



U.S. Citizenship
and Immigration
Services

BC

[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: SEP 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:

[REDACTED]

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as an engineering programmer. 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 additional evidence and asserts that the petitioner has demonstrated its 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. 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 [Citizenship and Immigration Services (CIS)].

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 April 9, 2002. The proffered wage as stated on the Form ETA 750 is \$54,000 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since May 2001.

On the petition, filed May 8, 2003, the petitioner claims to have been established in 1997, to have a gross annual income of approximately \$7,700,000, and to currently employ forty-nine workers. In support of the its ability to

pay the proffered wage, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000, copies of computer wage records from 2001, and copies of bank account statements from 2001.

Because these records did not cover the priority date of April 9, 2002, and because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on September 10, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), 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 also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statement's (W-2s) and relevant payroll records showing how much the petitioner had compensated the beneficiary, as well as monthly balance sheets and copies of its quarterly federal tax returns (Form 941).

In response, the petitioner, through counsel, submitted copies of the beneficiary's W-2s for 2001 and 2002. They show that the petitioner paid the beneficiary \$25,850 in 2001 and \$24,329.71 in 2002. The petitioner also submitted payroll records showing that the petitioner had paid the beneficiary \$11,788.14 as of September 30, 2003.

In addition, counsel submitted a copy of the petitioner's 2002 corporate federal tax return. It reflects that the petitioner uses a standard calendar year to file its taxes and that the 2002 tax return, like its 2000 tax return was not filed until September of the following year. It also shows that the petitioner declared a taxable income of \$34,201 before taking the net operating loss deduction. Schedule L, which shows a corporate petitioner's current assets and current liabilities, indicates that the petitioner's current assets were \$188,382 and its current liabilities were \$818,675, yielding net current assets of -\$630,293. Besides net income, CIS will consider a petitioner's net current assets as an alternative method of demonstrating its ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ If a corporate petitioner'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.

Counsel also submitted copies of the petitioner's checking account statements for the period from March 2002 through October 31, 2003 and copies of computer printouts of cumulative payroll information supporting the first three quarters its federal quarterly tax returns. The 2003 checking account statements show an average balance of approximately \$149,000.

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 30, 2004, denied the petition.

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.

On appeal, counsel attaches a copy of a CIS Interoffice Memorandum, dated May 4, 2004, relating to the determination of the ability to pay, and asserts that the petitioner's current financial ability merits approval of its petition.

The AAO does not concur with the director's decision because the director miscalculated the petitioner's ability to cover the difference between the wages paid to the beneficiary in 2002 and the proffered wage.

In reviewing a petitioner's ability to pay a proffered wage, CIS generally evaluates 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).

If the deductible expenses for the tax year exceed the business' gross income for the year, some corporate filers may deduct the loss from their income in another year or years on their federal income tax return. The loss claimed in a year other than the year in which it was incurred is called a net operating loss (NOL). Because it does not reflect a loss of the current year, when considering taxable income, CIS reviews taxable income before the NOL deduction in order to determine whether a petitioner had sufficient taxable income in the year of filing to pay the proffered wage. In this case, the director erred in failing to consider the petitioner's taxable income before the NOL deduction (line 28 of Form 1120), rather than taxable income after the deduction (line 30 of Form 1120).

To the extent that a petitioner has employed and paid wages to a beneficiary, CIS will credit those wages. If the petitioner's net income or net current assets in a given year can cover the shortfall between the proffered wage and the actual wages that a petitioner paid to the beneficiary, then the petitioner has established its ability to pay the full proffered wage for the relevant period. In this case, the petitioner's declared taxable income before the net operating loss deduction in 2002 was \$34,201. The difference between the actual wages of \$24,329.71 paid to the beneficiary in 2002 and the proffered wage of \$54,000, is \$29,670.29. This amount could have been covered by the petitioner's taxable income of \$34,201 before the NOL deduction. Thus, the petitioner demonstrated its ability to pay during this period. The totality of the evidence contained in the record relating to 2003, subsequent to the petitioner's 2002 tax return, including its bank accounts and profit and loss records, as suggested for consideration by 8 C.F.R. § 204.5(g)(2), indicates that the petitioner had sufficient available resources to cover the proffered wage.

Based on the evidence submitted to the record, the petitioner has sufficiently established its continuing ability to pay the proffered wage beginning as of the visa priority date of April 9, 2002.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.