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U.S. Citizenship
and Immigration
Services

B6

FILE: EAC 02 207 51171 Office: VERMONT SERVICE CENTER Date: JAN 04 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.

for Michael Valdes
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 rug repair and cleaning firm. It seeks to employ the beneficiary permanently in the United States as a rug repairer. 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 asserts that the petitioner's evidence demonstrated its continuing financial ability to pay the certified 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 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 November 9, 1999. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$18,200 per annum, based on a 35-hour week as set forth on the ETA 750. On Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in 1996, to have a gross annual income of \$280,000, and to currently employ two workers. In support of the petitioner's ability to pay the beneficiary's proposed wage offer, the petitioner submitted an incomplete copy of its Form 1120S, U.S. Income Tax Return for an S corporation for 1999. It shows that the petitioner files its taxes using a fiscal year beginning on July 1st and ending on June 30th. Thus its 1999 corporate tax return shows financial data for the twelve months ending June 30th, 2000. During this year, the petitioner reported net income of \$9,719. Schedule L of the tax return shows that the petitioner had \$1,142 in current assets and \$8,872 in current liabilities, resulting in -\$7,730 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's ability to pay the certified 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 line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on November 21, 2001, the director requested additional evidence pertinent to that ability. The director instructed the petitioner to submit additional evidence demonstrating that it has had the ability to pay the proffered wage beginning on the priority date of November 9, 1999 and continuing until the present. The director also advised the petitioner to submit a copy of the beneficiary's Wage and Tax Statement (W-2) for 1999 if it employed the beneficiary during that year.

In response, the petitioner, through counsel, submitted copies of the petitioner's checking account statements for the period from December 5, 1998 through December 6, 1999, omitting the statements for February and May 1999. In the transmittal letter, counsel states that the petitioner did not employ the beneficiary during 1999, but suggests that the beneficiary will produce additional income from which to draw upon when he is employed.

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 April 9, 2003 denied the petition. The director noted that the petitioner's net income and net current assets were not sufficient to pay the proffered wage.

On appeal, counsel submits a more complete copy of the petitioner's 1999 corporate tax return. Counsel also resubmits a copy of the petitioner's checking account statement for the period between October 7th and December 6th, 1999.

Counsel initially claims that the director misstated the petitioner's current assets as shown on Schedule L of the corporate tax return. Counsel emphasizes that cash on hand amounted to \$4,155. Counsel is apparently referring to the petitioner's cash at the beginning of the fiscal year (July 1, 1999) rather the end-of-year total of \$1,855. As noted above, CIS will review a petitioner's net current assets as an alternative method of determining a petitioner's ability to pay the proffered wage. Cash on hand, as set forth on line 1 of Schedule L is part of a petitioner's current assets. Current assets, however, are balanced by consideration of the petitioner's current liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula

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

used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a carpet repairer will significantly increase profits for a carpet repair and cleaning firm. Counsel's hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax return and cannot be considered to constitute evidence of the petitioner's continuing ability to pay the proffered wage. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 may have 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 record does not reflect that the petitioner has employed the beneficiary.

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). 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. Bank statements show only a portion of a petitioner's available resources and do not reflect other encumbrances that may affect a petitioner's continuing ability to pay the proffered wage. Further, 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. It is also noted that, with the exception of one month's bank statement for the period covering November 5, 1999 to December 6, 1999, all of the other bank statements pre-date the visa priority date of November 9, 1999, and are marginally relevant to the determination of the petitioner's continuing ability to pay the proffered wage.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its continuing ability to pay the proffered wage as of the visa priority date and must submit either federal tax returns, annual reports, or audited financial statements as part of this demonstration. In this case, it is noted that the petitioner filed the petition on June 1, 2002, yet the one federal tax return submitted covered the petitioner's financial status only through June 30, 2000. Including the bank statements, which offered information through December 1999, no financial documentation beyond this date was

offered. It is not sufficient to simply go on record without supporting documentary evidence for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Based on a review of the evidence in the record and the evidence and argument offered on appeal, the AAO concludes that the petitioner has not sufficiently demonstrated that it has 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.