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U.S. Citizenship  
and Immigration  
Services

*Ble*



FILE: [REDACTED] : CALIFORNIA SERVICE CENTER Date: **AUG 09 2004**

IN RE: Petitioner: [REDACTED]  
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: 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*  
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing contractor. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 additional evidence and asserts that it has the financial ability to pay the beneficiary's proposed wage offer.

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.

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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$23.27 per hour, based on a 40-hour week, which amounts to \$48,401.60 annually. Part B of the ETA 750, signed by the beneficiary, indicates that he has worked for the petitioner since 1997. The Immigrant Petition for Alien Worker (I-140), file November 15, 2002, reflects that the petitioner was established in 1923 and has eleven employees.

With the petition, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2000 in support of its continuing ability to pay the beneficiary's proposed wage offer of \$48,401.60 per annum. It shows that the petitioner files its taxes based on a fiscal year running from October 1st to September 30th of the following year. Thus, the 2000 corporate tax return represents financial data from October 1, 2000 to September 30, 2001. The tax return shows that the petitioner declared -\$4,873 in net income. As shown on Schedule L of the tax return, the petitioner reported \$68,267 in current assets and \$193,730 in current liabilities, resulting in -\$125,463 in net current assets. Net current assets represent the petitioner's liquidity at a given date

and are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> Besides net income, it represents an alternative source out of which the proffered salary may be paid. If the 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.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 24, 2003 the director requested additional evidence pertinent to that ability. The director instructed the petitioner to submit either annual reports, federal tax returns, or audited financial statements representing its financial ability to pay the proffered wage from March 6, 2001 to the present. The director specifically requested that the petitioner provide copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001 and 2002, as well as copies of the petitioner's state quarterly wage reports for the last four quarters filed.

On April 17, 2003, the petitioner responded by submitting copies of the beneficiary's W-2s for 2001 and 2002, along with a copy of the beneficiary's 2001 individual tax return computer record from the Internal Revenue Service (IRS). In 2001, the petitioner paid the beneficiary \$22,776.58 in wages. In 2002, the petitioner paid the beneficiary \$18,904.40. The quarterly state wage reports, representing the wages paid during 2002, confirm the amount reflected on the beneficiary's 2002 W-2. The petitioner also submitted unaudited financial statements covering specified periods in 2001 to 2003. In a letter accompanying the submissions, the petitioner explained that it had not yet filed its federal tax return for the period covering October 1, 2001 to September 30, 2002, but had requested an extension to file the tax return.

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 May 10, 2003, denied the petition based on the evidence contained in the record. The director concluded that neither the petitioner's net income of -\$4,873, nor its -\$125,463 in net current assets, as shown on its 2000 tax return, could cover any shortfall between the actual wages paid to the beneficiary in 2001 and the proffered wage.

On appeal, the petitioner submits a copy of its 2001 tax return, which covers the period from October 1, 2001 to September 30, 2002. The petitioner explains that it had been previously unable to comply with the director's request because it had not yet filed the tax return. The 2001 corporate tax return shows that the petitioner declared -\$38,787 in net income. Schedule L of the tax return indicates that the petitioner had \$61,256 in current assets and \$214,360 in current liabilities, resulting in -\$153,104 in net current assets.

The petitioner's federal tax returns for 2000 and 2001 fail to show sufficient net income or net current assets to cover any deficiency between the wages paid to the beneficiary in either 2000 or 2001, and the proffered wage of \$48,401.60. The petitioner declared net income losses in both years. Its current liabilities also substantially

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

exceeded its current assets in both years, reflected as -\$125,463 in net current assets in 2000 and -\$153,104 in net current assets in 2001.

It is further noted that the unaudited financial statements, submitted in response to the director's request for evidence, couldn't be considered as independently probative evidence of the petitioner's continuing ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 either 2001 or 2002. To the extent that the petitioner employed the beneficiary, credit will be given to the actual wages the beneficiary received. If the difference between the wages paid and the proffered wage can be paid out of either the petitioner's net income or its net current assets, the petitioner's ability to pay is established for the applicable period.

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. If the petitioner's net income is sufficient to pay a proffered salary, then the petitioner's ability to pay the proposed wage offer is demonstrated for the given period. 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

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 any time subsequently. 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.