

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



136

FILE: WAC-01-254-56776 Office: CALIFORNIA SERVICE CENTER Date: APR 18 2005

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

DISCUSSION: The Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion to reopen/reconsider. The matter is again before the AAO on a motion to reopen and reconsider. The motion will be granted. The prior decision of the AAO will be withdrawn. The appeal will be sustained. The petition will be approved.

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 April 25, 1996. The proffered wage as stated on the Form ETA 750 is \$1,500 per month, which is \$18,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1991.

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a facility manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

On March 19, 2002, 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 because it failed to provide tax returns as requested by the director and required by 8 C.F.R. § 204.5(g)(2). The petitioner stated its unwillingness to provide its tax returns for confidentiality reasons and did not provide any other evidence as delineated in 8 C.F.R. § 204.5(g)(2); however, the AAO notes that the director did not detail alternative evidentiary options delineated by that regulatory provision in either her request for evidence or her final decision.

On appeal, the petitioner submitted compiled financial statements but not audited financial statements. Thus, the AAO affirmed the director's decision on February 27, 2003 for the same reasons as the director. The AAO's decision discussed the petitioner's submission of unaudited financial statements and lack of evidence that it filed taxes through its individual partners.

In its first motion before the AAO, the petitioner submitted audited financial statements for 1996 through 2001 along with correspondence from the petitioner's certified public accountant (CPA), [REDACTED] stating that "[u]nder Sec. 6231(a)(1)(B) of the Internal Revenue Code [(IRC)], [the petitioner] is exempt from the partnership requirement to file information return for the business entity (Form 1065 – Partnership Income Tax

Return). Each partner's pro-rata share of business income and expenses is to be reported on his individual income tax returns . . ." The petitioner's CPA also stated that in response to the AAO's recent decision, the petitioner hired the CPA to audit its financial position from 1996 through 2001. The petitioner also submitted evidence concerning its bank accounts and copies of IRS publications and code sections pertaining to partnerships that highlight exclusions for filing partnership tax returns.

The AAO's most recent decision, dated December 16, 2003, stated that the petitioner again failed to provide audited financial statements and that the financial statements submitted with its motion conflicted with the information contained in financial statements already contained in the record of proceeding. Thus, the AAO affirmed its prior decision based on the petitioner's failure to provide regulatory prescribed evidence to prove its continuing ability to pay the proffered wage beginning on the priority date.

On motion, counsel submits additional evidence and a brief. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel asserts that the AAO's decision failed to properly evaluate the evidence submitted with its prior motion in its determination of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel stated that the AAO erred by calling audited financial statements unaudited and compiled, and that the "negligible" discrepancies in the information contained in the financial statements provided with its prior motion against the information contained in financial statements provided on appeal was the result of one being compiled and one being audited. Counsel illustrates the "negligible" discrepancies by submitting a chart of the two statements next to each other. Thus, since new evidence is presented and an assertion made that the AAO's decision contradicts precedent, the motion qualifies for consideration as a motion to reopen and a motion to reconsider.

At the outset, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its audited financial statements, such as the cash specified as current assets that will be discussed below further in determining the petitioner's net current assets.

Upon review, the AAO's prior adjudicator erred in failing to consider the audited financial statements and for failing to note that the financial statements were audited. The financial statements are accompanied by a letter from its CPA detailing that the statements were provided after an audit with accompanying notes detailing conformity to generally accepted accounting principles. Thus, this decision will evaluate the information contained in the audited financial statement to determine if the petitioner has shown its continuing ability to pay the proffered wage beginning on the priority date through the evidence it submitted with its prior motion¹.

¹ It is noted that this evidence could be excluded by the application of *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), if the director had put the petitioner on notice of the alternative evidentiary options detailed at 8 C.F.R. § 204.5(g)(2). While the AAO's initial decision noted that counsel could have known what the evidentiary requirements are by reviewing the regulatory provisions in advance of filing the petition, and that the burden of

Although the beneficiary represented that he has been employed by the petitioner since 1991 on the ETA 750B, the petitioner has not established that it actually employed and paid any wages to the beneficiary. The quarterly wage reports contained in the record of proceeding do not contain the beneficiary's name as a paid employee. The petitioner did not submit any other evidence of wages paid to the beneficiary, such as paystubs, checks issued to the beneficiary from the petitioner, the beneficiary's individual income tax returns, or 1099 forms showing compensation to the beneficiary as an independent contractor².

The petitioner's net taxable incomes from 1996 to 2001 were \$26,087, \$28,384, \$27,784, \$28,272, \$33,955, and \$30,099, for each year respectively. The petitioner's net current assets from 1996 to 2001 were \$43,446, \$40,893, \$41,620, \$43,579, \$72,107, and \$94,418, for each year respectively. The proffered wage is \$18,000 per year, which is less than the petitioner's net taxable income or net current assets in every relevant year³. Therefore, the

proof ultimately rests with the petitioner, the AAO on this review determines that in the interest of fairness and administrative efficiency, the AAO will exercise favorable discretion based upon the director's incompleteness in her request for evidence.

² 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. 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.

³ As noted in the prior AAO decisions, 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). 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 the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income.

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. 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. 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,

petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date as it could pay the proffered wage out of either its net income or net current assets in every relevant year.

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 motion to reopen or reconsider is granted. The prior decision of the AAO, dated December 16, 2003, is withdrawn. The appeal is sustained. The petition is approved.

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. 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.