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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



136

FILE: [Redacted]
WAC 03 031 53190

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, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a crane, rig, and industrial equipment repair and rental company. It seeks to employ the beneficiary permanently in the United States as a marketing analyst. 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 brief 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 granting 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 granting 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.

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 16, 1998. The proffered wage as stated on the Form ETA 750 is \$68,452.80 per year.

On the petition, the petitioner stated that it was established during 1946 and that it employs 75 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 1997. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Las Vegas, Nevada.

In support of the petition, the petitioner submitted its 2001 audited financial statements. Those statements show that the petitioner had negative cash flow from operations of \$3,847,311 during that year. The balance sheet shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted (1) a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$31,055.74 during that year and (2) a pay stub for the period ending September 28, 2002, showing that the petitioner paid the beneficiary a year-to-date total of \$32,896.34 in gross pay during that year.

On February 10, 2003 the California Service Center issued a Request for Evidence in this matter. The evidence requested, however, is not germane to the basis of the decision of denial currently under appeal.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on June 2, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that ability. The Service Center, however, only requested evidence pertinent to 2002. Why the Service Center did not request evidence pertinent to 1998, 1999, and 2000 is unknown to this office.

In response, counsel submitted the petitioner's 2002 financial statements. Those financial statements show only unaudited figures for 2002. Although they purport to show audited figures from 2001, no accountant's report accompanied those financial statements.

Counsel submitted a photocopy of a pay stub issued by the petitioner to the beneficiary for the pay period ending May 31, 2003. That pay stub shows a year-to-date gross pay of \$20,417. Counsel also submitted the petitioner's Form 7004 Application for an Automatic Extension of Time during which to file its 2002 Form 1120 U.S. Corporation Income Tax Return until September 15, 2003.

On July 30, 2003 the Service Center issued another Request for Evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a copy of the 2002 W-2 form showing wages the petitioner paid to the beneficiary during that year.

In response, counsel submitted the petitioner's 1998, 1999, 2000 and 2002 audited financial statements and a photocopy of a 2002 W-2 form showing that the petitioner paid the beneficiary \$33,036.57 during that year.¹

The 1998 financial statements show that the petitioner had cash flow from operations of \$1,652,871 during that year and that, at the end of that year, its current liabilities exceeded its current assets.

¹ This office questions why the petitioner had paid the beneficiary wages of \$32,896.34 as of September 28, 2002 but paid him only \$33,036.57 during that entire calendar year. That indicates that the petitioner paid the beneficiary only \$171.23 from September 29, 2002 to December 31, 2002. Because the petitioner has never been accorded an opportunity to address this aspect of its evidence, however, it plays no part in today's decision on appeal.

The 1999 financial statements show that the petitioner had cash flow from operations of \$876,355 during that year. At the end of that year the petitioner had current assets of \$5,621,440 and current liabilities of \$5,064,517, which yields net current assets of \$556,923.

The 2000 financial statements show that the petitioner had cash flow from operations of \$909,101 during that year and that, at the end of that year, its current liabilities exceeded its current assets.

The 2002 statements show that the petitioner had negative cash flow from operations of \$69,918 during that year and that at the end of that year its current liabilities exceeded its current assets.

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 6, 2003, denied the petition.

On appeal, counsel states that the petitioner has 75 employees and had been regularly paying its employees since its establishment. Counsel argues that this shows the ability to pay the proffered wage. Counsel also stresses the petitioner's gross receipts as evidence of its ability to pay the proffered wage.

Counsel states that the petitioner's average positive cash flow from 1998 to 2002 was \$3,363,677. Counsel urges that this figure demonstrates the petitioner's ability to pay the proffered wage. Counsel also argues that the petitioner financed its operation with short-term credit from suppliers during 1998, 2000, 2001, and 2002, resulting in negative net current assets. Counsel urges that those negative net current assets, therefore, are not indicative of an inability to pay the proffered wage.

Counsel also submits a letter, dated December 1, 2003 from an accountant. That letter also observes that the petitioner has made payroll for almost 60 years and stresses the petitioner's gross receipts in stating that it has the ability to pay the proffered wage. The accountant further argues that the authority relied upon in the decision of denial is inappropos, as the petitioner is relying on audited financial statements to show its ability to pay the proffered wage, rather than tax returns.

The accountant cites authority for the proposition that the characterization of a transaction in financial accounting may be different from its characterization for tax accounting purposes and that any presumption that the two are equivalent is incorrect. The accountant concludes that the statement in the decision of denial that the petitioner's tax returns show losses is unsupported.

The decision of denial, however, does not state that the petitioner's tax returns show losses, but only that the petitioner has failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Whether that is true is the sole issue on appeal. If the petitioner has failed to show that ability then, pursuant to 8 C.F.R. § 204.5(g)(2), the petition may not be approved. If the petitioner has shown that ability, then the petition must be approved.

Counsel is incorrect that the petitioner's average cash flow from 1998 to 2002 was \$3,363,677. That figure is the petitioner's cumulative cash flow from operations from 1998 to 2002. To convert it to an average would

require dividing it by five, the number of years in the sample. The petitioner's average cash flow from 1998 to 2002 was \$672,735.40. That amount, however, is considerably larger than the proffered wage.

That the petitioner's net current assets were negative during various years prevents the petitioner from demonstrating the ability to pay the proffered wage with its net current assets. Counsel's assertion that the petitioner's current liabilities were inflated by the use of short-term credit provided by material suppliers is inapposite. If the petitioner did not have net current assets in an amount greater than the proffered wage during a given year, the petitioner is precluded from demonstrating its ability to pay the proffered wage during that year with its net current assets.

Counsel urges that the citations of authority in the decision of denial are off point because the petitioner is attempting to demonstrate its ability to pay the proffered wage with audited financial statements rather than with tax returns. Counsel is attempting to distinguish the cases with a distinction that makes no difference. As counsel observes, the characterization of a transaction may differ from tax accounting to financial accounting. Nevertheless, the petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to select copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage. If the evidence it selects fails to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, then the petition shall be denied, notwithstanding that a perfectly legitimate alternative characterization of some number of transactions, pursuant to some other system of accounting, either in accord with generally accepted accounting principles or in accord with the tax code, would have demonstrated its ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 \$31,055.74 during 2001 and \$33,036.57 during 2002. Having established that it paid the beneficiary those amounts during those years it must establish only that it was able to pay the balance of the proffered wage during those years.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

The reliance of counsel and the accountant on the amount of the petitioner's gross receipts 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would

allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

If corporate tax returns are used to demonstrate the petitioner's ability to pay the proffered wage, then the appropriate net income figure for a given year is the petitioner's taxable income before net operating loss deduction and special deductions or ordinary income, depending upon whether the petitioner is a subchapter C or a subchapter S corporation. If the petitioner is using audited financial statements, as in the instant case, the net income figure is its cash flow from operations.²

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

That the petitioner's net current assets were negative during various years prevents the petitioner from demonstrating the ability to pay the proffered wage with its net current assets. Counsel's assertion that the petitioner's current liabilities were inflated by the use of short-term credit provided by material suppliers is inapposite. If the petitioner did not have net current assets in an amount greater than the proffered wage during a given year, the petitioner is precluded from demonstrating its ability to pay the proffered wage during that year with its net current assets.

The proffered wage is \$68,452.80 per year. The priority date is March 16, 1998.

During 1998 the petitioner had cash flow from operations of \$1,652,871. That amount is much greater than the proffered wage and clearly demonstrates that the petitioner was able to pay the proffered wage during 1998.

During 1999 the petitioner had cash flow from operations of \$876,355. That amount is much greater than the proffered wage and clearly demonstrates that the petitioner was able to pay the proffered wage during 1999.

During 2000 the petitioner had cash flow from operations of \$909,101. That amount is much greater than the proffered wage and clearly demonstrates that the petitioner was able to pay the proffered wage during 2000.

The petitioner has demonstrated that during 2001 it paid the beneficiary \$31,055.74. The petitioner need only demonstrate the ability to pay the \$37,397.06 balance of the proffered wage during that year. During that year, however, the petitioner had negative cash flow from operations of \$3,847,311. The petitioner is unable

² The phrase used to describe this statistic may vary slightly from one profit and loss statement to another.

to demonstrate the ability to pay any portion of the proffered wage during 2001 with its 2001 cash flow from operations. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate its ability to pay any portion of the proffered wage with its net current assets during that year.

The petitioner has demonstrated that during 2002 it paid the beneficiary \$33,036.57. The petitioner need only demonstrate the ability to pay the \$35,416.23 balance of the proffered wage during that year. During that year, however, the petitioner had negative cash flow from operations of \$69,918. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage during 2002 with its 2002 cash flow from operations. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate its ability to pay any portion of the proffered wage with its net current assets during that year.

The director denied the petition based on the petitioner's negative cash flow and negative net current assets during 2001 and 2002. Because the petitioner is obliged to demonstrate the ability to pay the proffered wage during each year since the priority date that analysis is, ordinarily, consistent with CIS policy.

As is noted in the opinion in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), however, a petitioner may demonstrate its continuing ability to pay the proffered wage beginning on the priority date notwithstanding losses or low profits during a given year. If the losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and do not appear to have precluded the petitioner meeting its obligations, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. In cases involving a few years of moderate losses or low profits CIS is justified in using a totality of circumstances test.

In the instant case the petitioner has, as counsel observed, paid its employees for approximately 60 years. Some inference may be drawn that it intends to, and is likely to, continue to pay its employees. Further, during the first three years after the priority date, 1998, 1999, and 2000, the petitioner enjoyed cash flow from operations of \$1,652,871, \$876,355, and \$909,101. Even during the least profitable of those years, 1999, the petitioner's cash flow from operations was more than 12 times the amount of the proffered wage, far more than sufficient to pay the proffered wage during each of the five salient years.

As the accountant observed on appeal the petitioner's cumulative cash flow from operations from 1998 to 2002 was \$3,363,677.³ As was observed above, the petitioner's average cash flow from operations during those years was \$672,735.40. That amount is nearly ten times the amount of the proffered wage.

The audited financial statements in this case show negative Cash flow from operations and negative net current assets during 2001 and 2002. The petitioner's overall performance during the five salient years, however, coupled with the fact that it has, as counsel and the accountant have stated, paid its workers

³ Some suspicion of the "Cash flow from operations" statistic may have been engendered by the apparent variation in the calculations leading to that statistic during the various salient years. This difference is, in fact, apparent rather than substantial. During some years the petitioner's Cash flow from operations was calculated by the direct method and during other years by the indirect method. Although the calculations differ the result of both calculations should be the same during any given year. The accountant's comparison of the petitioner's Cash flow from operations during various years is a valid comparison.

faithfully during the past half century, lead this office to conclude, based on the totality of circumstances, that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon 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.