

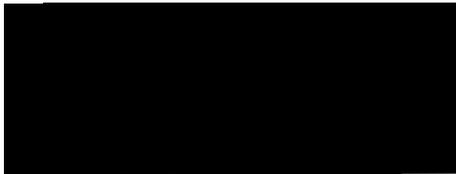
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U.S. Citizenship
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FILE: [REDACTED] EAC 06 008 51555

Office: VERMONT SERVICE CENTER

Date: NOV 05 2008

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:



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, Vermont 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 provides information technology consulting services. It seeks to employ the beneficiary permanently in the United States as an Oracle Software Engineer 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, counsel submits a brief and additional evidence. Counsel asserts that the director erred in denying the petition without first issuing a request for additional evidence. The regulation at 8 C.F.R. § 103.2(b)(8)(iii) provides that where all the initial evidence has been submitted but the evidence does not establish eligibility, Citizenship and Immigration Services (CIS) may deny the petition for ineligibility. In this matter, the record of proceeding, including the petitioner's previous petition in behalf of the beneficiary, contained the initial evidence required under 8 C.F.R. § 204.5(g)(2). Thus, the director did not err in denying the petition. Regardless, any error in this regard is best remedied by considering any new evidence submitted on appeal.

Counsel's assertions regarding the merits of denial will be discussed in detail below. Ultimately, while the director erred in his analysis for 2004, we concur with the director that the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date in 2002.

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 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 November 13, 2002. The proffered wage as stated on the Form ETA 750 is \$64,189 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2002.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of \$161,195, a net income of \$1,941 and five employees.

As stated above, the petitioner previously filed a petition in behalf of the beneficiary, receipt number EAC-04-157-53530, on April 29, 2004. As noted by the director, that petition was denied on February 28, 2005 based on the petitioner's inability to pay the proffered wage. The petitioner appealed that decision. On December 27, 2005, the AAO dismissed the appeal. On the appeal currently before us, counsel asserts that the petitioner submitted sufficient evidence to establish its ability to pay the proffered wage prior to 2004 in support of the earlier petition. The petitioner submits tax documentation and pay stubs from 2002 through 2006.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), 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. On appeal, the petitioner submits pay stubs reflecting that the petitioner paid the beneficiary \$18,296.69 from August 2002 through December 2002. Counsel asserts that these wages should be annualized. Counsel is not persuasive. We consider wages actually paid because if those wages were paid, clearly the employer had the ability to do so. It does not follow, however, that paying wages as of August 2002 establishes an ability to do so prior to that date. We will consider the related concept of prorating the proffered wage below. The petitioner also submits Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements to verify the following wages: \$58,833.13 in 2003, \$60,400 in 2004 and \$64,400.14 in 2005. The petitioner has now demonstrated that it paid the full proffered wage in 2005. It must, however, demonstrate its ability to pay the difference between the proffered wage and the wages actually paid for 2002, 2003 and 2004, \$45,892.31, \$5,355.87 and \$3,789 respectively.

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 the reliance on federal income tax returns as 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.

The record of proceeding, including both petitions and appeals, contains the petitioner's Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for the following years:

| | 2002 | 2003 | 2004 | 2005 |
|---------------------|----------|-----------|---------|----------|
| Net income | \$5,553 | (\$4,096) | \$6,037 | \$9,359 |
| Current Assets | \$30,911 | \$2,471 | \$5,637 | \$10,148 |
| Current Liabilities | \$2,581 | \$3,033 | \$5,572 | \$175 |
| Net current assets | \$28,330 | (\$562) | \$65 | \$9,973 |

The difference between wages paid and the proffered wage for 2002 is \$45,892.31. The petitioner's net income and net current assets in 2002 are less than that amount. We acknowledge that the priority date is in November 2002. Nevertheless, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. CIS will prorate the proffered wage if the record contains evidence of net income and payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period). The prorated proffered wage for two months is \$10,698.17. The petitioner paid the beneficiary \$7,318.68 during November and December 2002, \$3,379.49 less than the proffered wage. While the petitioner's net

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.

income and net current assets for 2002 are greater than this amount, they cover all of 2002. The record lacks evidence of the petitioner's net income for just November and December 2002. Even if concluded that the petitioner had established the ability to pay the difference between wages paid and the proffered wage from its net current assets in 2002, the petitioner has not established its ability to pay the proffered wage in 2003.

The petitioner did not pay the full proffered wage in 2003. In that year, the petitioner suffered a net loss and its current liabilities exceeded its current assets. Thus, the petitioner has not established its ability to pay the difference of \$5,355.87 between the proffered wage and the actual wages from net income or net current assets. On appeal, counsel asserts that the petitioner suffered a net loss in 2003 because it made the discretionary decision to repay a shareholder loan of \$22,507 that was not due that year. The petitioner submits a letter from the accountant that prepared the petitioner's 2003 tax return explaining that the repaid loan was not a current asset and, thus, was not due that year. We acknowledge that the petitioner's 2003 Schedule L reflects a shareholder loan of \$22,507 at the beginning of 2003 but not at the end of 2003. Even assuming the repayment of this loan was discretionary, funds expended during any year are no longer available to pay the proffered wage. Thus, the petitioner has not established that any other funds were available to pay the difference between the proffered wage and wages paid in 2003. Moreover, had that liability remained outstanding in 2004, it might have adversely impacted the petitioner's ability to pay the proffered wage in that year by requiring at least some repayment during that year.

In denying the current petition, the director incorrectly concluded that the petitioner's net income in 2004 was \$1,941. As noted by counsel, however, that figure represents net income less a net operating loss carried over from previous years. We concur with counsel that the correct net income for 2004 is \$6,037, more than enough to cover the difference between the proffered wage and the wages actually paid in 2004. Thus, the petitioner has established its ability to pay the proffered wage in 2004.

As stated above, the petitioner paid the beneficiary the full proffered wage in 2005 and, thus, has established its ability to do so.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2002 or subsequently during 2003. 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.