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APR 19 2004

FILE: WAC 02 216 52562 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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:



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 on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner is a computer software company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel for the petitioner submits a brief and additional evidence.

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 or seasonal nature, for which qualified workers are not available 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 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. Here, the petition's priority date is March 15, 2001. The beneficiary's proffered salary as stated on the labor certification is \$60,000 per year.

With its initial petition, counsel provided a copy of the petitioner's 2001 federal tax return, copies of the petitioner's bank statements from May 2001 through April 2002, and documentation establishing that the petitioner was the successor in interest to the original petitioner named on the labor certification. In response to a request for additional financial evidence by the director, counsel submitted a duplicate copy of the petitioner's 2001 tax return, a copy of its 2000 return, and additional bank statements for the period from May 2002 to October 2002.¹ Counsel also submitted a letter and income statement prepared by the petitioner's president.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage during the relevant period because the petitioner's net income was less than the proffered wage. Accordingly, the director denied the petition on February 6, 2003.

¹ The request for evidence also requested verification of the beneficiary's experience, as well as an original copy of the Form ETA 750. Since the petitioner satisfied these evidentiary requirements, the director did not base his decision to deny the petition upon these issues. Therefore, these issues will not be discussed within the scope of this decision.

On appeal, counsel submits copies of the petitioner's payroll register for January 2003 and copies of the beneficiary's IRS Forms W-2 for 2001 and 2002 as evidence that the petitioner employed the beneficiary during this period. In addition, counsel provides copies of the petitioner's IRS Form W-2 for 2002.

In determining the petitioner's ability to pay the proffered wage, the AAO will examine the petitioner's net income figure as 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.*, the court held that Citizenship and Immigration Services (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. 623 F. Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In this case, the director noted that the petitioner had a net loss of \$122,268 for 2001, with cash assets of \$44,000. The AAO notes that the director did not address the petitioner's net current assets. Based on these figures, the director determined that the petitioner did not have the ability to pay the proffered wage as of the establishment of the priority date and continuing to the present.

It is further noted that the petitioner's bank account statements and income statement were not considered by the director in determining the petitioner's ability to pay the proffered wage. The director did not err in excluding these documents from consideration. Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes. In addition, unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). This regulation neither states nor implies that an *unaudited* document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

On appeal, counsel presents several reasons in support of the petitioner's position, alleging that the director erroneously failed to consider the petitioner's monthly bank account balances and the fact that the petitioner had been paying the beneficiary's salary since October of 2001. The AAO will address each of counsel's points individually.

First, counsel's reliance on the petitioner's bank account balances as proof of its ability to pay is misplaced. Counsel has submitted copies of the petitioner's bank statements for the period from May 2001 through October 2002 in an attempt to demonstrate that it had sufficient cash flow to pay the proffered wage. While it is noted that the petitioner maintained an average monthly balance of \$25,000, these statements are not persuasive evidence of the petitioner's ability to pay the wage offered because there is no proof that these statements somehow represent additional funds beyond those of the tax returns. 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). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes. Although counsel relies on the findings of this office in *In re X*, AAU, January 10, 1994 in support of the petitioner's ability to pay, this is a non-precedent decision that is not binding for purposes of this decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the

administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In addition, counsel alleges that the director's failure to consider the wages paid to the beneficiary by the petitioner is erroneous, and therefore warrants a favorable conclusion in this matter. The AAO does not agree. Prior to this appeal, counsel failed to submit any evidence, such as W-2 forms, that demonstrated that the petitioner employed the beneficiary and paid her salary. On appeal, counsel states "the CSC ignored the fact that petitioner's financial figures include the fact that the petitioner had been successfully paying the beneficiary's salary since October 2001 (as clearly shown on Form ETA 750 Part B)." Counsel overlooks the fact that documentary evidence confirming the petitioner's employment of the beneficiary was not provided until the appeal was filed.² When the director issued the decision in this matter, the record contained no additional evidence to support the claims on the ETA 750. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See id.* Therefore, counsel's contention that the director "ignored" this evidence is inappropriate.

If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. Although W-2 forms and payroll registers are submitted on appeal, the documents fail to establish the petitioner's ability to pay as of the priority date. Specifically, the beneficiary's W-2 form for 2001 shows wages of \$15,262.25. Since the proffered wage is \$60,000.00, the petitioner has not established that it paid the petitioner a salary equal to or in excess of the proffered wage. An adjustment to the proffered wage to reflect the wages already paid leaves an amount totaling \$47,737.65. The director found that the petitioner did not have sufficient funds to pay this amount.

Upon review of the tax return, the AAO concludes that the director's determination was erroneous. While the AAO concurs that the petitioner suffered a net loss in 2001, a review of its assets and liabilities as set forth on Schedule L shows that the petitioner had net current assets in the amount of \$210,105.00. Net current assets are a corporate taxpayer's current assets less its current liabilities. If a corporation's 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 amount of the petitioner's net current assets clearly exceeds the amount of the proffered wage and the deficit amount between the proffered wage and wages actually paid to the beneficiary in 2001. Thus, the petitioner has established its ability to pay the proffered wage for its portion of 2001, when it assumed all immigration liabilities for the beneficiary.

Counsel's final assertion is that as the successor in interest to the original petitioner named in the labor certification, the petitioner should be permitted to prove its ability to pay the beneficiary by relying on its predecessor's confirmed ability to pay as set forth in the previously approved petition. In the appeal brief, counsel alleges the following in a footnote:

... [p]rior to October 2001, the beneficiary was employed by Software AG, and Software AG had previously demonstrated the ability to pay the wage in support of its I-140 petition on behalf of the beneficiary ... [Petitioner], as successor in interest to Software AG, may

² This newly introduced evidence will be considered since it was not specifically requested by the director in the request for evidence.

rightly assume Software AG's demonstration of ability to pay as its own, at least until October 2001 when [petitioner] assumed the rights, duties and obligations of Software AG.

The record contains credible evidence that the petitioner qualifies as a successor in interest to Software AG. In order to maintain the original priority date, however, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has provided a copy of Software AG's Approval Notice on behalf of the beneficiary, which was issued on May 6, 2002. While this notice is certainly credible on its face, the record in the instant case does not establish that the predecessor enterprise had the financial ability to pay the proffered wage from the priority date of March 15, 2001 until the petitioner's acquisition of the predecessor enterprise in October 2001. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Although counsel has volunteered the fact that the 2001 W-2 form only represents wages earned by the beneficiary from October through December of 2001, the record lacks sufficient evidence to clearly establish the petitioner's ability to pay the proffered wage from the priority date, March 15, 2001, until October 2001. In addition, counsel alleges that the predecessor enterprise paid the beneficiary's wages until its acquisition in October 2001, but does not provide any additional documentary evidence to support this contention. The assertions of counsel, without independent evidence to support such assertions, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If credible first-hand evidence exists to show that the petitioner and its predecessor had the ability to pay the proffered wage at the establishment of the priority date, then the director should review the W-2s and payroll records.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional financial evidence from the petitioner evidencing its predecessor's ability to pay the proffered wage from the priority date until October 2001, as well as evidence of the petitioner's continuing ability to pay the proffered wage. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director, particularly with reference to its continuing ability to pay the proffered wage until the beneficiary obtains lawful resident status. Upon receipt of all evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.