



U.S. Citizenship
and Immigration
Services

103

[REDACTED]

FILE: [REDACTED]

Office: VERMONT SERVICE CENTER

Date: OCT 11 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 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

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent disclosure of warranted
invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and reaffirmed on motion. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a telecommunications firm. It seeks to employ the beneficiary permanently in the United States as a telecommunications engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director found that the position offered did not require a member of the professions holding an advanced degree. The director also concluded that the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel asserts that the beneficiary has an advanced degree and, thus, qualifies for the classification sought. Counsel further asserts that financial documentation establishing the petitioner's ability to pay the proffered wage was submitted. Counsel notes that the petitioner is currently paying the beneficiary. The petitioner resubmits its corporate tax returns and the Form W-2 issued to the beneficiary.

On October 6, 2003, the director denied the petition for the reasons stated above. The decision cites a response to a request for additional documentation by the petitioner. The petitioner submitted a timely appeal. On January 26, 2004, the director reopened the petition on her own motion, acknowledged that the petitioner had submitted a supplemental response that she had not considered in the initial denial, concluded the response did not overcome the concerns set forth in the request for additional documentation, and denied the petition on the same grounds as the October 6, 2003 decision.¹ The director then forwarded the appeal to this office. We will consider the merits of the director's October 6, 2003 decision.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced 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.

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

¹ According to 8 C.F.R. § 103.3(a)(2)(iii), the director may only treat an appeal as a motion when favorable action is warranted. As the director did not take action favorable to the petitioner, she did not have the authority to treat the appeal as a motion.

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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 22, 2002. The proffered wage as stated on the Form ETA 750 is \$70,928 annually.

In addition, the Form ETA-750A provides that a four-year bachelor's degree and two years of experience in the job offered is required for the position of telecommunications engineer. The petitioner submitted an evaluation of the beneficiary's credentials concluding that the petitioner's 1998 engineering degree was the equivalent of a U.S. Master's degree in Electronics Engineering.

On June 11, 2003, the director advised the petitioner to request a lesser classification as the job did not require an advanced degree and requested evidence of its ability to pay the proffered wage. In response, counsel noted that the beneficiary has an advanced degree and asked that the director "proceed with the petition as filed." While counsel asserted that tax documents were included in the response, those returns were submitted in a subsequent submission. Specifically, the petitioner submitted its 2002 Form 1120 U.S. Corporation Income Tax Return showing taxable income before net operating loss deduction and special deductions of -\$637,094 and net current assets (current assets minus current liabilities) of \$19,279. The petitioner also submitted the Form W-2 it issued to the beneficiary in 2002 reflecting annual wages of \$33,000, \$37,928 less than the proffered wage.

In the October 6, 2003 decision, the director noted that the petitioner had not requested to change classification and concluded that the job offered did not require an advanced degree professional. The director further stated that the petitioner had not submitted any evidence relating to the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the law only pertains to the alien's qualifications and that if he has an advanced degree, he qualifies as an advanced degree professional.

Counsel's position is contrary to the plain language of the relevant language regarding labor certifications for advanced degree professionals. The final sentence of 8 C.F.R. § 204.5(k)(4) states: "The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability." 8 C.F.R. § 204.5(k)(2) states that a bachelor's degree plus five years of progressive experience is equivalent to an advanced degree. In this case, the job offer portion of the individual labor certification does not require a professional holding an advanced degree or the equivalent as it only requires a bachelor's degree plus two years of experience. Thus, we concur with the director's finding in her October 6, 2003 decision.

Counsel also asserts on appeal that "financial information had been submitted initially and is resubmitted herewith." Counsel notes that the petitioner currently employs the beneficiary as a nonimmigrant. The petitioner resubmits the previously submitted tax returns and Form W-2.

8 C.F.R. § 103.2(b)(11) provides that all evidence submitted in response to a request by U.S. Citizenship and Immigration Services (CIS) must be submitted at one time and that the submission of only some of the requested evidence will be considered a request for a decision on the record. Thus, the director was not required to consider the tax documentation submitted subsequent to the petitioner's response. Nevertheless, even if we consider that documentation, it does not establish 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 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 did not establish that it employed and paid the beneficiary the *full* proffered wage in 2002. Rather, it paid the beneficiary \$37,928 less than the proffered wage.

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 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). Showing that the petitioner's gross receipts 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 (legacy INS), 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 legacy INS should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay the proffered wage. 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. We reject, however, any argument 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 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.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current

² 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

liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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.

The petitioner must demonstrate net income or net current assets sufficient to pay the difference between the proffered wage and wages paid in 2002, or \$37,928. In 2002, the petitioner shows a negative net income and net current assets of only \$19,279 and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

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 sustained that burden.

ORDER: The appeal is dismissed.

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.