

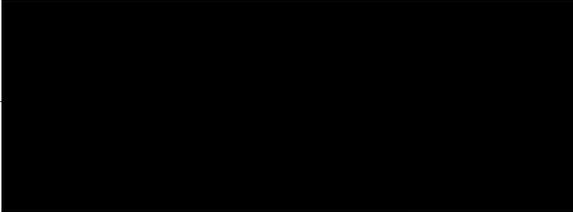
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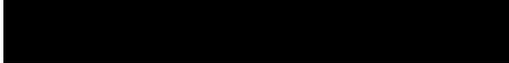


**U.S. Citizenship
and Immigration
Services**



Blp

FILE:  Office: CALIFORNIA SERVICE CENTER Date: **JUL 12 2004**

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.

fo 
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 wholesale clothing manufacturer. It seeks to employ the beneficiary permanently in the United States as a production manager. 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, counsel submits a brief and asserts that the evidence establishes the petitioner's continuing financial ability to pay the proffered wage.

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 November 15, 1999. The proffered wage as stated on the Form ETA 750 is \$3,000 per month, which amounts to \$36,000 annually. The visa petition reflects that the petitioner was established in 1991 and has eight employees.

With the petition, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1999 and 2000. They indicate that the petitioner uses a standard calendar year to file its taxes. In 1999, the petitioner declared -\$7,831 as taxable income before taking the net operating loss (NOL) deduction. Schedule L of the tax return reflects the petitioner's current assets and current liabilities. The difference between current assets and current liabilities are net current assets. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. In this case, Schedule L shows that the petitioner had \$87,307 in current assets and \$120,092 in current liabilities, producing -\$32,785 in net current assets.

The petitioner's 2000 corporate tax return indicates that the petitioner reported \$12,703 in taxable income before the NOL deduction. Schedule L shows that the petitioner declared \$231,237 in current assets and \$264,235 in current liabilities, resulting in -\$32,998 in 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 December 17, 2002, the director requested additional evidence pertinent to that ability. 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. The director requested this evidence for the year 2001. The director also instructed the petitioner to provide copies of the last 12 quarters of its state quarterly wage report.

In response, the petitioner submitted its corporate tax return for 2001. It reflects that the petitioner had taxable income before the NOL deduction of -\$4,646. Schedule L shows that the petitioner had \$160,211 in current assets and \$212,763 in current liabilities, yielding -\$52,552 in net current assets.

In addition, counsel submitted copies of the petitioner's state quarterly wage reports. They show that the petitioner employed between eight and thirteen workers between 2000 and 2002. They do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 April 14, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's assets are in excess of \$194,000 as shown on its 2001 corporate tax return. Counsel maintains that the petitioner's revenue has enabled it to pay substantial officer compensation and achieve impressive gross profits of \$321,970 in 1999, \$373,758 in 2000 and \$317,499 in 2001.

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 record does not indicate that the petitioner has ever employed the beneficiary.

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). In this case, counsel's reliance on the petitioner's gross profits is misplaced. Showing that the petitioner had substantial gross profits is insufficient because it does not account for the expenses incurred in order to generate those profits. Similarly, showing that the petitioner paid officer compensation or employed other workers is also insufficient. Funds already expended are not available to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the continuing ability to pay the proffered wage be shown beginning as of the visa priority date. Eligibility for approval must be established at the time of

filing, not at a future time under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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.

Counsel's observation relating to the amount of the petitioner's total assets as set forth on Schedule L of its 2001 tax return is accurate, but does not balance them against the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. The petitioner's total assets also 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. Rather, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

As set forth on the petitioner's corporate tax returns, its net income of -\$7,831 in 1999, \$12,703 in 2000, and -\$4,646 in 2001 was insufficient to cover the beneficiary's wage offer of \$36,000 in each of those years. Similarly, its net current assets of -\$32,785 in 1999, -\$32,998 in 2000, and -\$52,552 in 2001 were also insufficient to cover the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the relevant period. 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.