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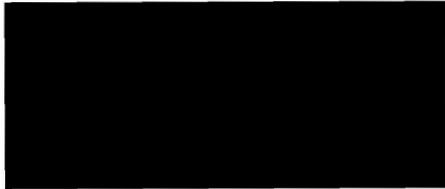
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-05-241-52841

Office: VERMONT SERVICE CENTER

Date: **SEP 10 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and development firm. It seeks to employ the beneficiary permanently in the United States as a programmer 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 (DOL). The director determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 26, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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. See 8 C.F.R. § 204.5(d). 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 April 23, 2002. The proffered wage as stated on the Form ETA 750 is \$84,850 per year. On the Form ETA 750B, signed by the beneficiary on March 18, 2002, the beneficiary claimed to have worked for the petitioner since February 2001. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$3,500,999, to have a net annual income of \$39,326, and to currently employ 25 workers.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence in the record includes the petitioner's corporate tax returns for its fiscal years 2001 through 2004, financial statements for its fiscal years ending July 31, 2002, 2003, 2004 and 2005, the beneficiary's W-2 forms for 2002 and 2003, W-2 forms for 2005 issued for [REDACTED] and [REDACTED] and the letters from the petitioner regarding the three beneficiaries of the approved petitions. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the submitted evidence established that the petitioner had the financial ability at the time of the submission of the application for alien employment certification on behalf of the beneficiary as of April 23, 2002 and continued thereof.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 submitted the beneficiary's W-2 forms for 2002 and 2003. These W-2 forms show that the petitioner hired and paid the beneficiary \$71,625.73 in the calendar year of 2002 and \$59,024.75 in the calendar year of 2003. The record does not contain any evidence showing the petitioner hired and paid the beneficiary any compensation in 2004 and onwards. The petitioner has established that it paid the beneficiary the partial proffered wage in the calendar year of 2002, the year of the priority date, and 2003 while it did not establish that it paid the beneficiary the proffered wage in 2004 and 2005. The petitioner is obligated to demonstrate that it could pay the difference of \$13,224.27 in 2002 and \$25,825.25 in 2003 between wages actually paid to the beneficiary and the proffered wage, and pay the full proffered wage of \$84,850 per year in 2004 through the present with its net income or its net current assets.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years 2001 through 2004. According to the tax returns in the record, the petitioner is structured as a C corporation and the petitioner's fiscal year runs from August 1 to July 31. The AAO notes that the beneficiary's W-2 forms were issued on a calendar year basis while the tax returns were filed on the petitioner's fiscal year basis. The petitioner did not submit evidence of the beneficiary's compensation on its fiscal year basis, such as payroll records, paystubs or cancelled paychecks, for the beneficiary during the fiscal year of 2001, i.e. from August 1, 2001 to July 31, 2002. Nor did the petitioner submit audited financial statements for calendar years of 2002 and 2003. It is impossible to figure out exactly with the W-2 forms how much the petitioner paid the beneficiary during the fiscal year of 2002 or 2003, or calculate precisely how much of the net income the petitioner had in calendar years of 2002 or 2003. Therefore, the AAO will treat the wages already paid to the beneficiary in calendar year of 2002 as ones paid during the fiscal year of 2001 since the calendar year 2002 and the fiscal year 2001 have 7 months overlapped but the calendar year 2002 only has 5 months with the fiscal year 2002, and both the W-2 for the calendar year 2002 and the tax return for the fiscal year 2001 cover the priority date in the instant case, that is April 23, 2002. If the petitioner pursues this matter, it should submit either the beneficiary's payroll records, paystubs or cancelled paychecks on the fiscal year basis, or audited financial statements for calendar years of 2002 and 2003.

The petitioner's tax returns for its fiscal years 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2002 and 2003 and the full proffered wage of \$84,850 per year in 2004 and onwards:

- In the fiscal year 2001 (8/1/01-7/31/02), the Form 1120 stated a net income² of \$(22,018).
- In the fiscal year 2002 (8/1/02-7/31/03), the Form 1120 stated a net income of \$33,247.
 - In the fiscal year 2003 (8/1/03-7/31/04), the Form 1120 stated a net income of \$57,188.
 - In the fiscal year 2004 (8/1/04-7/31/05), the Form 1120 stated a net income of \$(12,376).

Therefore, for the fiscal year 2001, the petitioner did not have sufficient net income to pay the difference of \$13,224.27 in the calendar year 2002 between wages actually paid to the beneficiary and the proffered wage; for the fiscal year 2002, the petitioner had sufficient net income to pay the difference of \$25,825.25 in the calendar year 2003 between wages actually paid to the beneficiary and the proffered wage; for the fiscal years 2003 and 2004, the petitioner did not have sufficient net income to pay the full proffered wage of \$84,850 per year.

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.³ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during its fiscal year 2001 were \$1,200.
- The petitioner's net current assets during its fiscal year 2003 were \$77,219.
- The petitioner's net current assets during its fiscal year 2004 were \$7,857.

Therefore, for the fiscal year 2001, the petitioner did not have sufficient net current assets to pay the difference of \$13,224.27 in the calendar year 2002 between wages actually paid to the beneficiary and the proffered wage; for the fiscal years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the full proffered wage of \$84,850 per year.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as

² Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

³ 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.

of the priority date to its fiscal year 2004 except for the fiscal year 2002 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel asserts that the petitioner's tax returns were filed on cash basis and its financial statements were prepared in accordance with accrual basis, and that the submitted reviewed financial statements for its fiscal years 2002 through 2005 establish the petitioner's continuing ability to pay the proffered wage. This office will accept tax returns prepared pursuant to either cash convention or accrual convention, if those were the tax returns the petitioner had actually submitted to IRS. This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Moreover, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition, the petitioner filed other Immigrant Petitions for Alien Worker (Form I-140) for seven more workers. All of these seven petitions were approved during the years 2004 through 2006 except for one of the approval was revoked in 2006.⁴ The petitioner must show that it had sufficient income to pay all the wages at the priority date.

⁴ These petitions are as follows: EAC-04-104-52245 filed on February 24, 2004 with the priority date of January 24, 2002 and approved on July 28, 2004; EAC-05-093-53321 filed on February 14, 2005 with the priority date of March 21, 2000 and approved on February 28, 2005; EAC-05-123-53413 filed on March 29, 2005, approved on April 11, 2005 but revoked on October 10, 2006; EAC-05-150-52941 filed on April 29, 2005 with the priority date of March 22, 2002 and approved on June 27, 2005; EAC-05-192-50164 filed on June 22, 2005 with the priority date of May 9, 2002 and approved on December 9, 2005; EAC-06-098-52615 filed on February 17, 2006 with the priority date of August 1, 2005 and approved on May 22, 2006; LIN-06-112-52515 filed on March 7, 2006 with the priority date of August 1, 2005 and approved on May 3, 2006.

Counsel submitted copies of letters dated March 10, 2006 from the petitioner to CIS requesting cancellation of the three approved petitions (EAC-04-104-52245, EAC-05-123-53413 and EAC-05-150-52941) and W-2 forms for 2005 for two of them. CIS records do not show that the approvals of the petitions EAC-04-104-52245 and EAC-05-150-52941 have been revoked. The record of proceeding does not contain any evidence that the petitioner paid the other four beneficiaries of the approved petitions proffered wages as of their priority dates until they obtained their lawful permanent residence. The record shows that the petitioner failed to establish its continuing ability to pay the proffered wage not only to all the other four beneficiaries, but also to the instant beneficiary.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.