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U.S. Citizenship
and Immigration
Services

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AB6

JAN 27 2005



FILE: EAC 02 198 51487 Office: VERMONT SERVICE CENTER Date:

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

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 general contracting company in the heating, ventilation, and air-conditioning areas. It seeks to employ the beneficiary permanently in the United States as a sheet metal worker. 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 has had the ability to pay the proffered wage at all times. Counsel submits a letter from the petitioner's accountant.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$33.17 per hour for 35 hours weekly, which amounts to \$60,369 annually.

The petitioner is structured as an S corporation. The petitioner stated it was established in February 1997 and has five employees. With the petition, the petitioner submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 1999.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 2, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of its federal tax returns for 1997, 1998, 2000 and 2001, with all schedules and attachments. Since the petitioner indicated that the beneficiary had worked for him from 1997 to 2001, the director also requested copies of the beneficiary's Form W-2 Wage and Tax statements. Finally, the director requested evidence to establish that the beneficiary possessed the requisite four years of work experience listed on the ETA 750 as of January 13, 1998, the priority date for the Application for Employment Certification.

In response, the petitioner submitted a letter from [REDACTED] its accountant. This letter stated that Mr. [REDACTED] had been the petitioner's accountant since 1998, and was familiar with the petitioner's cash flows since that date. Mr. [REDACTED] stated that the petitioner had consistently had the ability to pay all liabilities including wages on a current and timely basis. He also stated that while the petitioner had available lines of credit, the petitioner maintained its ability to operate and pay its liabilities without borrowing funds. Finally, Mr. [REDACTED] stated that the petitioner should be deemed to a qualified, consistent wage payer, and that it had the ability to pay a wage of \$61,000 in 1998 and onward.

The petitioner also submitted W-2 forms for the beneficiary for the years 2002 and 2001, as well as a letter from Mr. [REDACTED] President, U.S.B.R. Construction and Mechanical Corporation, College Point, New York. [REDACTED] stated that the beneficiary had worked for him from April 12, 1994 to January 10, 1997 as a sheet metal mechanic.

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 29, 2003, denied the petition.

On appeal, counsel states that the petitioner has had the ability to pay the proffered wage at all times. Counsel states that documentation of the petitioner's tax forms and the beneficiary's tax forms were submitted, as well as a letter from the petitioner's accountant. Counsel submits a letter dated February 13, 2003 from the petitioner's accountant that appears identical to the letter previously submitted by the petitioner's accountant although the second letter omits the statement with regard to the petitioner's ability to pay the wage of \$61,000 to the beneficiary.

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 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 established that it employed and paid the beneficiary \$13,000 in 2001 and \$26,500 in 2002. The petitioner did not provide any further documentation of wages for the years 1998, 1999, and 2000. Since the petitioner has not provided documentation of any wages paid as of the priority date of January 13, 1998, the documentation in the record is not sufficient to establish that it paid the beneficiary wages in the years 1998, 1999, and 2000. In addition, for the years in which it did pay the beneficiary wages, namely 2001, and 2002, the petitioner did not pay the beneficiary a salary equal to or greater than the proffered wage. In the year 2001, the beneficiary's salary was \$47,369 less than the proffered wage, while in the year 2002, the beneficiary's salary was \$33,869 less than the proffered wage.

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).

With regard to the instant petition, the petitioner submitted its federal income tax returns for the year 1999, which does not cover the priority date of January 13, 1998. The petitioner submitted no other subsequent federal income tax information to substantiate its ability to continue to pay the proffered wage. The only federal income tax documentation submitted for the petitioner was for the year 1999.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 1999 shows the following amount of ordinary income: -\$1,369. This figure fails to establish the ability of the petitioner to pay the proffered wage. In addition, the petitioner submitted no further corporate income tax information or any other evidence or source of the petitioner's ability to pay the proffered wage for 1998, or from 2000 to the present.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. The petitioner's net current assets during the year 1999, however, were \$5,542. In the year 1999, \$54,827 would still have been lacking from the petitioner's net current assets to pay the proffered wage of \$60,639.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 1999, the petitioner shows a negative net income, and net current assets of only \$5,542, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1998 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner also has not established that the beneficiary has the requisite four years of work experience as a sheet metal mechanic. Although the letter from Mr. [REDACTED]

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.

stated that the beneficiary had worked for him from April 12, 1994 to January 10, 1997, a period of time less than three years. In addition, Mr. [REDACTED] did not provide any further evidentiary documentation, such as pay stubs or W-2 forms to substantiate this employment. The petitioner provided no further documentation of the beneficiary's work experience prior to January 13, 1998, the priority date. For this additional reason, the petition may not be approved.

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.