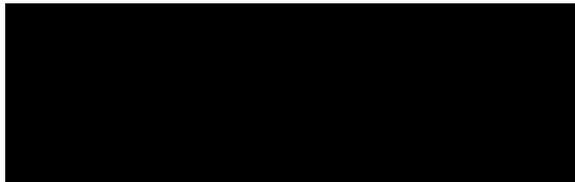


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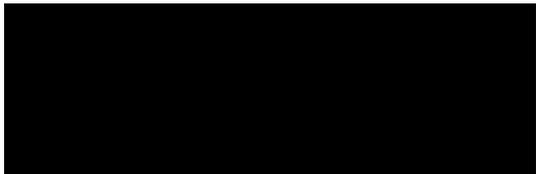
BB
APR 2007

FILE: EAC-02-224-51684 Office: VERMONT SERVICE CENTER Date:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a cab auto service company. It seeks to employ the beneficiary permanently in the United States as an auto 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 states that the petitioner is a substantial company with adequate financial resources 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 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is November 17, 2000. The proffered wage as stated on the Form ETA 750 is \$18.46 per hour, which amounts to \$38,396.80 annually. On the Form ETA 750B, signed by the beneficiary on October 31, 2000, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on June 21, 2002. On the petition, the petitioner claimed to have been established in 1993. In the items for gross annual income and net annual income the petitioner entered "See Taxes." In the item for current number of employees the petitioner entered "N/A."

In support of the petition, the petitioner submitted a letter from a motor garage in Batala, India, stating the beneficiary's experience with that company as a motor mechanic from August 1997 to August 2003; and a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001.

In a request for evidence (RFE) dated February 25, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000; an additional copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001; and copies of bank account statements for an account of the petitioner for the year 2000.

In a decision dated July 3, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief and no additional evidence.

Counsel states on appeal that the petitioner is a substantial company with substantial assets and that the petitioner's bank statements and tax returns show that the petitioner is financial viable and able to pay the proffered wage.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

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 instant case, on the Form ETA 750B, signed by the beneficiary on October 31, 2000, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The name of the corporate taxpayer is not the same as the petitioner's name and the trade name of the corporate taxpayer as shown on the tax returns in the record does not exactly match the name of the petitioner on the Form ETA 750 and on the I-140 petition. However, the IRS tax number, hand written on the Form I-140, is the same as the employer identification number as shown on the tax returns. That information is sufficient to establish that the tax returns in the record are those of the petitioner.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: -\$862.00 for 2000; and \$38,215.00 for 2001. Since the figure for 2000 is negative and since the figure for 2001 is less than the proffered wage of \$38,396.80, those figures fail to establish the ability of the petitioner to pay the proffered wage in those years.

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 current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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 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.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$6,857.00 for the beginning of 2000; \$5,993.00 for the end of 2000; and \$13,699.00 for the end of 2001. Since each of those figures is less than the proffered wage of \$38,396.80, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage.

On the petitioner's bank statements the ending balances are as follows:

2000: \$2,610.08 for January; \$5,612.38 for February; \$6,739.38 for March; \$1,603.74 for April; \$1,285.19 for May; \$6,334.36 for June; \$8,001.26 for July; \$5,068.26 for August; \$4,394.48 for September; \$1,972.04 for October; \$9,838.94 for November; and \$5,968.19 for December.

No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, in the instant petition, no bank statements for 2001 were submitted. The record contains no explanation for the absence of any bank statements for that year. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001.

The petitioner submitted no other financial evidence.

In his decision, the director correctly analyzed the petitioner's tax return for 2000 and found that the information on that return failed to establish the petitioner's ability to pay the proffered wage that year. The director also correctly analyzed the petitioner's bank statements and found that they failed to show funds sufficient to pay the proffered wage in 2000. The director did not specifically discuss the petitioner's tax return for 2001, evidently because the director found an analysis of that return to be unnecessary, given the failure of the evidence to establish the petitioner's ability to pay the proffered wage in 2000, which is the year of the priority date. The director's decision to deny the petition was correct.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.