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U.S. Citizenship  
and Immigration  
Services



FILE: EAC 02 145 53026 Office: VERMONT SERVICE CENTER Date: **MAY 17 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a general contracting company. It seeks to employ the beneficiary permanently in the United States as a finishing carpenter. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel contends that the director failed to adequately consider that the petitioner's financial documentation and maintains that the evidence demonstrates the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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) also provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is March 1, 2001. The beneficiary's salary as stated on the labor certification is \$1,393.70 per week or \$72,472.40 per annum. The record indicates that the petitioner is organized as a corporation and has employed the beneficiary since 1998.

As evidence of its ability to pay, the petitioner initially submitted a letter from its accountant and partner, dated February 28, 2002, affirming the petitioner's ability to pay the proffered salary. On May 30, 2002, the director requested additional evidence pursuant to the regulatory requirements at 8 C.F.R. § 204.5(g)(2). The director instructed the petitioner to submit either annual reports, federal tax returns, or audited financial statements. The director also advised the petitioner that it could submit a copy of the beneficiary's 2001 Wage and Tax Statement (W-2) issued by the petitioner, summarizing the wages paid to the beneficiary.

The petitioner, through counsel, submitted a letter from its bank, dated July 3, 2002, accompanied by copies of seven monthly bank statements from November 2001 through June 2002. The bank letter states that the petitioner has had an average bank balance of about \$35,000, from March 2001 to the present. The petitioner also

submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. It shows that the petitioner declared an ordinary income of \$24,452.

Schedule L of this tax return also shows that the petitioner had \$38,040 in current assets and declared no current liabilities, producing \$38,040 in net current assets. CIS will consider net current assets because it represents the amount of liquidity that a petitioner has as of the date of filing. It shows the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, neither the petitioner's ordinary income of 24,452, nor its net current assets of \$38,040 was sufficient to cover the proffered wage.

The director denied the petition, finding that the petitioner's 2001 net income and net current assets, as shown on its tax return, were not sufficient to pay the proffered wage. The director also noted that the petitioner's monthly bank statements did not consistently show sufficient funds to pay the proffered salary. The AAO concurs and would further note that wages already paid to the beneficiary could have been considered if the petitioner had submitted evidence of such payment.

On appeal, counsel maintains that the director miscalculated the petitioner's current assets and did not consider the petitioner's cash-on-hand. Counsel cites \$92,508 as the correct figure that should have been considered as assets. The AAO disagrees. As explained above, CIS will review net current assets, rather than total net assets, because it is more representative of a petitioner's liquidity at a particular date. Counsel's assertion that the director failed to consider petitioner's cash-on-hand of \$32,395, as shown on Schedule L of its 2001 tax return, is also not accurate. This sum is included in the calculation of the petitioner's net current assets.

Counsel also claims that the petitioner's gross income figures, depreciation expenses and officer compensation, as shown on its tax return, should be considered in the determination of the petitioner's ability to pay the proffered salary. The AAO does not concur. In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that the continuing ability to pay the proffered wage be established as of the visa priority date. Wages already paid to others, such as officer compensation, are generally not considered to have been available to show the ability to pay the proposed wage to the beneficiary. Similarly, counsel's bare assertion that the \$530,503 listed in the petitioner's 2001 corporate tax return under "other costs," represents additional monies that could be available to pay salaries, is misplaced. The employment-based petition is for one beneficiary at an annual wage of \$72,472.40. It is noted that the amount of "subcontracting" under this category represents \$529,629. The evidence in the record, however, fails to show that any part of this sum can be directly correlated to specific wages paid to the beneficiary for services he may have performed for the petitioner.

Counsel also submits copies of the petitioner's 1998, 1999, and 2000 federal tax returns on appeal, as well as copies of various bank statements from August 1998 to September 2002. A new letter from the petitioner's bank is also included and mentions that the petitioner has a credit line available to cover deficiencies. It is noted that there is no proof submitted to show that the bank statements, covering the same period as the petitioner's tax returns, somehow represent additional funds beyond those shown on 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). Selected bank statements represent only a partial picture of a petitioner's financial status because they do not reflect other encumbrances that may affect a petitioner's ability to pay a proposed salary. It is further noted that a credit line available from a lending institution may give some indication of a petitioner's creditworthiness, but also represents a obligation that must be repaid if used as an additional cash resource. It is essentially a lending institution's unenforceable commitment to make a loan up to a specified maximum amount for a specified time period. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Comparable to the limit on a credit card, CIS will not treat a line of credit as cash or as a cash asset, as it represents a potential increase in a firm's liabilities as a means of paying the proffered wage.

Based on the evidence contained in the record and after consideration of the assertions presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

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.