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

BL



FILE:



Office: CALIFORNIA SERVICE CENTER

Date **JUL 12 2004**

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker 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

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 general contractor. It seeks to employ the beneficiary permanently in the United States as a construction records clerk. 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 additional evidence. Counsel asserts that the director misinterpreted the petitioner's evidence and maintains that the petitioner has the ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary nature 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 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 February 28, 2001. The proffered wage as stated on the Form ETA 750 is 11.97 per hour, which amounts to \$24,897.60 annually. The visa petition, filed October 17, 2002, indicates that the petitioner was established in 1986 and has two part-time employees. The record reflects that the petitioner is organized as a corporation.

With the petition, the petitioner, through counsel, submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2000 as evidence in support of its ability to pay the proffered wage. It indicates that the petitioner uses a standard calendar year to file its taxes. Thus, the information contained within this tax return does not cover the priority date of February 28, 2001 and would not be particularly probative in determining the petitioner's ability to pay the beneficiary's proposed annual wage offer of \$24,897.60.

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 5, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 specified that this evidence must include documentation from 2001 to 2003, or 2002 if 2003 is not available. The director advised the petitioner to also submit its federal tax returns for the years 2001 to 2003, copies of any Wage and Tax Statements (W-2s) issued to the beneficiary if the petitioner had employed him, and copies of its state quarterly wage reports for the last four quarters that were filed.

In response, the petitioner submitted copies of its federal corporate tax returns for 2001 and 2002. In 2001, it filed Form 1120. This tax return shows that the petitioner declared taxable income before the net operating loss (NOL) deduction of \$22,593. Schedule L of the return reflects that the petitioner had no current assets and \$88,987 in current liabilities, producing -\$88,987 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and current liabilities are shown on Schedule L of Form 1120. 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 petitioner's net current assets during 2001 reflected a deficit of \$88,987.

In 2002, the petitioner filed Form 1120-A, U.S. Corporation Short-Form Income Tax Return. It shows that the petitioner declared \$11,226 in taxable income before the NOL deduction. Part III, Balance Sheets per Books, reflects that the petitioner showed no current assets and no current liabilities. Therefore, no net current assets have been shown to be available to pay the proffered wage.

In addition, counsel's cover letter submitted with the petitioner's response to the director's request for evidence, states that the beneficiary began working for the petitioner on June 1, 2003. Counsel also provided copies of the petitioner's state quarterly wage reports for the last three quarters of 2003. For the quarter ending June 30, 2003, the petitioner paid the beneficiary \$3,340. For the quarter ending September 30, 2003, the petitioner paid the beneficiary \$1,500. For the last quarter of 2003, ending December 31, 2003, the beneficiary received \$7,540 from the petitioner. His W-2 reflects a total of \$12,380 in wages received from the petitioner in 2003.

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 19, 2004, denied the petition. The director found that the beneficiary's proffered wage of \$24,897.60 could not be paid out of either the petitioner's net income or its net current assets as shown on its federal tax returns in either 2001 or 2002. Although the director noted that the petitioner had paid the beneficiary \$12,380 in 2003, he concluded that without the petitioner's 2003 income tax return, the evidence did not establish that the petitioner could have paid the \$12,517.60 difference between the wages paid to the beneficiary and the proffered wage of \$24,897.60.

On appeal, counsel asserts that the director reached the wrong conclusion regarding the petitioner's payment of wages to the beneficiary in 2003. Counsel suggests that director placed inappropriate emphasis on the fact that

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

the beneficiary's wages in 2003 were \$12,517.60 less than the proffered wage. Counsel maintains that the petitioner's payment of wages as shown by the beneficiary's 2003 W-2, the petitioner's 2003 state quarterly wage reports, 2001 corporate tax return, and 2002 corporate tax return were "sufficient for [Citizenship and Immigration Services (CIS)] to determine that there is in fact the ability for the petitioner to pay the proffered wage." As additional support, counsel provides copies of the petitioner's 2003 corporate tax return that he asserts was not available to be submitted previously. Counsel also submits copies of the petitioner's payroll records for three consecutive pay periods in February and March 2004. They suggest that the petitioner currently employs the beneficiary at \$12.00 per hour. Also offered are two letters from accountants supporting the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. To the extent that a petitioner paid a beneficiary less than the proffered wage, credit will be given to those amounts the beneficiary received as wages. If the difference between the proffered wage and the monies actually paid as wages can be covered by a petitioner's net income or net current assets, then an ability to pay the proffered wage can be demonstrated.

As referenced by counsel, current regulations do not actually require the obligation to pay the wage offered in the ETA-750A to begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification.² If the petitioner, however, does happen to establish by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during the relevant period, the evidence will be considered as *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record shows that the petitioner did not employ the beneficiary until June 2003.

Where a beneficiary has not been employed at the proffered wage, 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 *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.

As noted previously, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Here, the petitioner's net income of \$22,593 was insufficient to pay the beneficiary's proffered wage of \$24,897.60 during 2001. The petitioner's declared net current assets of -\$88,987 were also insufficient to cover the proposed wage offer during 2001. Similarly, the petitioner's net income of \$11,226 was

² This may not foreclose the existence of a separate legal obligation to pay at least the prevailing wage pursuant different regulatory provisions applying to aliens with non-immigrant status.

far short of the amount needed to meet the proffered wage in 2002. The petitioner declared no net current assets as reflected on "Part III, Balance Sheets per Books" of its 2002 tax return. Although the petitioner's 2003 corporate income tax return, provided on appeal, indicates that its taxable income of \$45,346 is sufficient to cover the \$12,517.60 difference between the beneficiary's 2003 actual wages received and the proffered wage of \$24,897.60, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish a *continuing* ability to pay the proffered wage as of the visa priority date. Here, two out of the three relevant federal tax returns fail to establish the petitioner's continuing financial ability to pay the proffered wage. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In a letter dated April 16, 2004, submitted by counsel on appeal [REDACTED] a certified public accountant, states that Schedule L of the petitioner's tax return did not show any assets because there is no requirement to complete it if total assets are less than \$250,000. [REDACTED] states that for 2003, the petitioner's taxable income is enough to pay the beneficiary's proffered wage. [REDACTED] also states that the petitioner's office expense and outside service expense would gradually reduce due to the petitioner's hiring of the beneficiary because these expenses were previously contracted out.

As previously noted, the petitioner's ability to pay the proffered wage begins as of the priority date of February 28, 2001. The petitioner's ability to pay the proffered wage in 2003 has already been addressed. Even if [REDACTED] assertion relating to the petitioner's election to omit the listing of its assets is accurate with regard to the petitioner's 2002 tax return, it does not relieve the petitioner of its burden to demonstrate its continuing ability to pay the proffered wage during the entire relevant period with the appropriate evidence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner provide audited financial statements, federal tax returns, or annual reports. Nothing contained in the record suggests that the petitioner has demonstrated that ability beginning as of the priority date of February 28, 2001. Moreover, a brief review of the outside services of \$50,196 and office expenses of \$6,442 claimed by the petitioner on its 2002 state tax return and the \$206 in office expenses and \$63,510 in outside services claimed on its 2003 income tax returns, indicate that, rather than showing a reduction, they collectively increased more than \$7,000.

On appeal, counsel also provides an undated letter from [REDACTED] states that the petitioner's employment of the beneficiary as a construction records clerk "would help the company to achieve operation efficiency through better labor and material costs control. [REDACTED] asserts that the petitioner's revenue would increase. Beyond [REDACTED] speculation, the record contains no specific evidence of this hypothetical increase in revenue and cannot be considered in this case.³

The petitioner failed to submit evidence that convincingly demonstrates that it had the ability to pay the proffered wage during the salient portion of 2001 and 2002. 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.

³ The petitioner's tax returns show that gross sales or receipts have decreased from 2001 to 2003.



ORDER: The appeal is dismissed.