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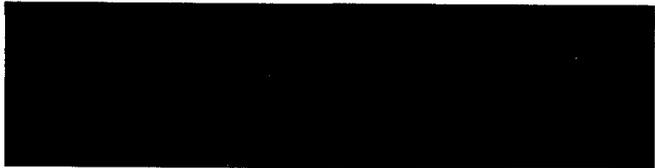
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BE



FILE: EAC 04 069 53930 Office: VERMONT SERVICE CENTER Date: DEC 21 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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further investigation and entry of a new decision.

The petitioner is a woodworking firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, the petitioner contends that the proffered salary can be paid.

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) provides:

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.09 per hour, which amounts to \$31,387 per annum. On the Form ETA 750B, signed by the beneficiary on February 28, 2001, the beneficiary claims to have worked for the petitioner since March 1997.

Part 5 of the visa petition, filed January 12, 2004, indicates that the petitioner was established in 1995, employs twenty-two workers, has a gross annual income of \$1,076,051, and a net annual income of -\$60,974. In support of its ability to pay the beneficiary's proposed wage offer of \$31,387.20 per year, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return 1999-2001. They reflect that the petitioner files its federal tax returns using a fiscal year running from December 1st to November 30th of the following year. Thus the 2000

and 2001 income tax returns both cover a period beginning December 1, 2000 to November 30, 2002. As they cover the period encompassing the priority date of April 30, 2001, these returns are more relevant to the petitioner's ability to pay the proffered salary of \$31,387.20. They contain the following information:

| | 2000 | 2001 |
|---|-----------|-----------|
| ¹ Taxable Income before Net Operating Loss (NOL) | -\$47,098 | -\$12,864 |
| Current Assets (Sched. L) | \$12,427 | \$14,146 |
| Current Liabilities (Sched. L) | n/a | n/a |
| Net current assets | \$12,427 | \$14,146 |

Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18 (d). If a corporation's year-end 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 also provided copies of an individual Wage and Tax Statements (W-2s) for 2000-2002. They show that the petitioner paid this person \$17,363 in wages in 2000; \$20,450 in wages in 2001, and \$20,440 in 2002. The individual named on these W-2s bears a shortened version of the beneficiary's name and gives the same address as that of the beneficiary named on the Immigrant Petition for Alien Worker (I-140). The social security listed for the person on the W-2s cannot be compared, because no social security number was given on the I-140.

The director reviewed the petitioner's financial data submitted to the record and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 30, 2001. The director noted that the petitioner's net income and net current assets were not sufficient to pay the proposed wage offer in 2001, but failed to discuss the wages actually paid to the beneficiary as suggested by the W-2s.

On appeal, counsel merely submits a copy of an unsigned letter from the petitioner's president and principal shareholder, [REDACTED]. This document claims that the petitioner can continue to pay the beneficiary's salary until he obtains permanent resident status and even though a loss was reported in 2001, it does not mean that the proffered salary cannot be paid. As this document was not signed, it cannot be considered as probative of the petitioner's ability to pay the certified wage.

¹ For the purpose of this review, taxable income before the NOL deduction will be treated as net income.

² 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.

CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

In this case, the W-2s submitted indicate that during the fiscal year represented by the petitioner's 2000 tax return, the petitioner paid the beneficiary approximately \$20,193 from December 1, 2000 to November 30, 2001. This represents approximately one month of wages (\$1,446.90) based on the beneficiary's 2000 W-2, combined with eleven months of wages (\$18,745.76) based on the beneficiary's 2001 W-2. This amount is \$11,194.20 less than the proffered wage. A similar calculation using the beneficiary's 2001 and 2002 W-2s results in \$20,449.92 in wages paid during the period from December 1, 2001 to November 30, 2002, or \$10,937.28 less than the proffered salary of \$31,387.20 per year.

As mentioned above, CIS also reviews a petitioner's net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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.

As mentioned above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets.

In this case, as shown above, while the petitioner's net income as shown on the 2000 and 2001 tax returns was insufficient to pay the proffered wage or any difference resulting from a comparison of actual wages paid to the proffered wage, the petitioner's net current assets of \$12,427, shown on the 2000 tax return, were sufficient to cover the \$11,194.20 shortfall occurring when comparing the actual wages paid of \$20,193 to the proffered wage of \$31,387.20. Similarly, the petitioner's net current assets of \$14,146 were enough to cover the \$10,937.28 difference between the proffered wage and the actual estimated wages paid as shown on the beneficiary's W-2s. These figures suggest the petition should be approved as they indicate that the petitioner had the ability to pay the difference between the wages paid and the proffered salary in both 2001 and 2002. Further review is necessary.

however, because CIS electronic records indicate that the petitioner filed at least two other petitions. One (EAC0409251530) was denied, but one petition (EAC0406752605), filed on January 9, 2004, was approved on September 29, 2004, with the same priority date as reflected by the record in this case. When multiple petitions are filed, a petitioner must show that it had sufficient income to pay all the wages as of the respective priority dates. Here, the relevant information such as the proffered wage and any W-2s relating to the approval of the other petition were not provided, so a remand is necessary in order to confirm whether the petitioner's financial documentation justifies the approval of an additional petition; specifically whether the petitioner's net current assets were sufficient to pay the remainder of the beneficiary's wages and meet any other wage needs pertinent to the other petition's beneficiary.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.