from July 1989 to January 1999.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on May 19, 2003, the corporate petitioner claims that it was established on October 1, 1989, has twenty current employees, has a gross annual income of 1.2 million dollars, and a net annual income of $850,000.

In support of its ability to pay the proffered salary, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It indicates that the petitioner files its taxes using a standard calendar year. The 2001 tax return shows that the petitioner reported ordinary income of $8,757.[1]

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[1] For the purpose of this review, ordinary income will be treated as net income.

Schedule L of the tax return reveals that the petitioner had $86,564 in current assets and $230,321 in current liabilities, resulting in -$143,757 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as a measure of liquidity during a given period and as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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.

On December 10, 2003, the director requested additional evidence in the form of federal tax returns, annual reports, or audited financial statements from the petitioner pertinent to its continuing ability to pay the proffered wage of beginning at the priority date of April 30, 2001. The director also specifically requested that the petitioner provide a copy of its 2002 federal income tax return with all schedules and attachments, copies of the beneficiary's Wage and Tax Statement (W-2) if the petitioner employed him, a statement from a financial officer, or annual reports for 2001 and 2002 along with audited or reviewed financial statements.

The petitioner, through counsel, provided a copy of the petitioner's corporate tax return for 2002. It reflects that the petitioner reported $37,107 in ordinary income. Schedule L indicates that the petitioner had $823,234 in current assets and $945,532 in current liabilities, yielding -$122,298 in net current assets.

Counsel also supplied a letter, dated March 3, 2004, from the petitioner's vice-president. states that the beneficiary "will perform duties previously assigned to a replaced management staff person" and that the salary of the "replaced staff person would partially cover" the beneficiary's wages. Counsel also provides a letter, dated March 3, 2004, from the petitioner's accountant, states that $92,400 in bonuses was paid to shareholder(s) in 2001 and in 2002 in order to minimize the corporate petitioner's tax liability by reducing profits. He states that these funds could have been available to pay the proposed wage offer.

The director denied the petition on May 6, 2004, noting that the petitioner's level of net income and net current assets failed to the demonstrate the petitioner's ability to pay the proposed wage offer in either 2001 or 2002. The director declined to consider the shareholder bonuses paid in 2001 or 2002 and noted that the assertion that the beneficiary intended replacement of another staff management employee was not supported by the evidence showing that the staff person no longer works for the petitioner or the amount of wages paid.

On appeal, counsel submits two additional letters from nd Both are dated October 18, 2004. repeats the assertions in his earlier letter and states that the tax returns do not accurately reflect available funds that the petitioner could have used to pay the proffered wage. He adds that the beneficiary "would have replaced an existing management employee" so that this employee's salary would not have been incurred by the petitioner. He also reiterates the assertion that the shareholder bonuses[2] could have been paid to the beneficiary as wages. letter describes the beneficiary's background and the petitioner's desire to employ him. He states that his responsibilities would "include incorporating the duties performed by a former

[2] Shown on the tax return as officers' compensation

employee" who served as a direct project supervisor. also states that the shareholder bonuses would have been able to also support the payment of the proffered wage. In support of the amount of wages paid to the former employee, copies of three W-2s have been submitted. The wages paid by the petitioner, however, are shown to be $41,744.33 in 2001; $54,364.80 in 2002, and $59,365.83 in 2003.

In determining a petitioner's ability to pay a certified wage, CIS will first examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, the record does not indicate that the petitioner has employed the beneficiary after the priority date.

If the evidence fails to show that the petitioner has already established its ability to pay the proffered wage through compensation paid to the beneficiary, CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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*, 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.

If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, as stated above, CIS will review a petitioner's net current assets.

In this case, although the evidence indicates that the petitioner's net income could not support the proffered wage of $109,000, in some cases, where the evidence indicates that a reasonable portion of shareholder bonuses may be considered as additional financial resource, it is appropriate to review such figures in addition to the net income of the business. Here, the salary of the former employee may also be considered in conjunction with the when the amounts of income in those respective years, the results indicate that the petitioner could cover the certified wage of $109,000 in both 2001 and 2002.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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 petition will be approved.