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U.S. Citizenship
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[redacted]

MAY 06 2004

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

This is the decision 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 on appeal. The appeal will be dismissed.

The petitioner is a marine equipment facility. It seeks to employ the beneficiary permanently in the United States as an administrative service manager. 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 and denied the petition accordingly.

On appeal, counsel submits a brief.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on March 12, 2001. The proffered wage as stated on the Form ETA 750 is $48,135.55 per year.

With the petition, counsel submitted a letter, dated September 24, 2002, from the petitioner's president. The letter cites the petitioner's gross receipts as evidence of its ability to pay the proffered wage. Counsel also submitted unaudited financial statements for the years 2000 and 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 17, 2003, requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. The

return shows that the petitioner declared a loss of $37,770 as its taxable income before net operating loss deduction and special deductions during that calendar year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In addition, counsel submitted copies of the petitioner's checking account statements for the period from December 19, 2000 through December 18, 2002, a computer generated total of the total wages the petitioner paid during 2002, and the petitioner's quarterly wage reports for all four quarters of 2001, the last quarter of 2002 and the first quarter of 2003. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 18, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's gross receipts, its total income, its total assets, its salary expense, and its bank balances clearly show the petitioner's ability to pay. Counsel asserted that the loss shown on the petitioner's tax return is the result of good tax planning, and a poor indicator of the petitioner's ability to pay the proffered wage. Counsel implies that to focus solely on the petitioner's net income was prejudicial error.

The unaudited financial statements which counsel submitted with the petition are not convincing evidence. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that audited financial statements are among the preferred types of evidence of a petitioner's financial condition and ability to pay the proffered wage. Unaudited statements, however, are the unsupported representations of management. The unsupported representations of management are not convincing evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the petitioner's bank balances is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. 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. 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).

Counsel's reliance on the petitioner's gross receipts and wage expense is similarly misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to

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[1] The petitioner might demonstrate this, for instance, not by alleging, but by submitting evidence sufficient to demonstrate that beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

pay the proffered wage. That remainder is the petitioner's ordinary income.

Counsel's assertion that the net income shown on the petitioner's tax return is a poor indicator of the petitioner's cash position is inapposite. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to exclusively rely upon tax returns to demonstrate its ability to pay the proffered wage.

Counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. In the alternative, a petitioner may rely on its net current assets to demonstrate its ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. The petitioner's net current assets during the year in question, 2001, however, were negative. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

Counsel is incorrect, however, that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those 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 are not net of the petitioner's liabilities. As such, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed 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 did not establish that it employed the beneficiary.

If the petitioner does not establish that it employed and paid an amount at least equal to the proffered wage during that period, the AAO will next 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.

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[3] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

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 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. *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.

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, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is March 12, 2001. The proffered wage is $48,135.55 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 70 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 295 days. The proffered wage multiplied by 295/365th equals $38,904.07, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared a loss of $37,770. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, and cannot rely on wages paid to the beneficiary to show the ability to pay any portion of the proffered wage. The petitioner finished 2001 with negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

During 2002, the petitioner is obliged to show the ability to pay the entire proffered wage. The petitioner did not submit copies of annual reports, federal tax returns, or audited financial statements for 2002 because counsel stated they were unavailable at the time the director requested them. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002, and cannot rely on wages paid to the beneficiary to show the ability to pay any portion of the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it might have paid the proffered wage during 2002. The petitioner has failed, therefore, to demonstrate the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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.