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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 02 129 50318 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an E-business products and consulting firm. It seeks to employ the beneficiary permanently in the United States as a System Engineer II (multiple positions). As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advance degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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. The petition's priority date in this instance is February 16, 2001. The beneficiary's salary as stated on the labor certification is $75,151 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated May 21, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specified the petitioner's 2001 federal income tax return, annual report or audited financial statement and, for 2001 and the first quarter of 2002, California quarterly wage reports (Form DE-6).

Counsel submitted the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return and Forms DE-6, as requested. The response to the RFE added such unaudited samplings of business transactions as purchase orders, one (1) bank statement, a profit and loss statement for January through June 2002, and balance sheets as of December 31, 2001 and March 31, 2002. The petitioner's 2001 Form 1120 reported a loss, ($1,318,016), for taxable income before net operating loss deduction and special deductions. The director further considered the difference of current assets minus current liabilities, as reported in Schedule L of the federal tax returns, i.e., net current assets. Net current assets were a deficit ($103,101.16), an amount less than the proffered wage.

Citizenship and Immigration Services (CIS), formerly the Service or INS, uses a multiple-pronged analysis in evaluating whether the petitioner has the ability to pay the proffered wage. First, CIS considers whether the petitioner paid the proffered wage at or after the priority date. If the petitioner did not, CIS will determine whether its net income from the federal tax return or audited financial statement is equal to, or greater than, the proffered wage. If the petitioner's net income is less than the proffered wage, CIS will calculate net current assets, as the difference of its current assets minus current liabilities, from the balance sheet of the federal tax return or audited financial statement. "Current assets" consist of cash and assets that the petitioner

may reasonably convert to cash, or cash equivalents, within one year from the date of the balance sheet. "Current liabilities" are debts that the petitioner must pay within one year from the date of the balance sheet.

The director's decision of August 23, 2002 acknowledged:

> It has been noted that the beneficiary has been working for the petitioner under H1B status since March of 2000. Apparently the [petitioner] has been able to pay the beneficiary's wages up to this time. . . . Nevertheless, the history of losses and the negative working capital position described above appears [sic] to indicate that the [petitioner] will have great difficulty in continuing to meet such large payroll expenditures in the near future.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date or in the near future and denied the petition.

On appeal, the petitioner, in a letter of September 23, 2002, pleads:

> Please note, we have been paying the proffered wage, not just to the beneficiary, but also to almost 11 other employees. We have been paying the beneficiary's wage for over two years.

Form DE-6 for 2001 shows payments to the beneficiary of $48,026.66, an amount less than the proffered wage. The petitioner contends, also, that this is an appropriate case to give weight to select, unaudited financial documents, as submitted. The petitioner insists on a balance sheet of March 31, 2002 and on its difference of total assets minus total liabilities of $9,505.08, an amount less than the proffered wage. The petitioner counters that, "In assessing it in the correct light, the same significance [evidentiary weight] should be given." The petitioner and counsel offer no authority to supplant net current assets as the customary measure of sums currently available to meet ongoing payroll.

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).

The petitioner concedes that it showed only a net loss at the priority date. Nonetheless, the petitioner speculates, "[T]his information alone does not establish that [the petitioner] cannot pay the proffered wage in the future."

On the contrary, 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. Tex. 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.,* 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

The petitioner persists in a hypothesis, for the future, that "Corporate loss does not necessarily mean that the company will not be able to make payroll or keep operating."

The regulations do not authorize the disregard of the condition of the business at the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

The petitioner urges that invoices, contracts, and purchase orders are "lucrative and long term and clearly establish that [the petitioner] has work, is viable and is making a profit." These documents pertain to 2001. The petitioner conceded that 2001 was an unprofitable year.

One (1) selected bank statement, as of May 31, 2002, reflected a commercial account balance of $51,433.85 and money market investment account balance of $31,399.12, totaling $82,832.97, equal to or greater than the proffered wage. This bank balance was not available to pay the proffered wage at the priority date. The petition must still fail because this sole balance did not establish the ongoing ability to pay the proffered wage. Moreover, there is no proof that the lone bank statement somehow represented additional funds beyond those of tax returns and financial statements. Although the petitioner claimed that it demonstrated sufficient cash flow to pay the proffered wage, 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).

The unaudited balance sheet of March 31, 2002 reflected a deficit of net current assets, ($108,101.16), an amount less than the proffered wage. An unaudited monthly profit and loss statement, restricted to March 2002, stated net income of $21,096.94, an amount less than the proffered wage. These unaudited financial documents, in response to the RFE are of little probative value, because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2).

Moreover, the unaudited financial statements do not establish amounts, equal to, or greater than, the proffered wage, sufficient to satisfy the ongoing ability to pay the proffered wage. A petitioner must establish the elements for the approval of the petition at the priority date. 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).

After a review of the federal tax returns, Forms DE-6, unaudited financial statements, bank records, and the miscellany of business transactions, 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 until the beneficiary obtains lawful permanent residence.

Beyond the record in these proceedings, a search of the internet indicates that the petitioner's business server can not be found. These proceedings contain insufficient information to base a decision on whether the petitioner's business has terminated. If it has, that event automatically revokes any approved Immigrant Petition for Alien Worker (Form I-140) for an employment-based preference under § 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). *See* 8 C.F.R. § 205.1(a)(3)(iii). Moreover, neither a revoked petition nor a denied I-140 will

confer a priority date. 8 C.F.R. § 204.5(e). For this additional reason, the record does not justify the approval of this petition.

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.