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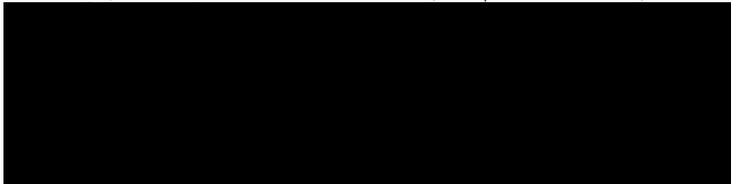
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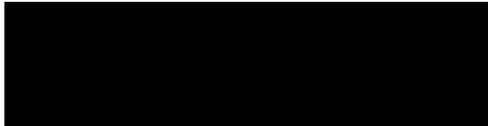


U.S. Citizenship
and Immigration
Services



FILE: WAC-02-182-52508 Office: CALIFORNIA SERVICE CENTER Date: **MAY 17 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 matter turns, in part, 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. The petition's priority date in this instance is October 1, 1998. The beneficiary's salary as stated on the labor certification is \$17.79 per hour or \$37,003.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The petitioner's evidence relevant to that issue consisted of unsigned copies of the first page of the petitioner's Form 1120S U.S. income tax return for an S corporation for the years 1998, 1999, 2000 and 2001. In a request for evidence (RFE) dated July 23, 2002, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specifically requested signed copies of the petitioner's tax returns for the years 1998, 1999, 2000 and 2001, with all accompanying schedules and tables. The RFE also requested copies of the petitioner's California quarterly wage reports for the most recent four quarters, bank statements for the most recent six months, and current reference letters from all of the petitioner's banks.

Counsel responded to the RFE with a letter dated September 23, 2002, accompanied by additional evidence consisting of complete, signed copies of the petitioner's income tax returns for 1998, 1999, 2000, and 2001; quarterly wage reports for the quarters ending September 30, 2001, December 31, 2001, March 31, 2002 and June 30, 2002; a letter of reference dated August 12, 2002 from the petitioner's bank; and bank statements for the months January through June 2002 for a checking account of the petitioner with account number ending in 586 and for a business savings account of the petitioner with account number ending in 649.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence, consisting of bank statements of the petitioner's business checking accounts from October 1998 through February 2003. Counsel states on appeal that the average of the petitioner's closing balances for each monthly bank statement establishes the petitioner's ability to pay the proffered wage from the priority date to the present.

The AAO will first evaluate the director's decision based on the evidence in the record prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. 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. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next 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 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp., supra*, at 1054.

The petitioner's Form 1120S U.S. income tax returns for an S corporation show the following amounts on line 21, for ordinary income: \$1,897 for 1998, -\$20,832 for 1999, -\$25,364 for 2000, and \$7,464 for 2001. Those amounts are insufficient to establish the ability of the petitioner to pay the proffered wage of \$37,003.20 per year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant petition, calculations based on the net current assets and net current liabilities on the petitioner's tax returns yield the following amounts for net current assets: -\$30,857 for the beginning of 1998, -\$44,352 for the end of 1998, -\$70,184 for the end of 1999, -\$82,370 for the end of 2000, and -\$92,669 for the end of 2001. Those amounts are also insufficient to establish the ability of the petitioner to pay the proffered wage.

The director correctly cited the petitioner's ordinary income and correctly calculated the petitioner's net current assets for the years referenced above.

Quarterly wage reports submitted by the petitioner show the following amounts paid to the petitioner's employees: \$42,341.74 for the quarter ending September 30, 2001, \$42,822.73 for the quarter ending December 31, 2001, \$47,600.94 for the quarter ending March 31, 2002 and \$42,475.97 for the quarter ending June 30, 2002. The director stated that the quarterly wage reports appeared to be inconsistent with the information on the petitioner's tax returns. The director did not specify the figures which he found to be inconsistent, but it appears that the director was referring to the petitioner's figures on its tax returns for compensation of officers and for salaries and wages. Nonetheless, a close study of the petitioner's tax returns indicates that some of the wages shown on the quarterly wage reports are reported on the petitioner's Form 1120S returns on line 19, for other deductions. The copies of the petitioner's tax returns in the record are incomplete, lacked supporting schedules for the "other costs" shown on the Schedule A's for the returns for 2000 and 2001. Nonetheless, the information on the tax returns in evidence does not appear to be inconsistent with the information on the petitioner's quarterly tax returns. The beneficiary's name is not among the names of the petitioner's employees shown on the quarterly wage statements.

The petitioner's bank statements in the record prior to the director's decision show closing balances in the petitioner's checking account in the year 2002 as follows: \$12,920.54 in January, \$7,527.73 in February, \$4,680.17 in March, \$5,181.12 in April, \$5,246.97 in May, and \$11,119.46 in June, and in the petitioner's business savings account, \$51.14 in January, \$45.06 in February, \$40.12 in March, \$325.74 in April, \$50.12 in May and \$211.00 in June.

The director correctly calculated the average of the closing balances for the petitioner's checking account as \$7,779.33. The director apparently considered the closing balances in the business savings account as too small to be significant.

It is unclear from the record why the director's RFE requested only the most recent months of the petitioner's bank statements and quarterly wage and tax statements. Counsel provided only the documents for the months specifically requested in the RFE. But even for the months for which counsel submitted financial documents to supplement the petitioner's tax returns, the petitioner's evidence fails to establish the petitioner's ability to pay the proffered wage. Even assuming that the petitioner's bank statements demonstrate that the petitioner had sufficient cash flow to pay the proffered wage, there is no evidence that the funds in the petitioner's bank statements represent additional funds beyond those shown on the petitioner's 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. 990 (Reg. Comm. 1972). Moreover, the petitioner's tax returns show negative current assets for the years in questions, therefore any cash in the petitioner's bank accounts would be subject to the petitioner's current liabilities.

For the foregoing reasons, the decision of the director that the evidence in the record failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence was correct.

On appeal, counsel submits additional evidence, consisting of bank statements of the petitioner's business checking accounts from October 1998 through February 2003, for two separate accounts. The statements for October 1998 through December 2000 have an account number ending in 439 and the statements for January 2001 through February 2003 have an account number ending in 586.

With the exception of the bank statements for the months of January through June 2002, all of the evidence submitted with counsel's notice of appeal is being submitted for the first time on appeal. Counsel makes no

claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated July 23, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. The RFE specifically requested six months of bank statements, which the petitioner then submitted in response. But nothing in the RFE prevented the petitioner from submitting any additional evidence which the petitioner considered relevant. The petitioner bears the burden of proof, and the fact that the director did not specifically request bank statements which the petitioner now believes might be helpful to its position did not relieve the petitioner of its burden of proving its case before the director. The RFE was sufficiently detailed to put the petitioner on notice of the types of evidence needed.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so.

The most recent among the bank statements submitted on appeal are dated after the director's decision and are therefore not precluded from consideration by *Matter of Soriano, supra*. But the most recent bank statements contain information relevant only to the period since the director's decision, and therefore contain no information to overturn the decision of the director.

For these reasons, the evidence submitted for the first time on appeal will not be considered.

Moreover, even if all of the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. The bank statements contain no indication that they represent funds beyond those already shown on the petitioner's tax returns. Also, as noted above, the petitioner's current liabilities exceeded its current assets during the years in question, and any cash in the petitioner's bank accounts was subject to the petitioner's liabilities.

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.