



U.S. Citizenship
and Immigration
Services

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FILE: EAC-02-083-53206 Office: VERMONT SERVICE CENTER Date: SEP 08 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:



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

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DISCUSSION: The preference 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 is an automobile service and repair facility. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. 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 letter and additional evidence.

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 March 19, 2001. The proffered wage as stated on the Form ETA 750 is \$18.46 per hour, which amounts to \$38,396.80 annually.

With the petition, the petitioner submitted evidence of the beneficiary's prior employment as an automobile mechanic and the petitioner's 1999 and 2000 fiscal years Form 1120 U.S. Corporation Income Tax Return. The tax return for fiscal year 1999 predates the priority date of the petition and are therefore of no probative value in determining the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 29, 2002, 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.

In response, counsel submitted a letter, dated August 9, 2002, indicating that the beneficiary would replace a former employee by the name of [REDACTED]. Counsel submits evidence that [REDACTED] was paid \$9,650 for the period ending March 31, 2001 and \$6,650 for the period ending June 30, 2001. Counsel further stated that the petitioner's 2001 tax returns were not available because the petitioner's fiscal year did not end until June 30, 2002. Counsel submits a letter from the petitioner's accounting firm corroborating this statement. The petitioner submitted Form 941 Employer's Quarterly Federal Tax Return for the quarters ending March 31, 2001, September 30, 2001, December 31, 2001, and, March 31, 2002, respectively. However, the quarterly wage reports do not show that the petitioner paid wages to the beneficiary only during the quarter ending March 31, 2002. The petitioner also, however, submits four photocopied checks indicating that the beneficiary was hired as a sub-contractor and was paid \$3,150.00 on March 29, 2002; \$3,480.50 on April 26, 2002; \$3,215.80 on May 31, 2002; and, \$3,395.95 on June 28, 2002.

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 November 13, 2002, denied the petition.

On appeal, the petitioner submits its 2001 Form 1120 U.S. Corporation Income Tax Return

The tax returns in the record reflect the following information for the following fiscal years:

	FY 2000	FY 2001
Net income	\$13,359	\$8,520
Current Assets	\$18,185	\$28,722
Current Liabilities	\$23,800	\$37,987
Net current liabilities	\$5,615	\$9,265

In response to the RFE, counsel indicates that the beneficiary will be replacing an employee name [REDACTED] Habana. However, counsel proffers limited evidence as to the position held by this employee and whether the beneficiary would be replacing her. Further, the fact that [REDACTED] did not have earnings during the first quarter of 2002 is not clear evidence that she has been terminated. The Form 941 Employer's Quarterly Federal Tax Returns shows only earnings and not the status of an employee.

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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets 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. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 the years in question, -\$9,265 and -\$26,112, however, were negative.

The petitioner has not demonstrated that it paid any wages to the beneficiary during fiscal years 200 and 2001. In these years, the petitioner shows a net income of only \$8,520 and \$13,359, negative net current assets of \$9,265 and \$5,615 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage during this period.

The payments to [REDACTED] during the first and second quarters of 2001, when annualized, are not sufficient to pay the proffered wage. Counsel does not address the director's concerns that a new employee appears on the payroll after Ms. [REDACTED] departure, suggesting she may have been replaced already.

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

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 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.

ORDER: The appeal is dismissed.