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JUN 06 2005



FILE: EAC-00-135-50552 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



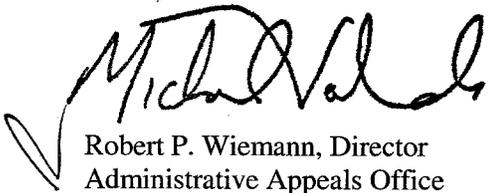
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Vermont Service Center, denied the immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. 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. The AAO dismissed a subsequent appeal determining that the petitioner established its ability to pay the proffered wage on the priority date, but failed to provide evidence of its *continuing* ability to pay the proffered wage.

On motion, 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 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 19, 1996. The proffered wage as stated on the Form ETA 750 is \$17.83 per hour, which amounts to \$37,086.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 1994.

On the petition, the petitioner claimed to have been established on May 1, 1984, to have a gross annual income of \$1,246,985, and to currently employ 15 workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 1996.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 14, 2000, the director requested additional evidence pertinent to that ability. The director requested copies of the beneficiary's W-2 forms for 1999. In response, the petitioner submitted a letter stating that the petitioner did not employ the beneficiary in 1999.

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 February 6, 2001, denied the petition.

On appeal, the petitioner stated that it changed lawyers because its prior lawyer misled them about the substantive requirements to prove its continuing ability to pay the proffered wage beginning on the priority date. The petitioner stated that it represented that it did not employ the beneficiary in 1999 because it thought the director was referencing the time it filed the visa petition in 2000 and not the alien labor certification application in 1996<sup>1</sup>. Thus, the petitioner submitted a copy of a 1099 form issued by the petitioner to the beneficiary reflecting that it paid wages of \$35,903.55 to the beneficiary in 1996.

The AAO dismissed the appeal on December 10, 2003, stating that the petitioner showed the ability to pay the proffered wage in 1996, but failed to present evidence of its continuing ability to do so.

On motion, counsel states that the AAO's decision was the first time the issue of the petitioner's continuing ability to pay the proffered wage was raised. Counsel is technically correct, since the director failed to request evidence for 1996 "to the present," but the clear language of 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that "[t]he petitioner must demonstrate this ability at the time the priority date is established and *continuing until the beneficiary obtains lawful permanent residence.*" (Emphasis added). The burden of proving its case is on the petitioner, not the director. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Regardless, the AAO will exercise favorable discretion and accept the new evidence and assertions on motion. The petitioner submits its corporate tax returns for 1997 through 2002. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Thus, since the petitioner submits new evidence and counsel states new facts to be proved, namely, the petitioner's continuing ability to pay the proffered wage as reflected on its corporate tax returns, the motion qualifies as a motion to reopen.

The petitioner's tax returns reflect the following information for the following years:

|                         | <u>1996</u> | <u>1997</u> | <u>1998</u> | <u>1999</u> |
|-------------------------|-------------|-------------|-------------|-------------|
| Net income <sup>2</sup> | \$30,332    | \$19,548    | \$40,058    | \$122,701   |
| Current Assets          | \$120,825   | \$138,316   | \$287,331   | \$248,811   |
| Current Liabilities     | \$92,697    | \$88,708    | \$161,024   | \$33,725    |
| Net current assets      | \$28,128    | \$49,608    | \$126,307   | \$215,086   |
|                         | <u>2000</u> | <u>2001</u> | <u>2002</u> |             |
| Net income <sup>3</sup> | -\$8,940    | \$86,104    | \$155,882   |             |
| Current Assets          | \$168,538   | \$204,351   | \$285,996   |             |
| Current Liabilities     | \$132,115   | \$122,044   | \$92,783    |             |

<sup>1</sup> The petitioner's prior statement explicitly referred to the beneficiary's employment in 1999, not 2000.

<sup>2</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>3</sup> See note 2, *supra*.

|                    |          |          |           |
|--------------------|----------|----------|-----------|
| Net current assets | \$36,423 | \$82,307 | \$193,213 |
|--------------------|----------|----------|-----------|

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 \$35,903.55 to the beneficiary in 1996, which is \$1,182.85 less than the proffered wage, but did not establish that it employed and paid the beneficiary the full proffered wage in 1997, 1998, 1999, 2000, 2001, or 2002.

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.

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.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1996, but must show that it can pay \$1,182.85 to cover the difference between the wages actually paid to the beneficiary and the proffered wage. In 1996, the petitioner shows a net income of \$30,33 and net current assets of \$28,128, which are both greater than the proffered wage and has, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 1996.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 1997. In 1997, the petitioner shows a net income of \$19,548, which is less than the proffered wage, and net current assets of \$49,608, which is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets in that year. The petitioner has, therefore, shown the ability to pay the proffered wage during 1997.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 1998. In 1998, the petitioner shows a net income of \$40,058 and net current assets of \$126,307, which are both greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 1998.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1999. In 1999, the petitioner shows a net income of \$122,701 and net current assets of \$215,086, which are both greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 2000. In 2000, the petitioner shows a net income of -\$8,940, which is less than the proffered wage and net current assets of \$36,423, which is slightly less than the proffered wage, but has not, therefore, demonstrated the ability to 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 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 2001. In 2001, the petitioner shows a net income of \$86,104 and net current assets of \$82,307, which are both greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 2002. In 2002, the petitioner shows a net income of \$155,882 and net current assets of \$193,213, which are both greater than the proffered wage, and has, therefore, demonstrated the ability to the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2002.

Although the petitioner failed to show sufficient net income or net current assets in 2000 to pay the exact proffered wage, its net current assets were very close to the proffered wage and the slight difference (\$663.40) is too miniscule to detract from the strong financial showing it made in every other year. The AAO also notes that the officer compensation in each year is over \$140,000, and thus it is not unrealistic that the majority owner would have been able to pay himself \$663 less in 2000. The overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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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 met that burden.

**ORDER:** The motion will be granted. The prior decision of the AAO, dated December 10, 2003, is withdrawn. The appeal is sustained. The petition is approved.