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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 078 51880 Office: CALIFORNIA SERVICE CENTER Date: JAN 29 2004

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, 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 ("the AAO") on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner creates software packages for the internet media. It seeks to employ the beneficiary permanently in the United States as a senior software engineer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is April 23, 2001. The beneficiary's salary as stated on the labor certification is $83,900.00 per annum.

Counsel submitted a copy of the petitioner's Internal Revenue Service ("IRS") Forms 1120 for 2001 which showed a taxable income of -$668,011.00. Counsel further submitted copies of the petitioner's bank statements for February, March, May, June and July of 2001, a copy of the petitioner's unaudited Balance Sheet for the period ending March 31, 2001, a copy of the petitioner's Profit and Loss Statement for the period from April 2000 through March 2001, and a letter from the Chairman of the Board and Lead Investor ("the Chairman"), Josh Gordon, of the petitioning entity. The Chairman stated that he has already invested $2,000,000 in the company and would be willing to provide additional investment capital as needed.

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 both CIS and 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).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's taxable income, with depreciation added to the taxable income, was lower than the proffered wage and denied the petition accordingly.[1]

On appeal, counsel reiterates his assertion that "[the Chairman] has pledged that he will continue to financially support the company until it is financially independent."

The speculative assertion that the Chairman could pay the wage from his personal assets is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders, or in this case, board of chairpersons. Consequently, any assets of its chairpersons or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec.24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Even if the Chairman's assets and financial contributions could be considered with respect to the petitioner's future ability to pay the proffered wages, the AAO notes that the Chairman's past financial support for the petitioner start-up company has not facilitated positive earnings for the petitioner. The petitioner's 2001 tax return shows significant losses and investment funds were reported as liabilities on the petitioner's Schedule L to its 2001 tax return.

Counsel further asserts that the petitioner's improved economic performance since the filing of the petition allows the petitioner the ability to pay the proffered wage. On appeal, the petitioner submits copies of its bank statements for December of 2001 and January of 2002 to illustrate the petitioner's improving situation.

The new evidence submitted with the appeal is not adequate to demonstrate that the petitioner has sufficient ability to pay the proffered wage. Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

To the contrary of counsel's assertions, a review of the petitioner's website at http://www.workspot.com reveals the petitioner's poor financial situation. On a link to its history or "blog," Greg Bryant, a founder and signatory of the visa petition, states the following: "We're impoverished . . . . We have to get real: we have no assets, and we made almost no money this year. . . ." (September 24, 2003); "Basically, [the petitioner] isn't making enough money to pay even a single person regularly. . . ." (September 23, 2003). There are varied references to the petitioner's financial situation declining rather than improving and a statement that it cannot pay wages.

The petitioner's IRS Form 1120 for calendar year 2001 shows a taxable income of -$668,011. The petitioner could not pay a proffered wage of $83,900.00 a year out of this income. Additionally, the petitioner's current liabilities outweigh its current assets.[2]

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[1] At the outset, the director made a mistake in adding back deprecation. There is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

[2] Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, if net current assets are greater than the proffered wage, the petitioner can illustrate the ability to pay the proffered wage.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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. The petition is denied.