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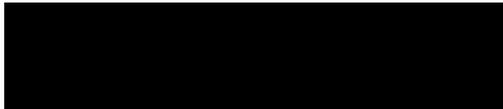
Office: TEXAS SERVICE CENTER

Date:

SEP 21 2007

IN RE:

Petitioner:
Beneficiary:



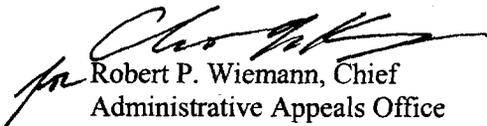
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pediatric practice. It seeks to employ the beneficiary permanently in the United States as a general pediatrician pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from 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, the petitioner submits a statement and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's concerns.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 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 ETA Form 9089 was accepted for processing on June 15, 2006. The proffered wage as stated on the ETA Form 9089 is \$118,000 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of December 1, 2003.

On the petition, the petitioner claimed to have an establishment date in 1990, a gross annual income of \$561,973.75, a net income of \$47,498.73 and 16 employees. In support of the petition, the petitioner submitted unaudited financial statements for the first six months of 2006 and a pay stub for the October pay period demonstrating that the petitioner paid the beneficiary \$7,000 during that period and had paid a year-to-date total of \$86,833.34

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 24, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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, the petitioner submitted unaudited financial statements for all of 2006, its 2005 Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation and pay statements for the beneficiary covering June and July 2006 and February 2007.

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 March 22, 2007, denied the petition.

On appeal, the petitioner asserts that it paid the beneficiary the proffered wage in 2003 and 2004 and is paying the proffered wage in 2007. The petitioner notes that it had gross revenues above \$1,000,000 in 2005 and 2006. The petitioner requests that the "totality of the circumstances" be taken in consideration, noting that the petitioner is a legitimate health care facility with an increasing population of uninsured patients. Finally, the petitioner asserts that it is offering the beneficiary a partnership in the practice upon adjustment of status. The petitioner submits pay statements demonstrating monthly wages of \$9,833.33 in December 2003 and January 2004, an article about the petitioner in *Immunize Georgia*, evidence that *the beneficiary* has large personal assets available and the petitioner's 2006 Form 1120S, showing net income of \$11,608 and current liabilities that exceed current assets. We note that beneficiary did not work for the petitioner during all of 2003 and that pay statements for early 2004 can not demonstrate that the petitioner paid the proffered wage for the full year.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 2006. The director attempted to annualize the beneficiary's 2006 wages from the various pay statements submitted. We note that as of the end of October 2006, the petitioner had already paid the beneficiary \$86,833.34 and was paying the beneficiary \$7,000 per month. Assuming the petitioner paid the beneficiary the same rate in November and December 2006, and the petitioner has not submitted the beneficiary's pay statements for those months or the beneficiary's Form W-2 to establish the full 2006 wages paid, the petitioner would have paid the beneficiary \$100,833.34 in 2006.

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. Federal courts have recognized that reliance on federal income tax returns is a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp.

532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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, 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 the Service 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 a 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 be 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current 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.

In 2006, the difference between the wages paid, extrapolated to be \$100,833.34, and the proffered wage, \$118,000, was \$17,166.66. In that same year, the petitioner shows a net income of only \$11,608 and negative net current assets. The petitioner has not, therefore, demonstrated the ability in 2006 to pay the difference between the wages paid and the proffered wage out of its net income or net current assets. We acknowledge that the petitioner has requested that we take into consideration the "totality of circumstances" and recognize the financial risks involved in treating the uninsured, an important service to the area. It remains, however, that the petitioner has not demonstrated that any other funds were available to pay the proffered wage as of June 15, 2006.

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage as of June 15, 2006. 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.