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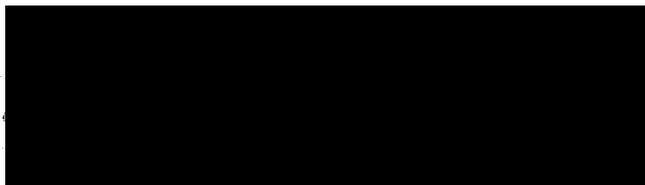
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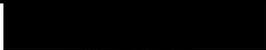
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 07 2005

WAC 03 149 52380

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 denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction cleaning company. It seeks to employ the beneficiary permanently in the United States as an industrial truck 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 submits a statement 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 11, 1999. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour, which amounts to \$38,188 annually.

With the petition, the petitioner submitted IRS Forms 1120, federal corporate income tax returns, for the years 1999, 2000, and 2001. For tax year 2002, the petitioner submitted Form 7004, Application to Apply for Extension of Time to File for Corporate Income Tax Return. The petitioner also submitted a letter of clarification with regard to the beneficiary's work experience in Guadalajara, Mexico, from 1976 to 1987.¹ Finally, the petitioner submitted a letter offering employment to the beneficiary, dated February 2003.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 10, 2003, the director requested additional evidence

¹ The ETA 750 submitted by petitioner and certified by the Department of Labor does not contain any information with regard to the beneficiary's employment in Mexico from 1976 to 1987. This work experience is considered outside of the parameter of the experience evaluated by DOL, and is given no weight in the proceedings.

pertinent to that ability. The director specifically requested that the petitioner provide Form DE-6, Quarterly Wage reports for all employees for the last four quarters, with names, social security numbers and numbers of weeks worked for all employees. With regard to the beneficiary's work experience, the director stated that the Form ETA-750 stated that the beneficiary had been employed with Exclusive Construction Clean Up, Inc. from October 1988 to July 1997. The director states that evidence of prior work experience should be submitted on the previous employer's letterhead showing the name, and title of the person verifying this information, along with verification of the beneficiary's title, duties, and dates of employment and number of hours worked each week.

In response, the petitioner's president, states that as of 1998, Exclusive Construction Clean Up, Inc., was dissolved and a new corporation was created, namely, the petitioner. The president further stated that the present petitioner has assumed all rights, duties, obligations and assets as the former petitioner and will continue the petitioner filed on behalf of the beneficiary. The petitioner's president stated that copies of the two corporations' city business licenses were attached to the president's letter.² The petitioner submitted copies of Forms DE-6 for quarters from June 2002 to June 2003. These documents indicated the petitioner had a work force of some 43 to 51 workers during this period of time.

The director issued a second request for further evidence on October 10, 2003. He requested completed and signed federal tax return for 2002, the beneficiary's W-2 Form for 2002, and requested again that the petitioner provide evidence of work experience. The director requested work experience information from the current employer with the same information requested previously.

In response, the petitioner submitted its Form 1120, corporate income tax for 2002, two W-2 Forms for the beneficiary that indicated he earned \$20,250 in 2002. The petitioner also submitted a letter dated December 2003 that contained the same wording as the petitioner's offer of employment letter originally written in February 2003.

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 continuing to the present day, and, on January 29, 2004, denied the petition. With regard to the year 1999, when the priority date was established, the director stated that the petitioner's taxable income plus the wages paid to the beneficiary demonstrated the petitioner's ability to pay the proffered wage. The director stated that the petitioner's 2000 and 2002 federal income tax returns indicated sufficient taxable income or net current assets to pay the proffered wage. With regard to the year 2001, the director determined that the petitioner did not have sufficient financial resources to pay the proffered salary. The director stated that the petitioner's 2001 corporate income tax return indicated gross receipts of \$2,629,050, compensation of the sole officer/shareholder of \$12,600, wages paid of \$449,636, and a net income of \$9,338. The director also noted that the petitioner's Schedule L, contained in Form 1120, showed no current assets and current liabilities of \$218,727.

On appeal, counsel states that in 2001, the petitioner reported profits or a net income of \$9,338 as well as wages paid to the beneficiary in the sum of \$6,750. Counsel further states that in the same year, the petitioner paid its

² No business licenses for the petitioner or for Exclusive Construction Clean Up, Inc. are found in the record. However, the petitioner's reference to the dissolution of the former corporation in 1998 is immaterial to the proceedings, as the priority date for the ETA 750 is June 11, 1999.

president \$10,700 in rents, and also compensated the president \$12,600. Counsel asserts that the compensation as well as the rent can be used to further support the beneficiary's proffered wage of \$38,188. Counsel also states that the petitioner's 2001 return shows gross receipts of \$2,629,050 that should not be ignored in analyzing the petitioner's ability to pay a \$38,000 salary. Finally, counsel submits a letter from [REDACTED] the petitioner's accountant. Mr. [REDACTED] examines the petitioner's tax return for 2001 and made comments with regard to the issue of no current assets referred to in the director's denial. The accountant states that this item should more appropriately refer to the bank overdraft line was -\$27,950. The accountant states that these bank overdraft arose from the petitioner's year-end tax planning. As such, the overdrafts were covered by the income earned and accounts receivable collected in the following months. The accountant states that the bank overdrafts were negative only in timing. The accountant also notes that the current payroll tax liabilities in the amount of \$178,736 were paid down in 2002 by \$29,149. Finally the accountant provides a document that he describes as the petitioner's monthly bank account balances for 2002, and states that, except for a few months, the petitioner had substantial positive balances in its monthly bank balances. The accountant's attachment lists the monthly bank balances for a general account and a payroll account. No further evidentiary documentation is submitted with regard to the petitioner's monthly bank statements.

Counsel, on appeal, submits a letter from the petitioner's accountant that examines the petitioner's monthly bank balances. The accountant's reliance on the balances in the petitioner's bank account is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Although the director stated in his denial that the petitioner had established the ability to pay the proffered wage in 1999, the record is not clear as to how the director reached this determination. The record documents the petitioner's net income in 1999 as \$9,101, and the actual wages paid to the beneficiary, as indicated by a W-2 form and Form 1040 submitted by the beneficiary in his I-485 petition, were \$15,000. The combination of the petitioner's net income of \$9,101 and the beneficiary's actual wages is only \$16,101. The proffered wage is \$38,188. Therefore the director's determination with regard to the petitioner's net income and the beneficiary's salary being enough to pay the proffered wage is withdrawn. The AAO will examine whether the petitioner's net current assets are sufficient to pay the difference between the proffered wage and the beneficiary's actual wages below.

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. The petitioner and the beneficiary provided W-2 Forms or DE-6 Quarterly Wage Reports for the beneficiary that document that he worked, on an undetermined fulltime or part-time basis, for the petitioner from 1999 to 2003. The W-2 Forms submitted establish that the beneficiary earned \$15,000 in 1999, \$14,510 in 2000, \$6,750 in 2001, and \$15,300 in 2002.³ While the petitioner established that it had

³ The beneficiary's W-2 Forms submitted with his I-485 petition also document that he earned \$15,300 from

employed the beneficiary and paid him wages as of the priority date and onward, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1999 and onward.

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 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, now CIS, should have considered income before expenses were paid rather than net income. The petitioner's net income for the years 1999 to 2002 are as follows: \$9,101 in 1999, \$71,471 in 2000, \$9,338 in 2001, and \$45,668 in 2002. As correctly noted by the director, the petitioner had sufficient net income to pay the difference between the proffered wage and the beneficiary's actual wages in both 2000 and 2002. However, as stated previously, the petitioner's 1999 net income of \$9,101 is not sufficient to pay the difference between the beneficiary's actual wages of \$15,000 and the proffered wage of \$38,188. As correctly noted by the director, the petitioner's net income of \$9,338 was insufficient to pay the difference between the beneficiary's actual wages of \$6,750 and the proffered wage. Therefore the petitioner did not establish its ability to pay the proffered wage for the years 1999 and 2001.

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. In addition, 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.⁴ 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. Since the petitioner established that it had sufficient financial resources to pay the proffered wage

another Texas company in 2001.

⁴ 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.

in 2000 and 2002, the AAO will only examine the years 1999 and 2001, with regard to the petitioner's net current assets. The tax returns reflect the following information for the years 1999 and 2001:

	1999	2001
Taxable income ⁵	\$ 9,101	\$ 9,338
Current Assets	\$ 4,500	\$ 0
Current Liabilities	\$ 54,765	\$ 218,727
Net current assets	\$ -50,265	\$ -218,727

The petitioner has demonstrated that it paid \$15,000 to the beneficiary during 1999. In 2001, as previously illustrated, the petitioner shows a taxable income of \$9,101, and negative net current assets of \$50,265. The petitioner has insufficient net current assets to pay the difference between the beneficiary's actual wages of \$15,000 and the proffered wage of \$38,188, namely, \$23,188. The petitioner, therefore, has not demonstrated the ability to pay the proffered wage as of the priority date, based on its net income or net current assets.

On appeal, counsel addresses the use of the sole officer/shareholder's compensation as an additional source of funds to pay the proffered wage. Although counsel brings up this issue in reference to tax year 2001, it can be evaluated for both years in which the petitioner lacked sufficient net income or net current assets to pay the proffered wage, namely 1999 and 2001. While counsel also notes that the petitioner paid the president rent, and that the amount paid in rent could also be used to pay the proffered wage, counsel's statement with regard to rents, money already spent throughout the year, is not persuasive. However, the compensation paid to the sole officer in the instant petition can be viewed as discretionary funds available to pay the proffered wage, for various reasons. Overall, the facts that the petitioner, through counsel, presents the issue, that compensation for the officer has varied from 1999 to 2002 which adds to the discretionary nature of the compensation; and that there is only one officer/shareholder support the discretionary nature of the officer's compensation. The president/officer received compensation from 1999 to 2002 in the following amounts: in 1999, \$65,800, in 2000, \$68,600, in 2001, \$12,600, and in 2002, \$35,460. The four DE-6 documents submitted by the petitioner that document wages paid in 2003, in part, also indicate that the sole officer/shareholder received a salary from the petitioner. With regard to the officer's compensation received in 1999, namely, \$65,000, the petitioner has established that the actual wages paid to the beneficiary of \$15,000, in combination with the petitioner's taxable income of \$9,101, along with the funds available from the officer's compensation are sufficient to pay the proffered wage in 1999. Thus, the petitioner has established that it had the ability to pay the proffered wage as of the priority date. Funds spent are normally not viewed to have been otherwise available to use to pay the wage. However, in the particular facts of this case, the AAO finds it a reasonable contention that, given the variation in officer's compensation over the pertinent years, the sole shareholder could have compensated himself \$14,087 less than the \$65,000 in 1999 if he had had to pay the proffered wage.

⁵ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

With regard to tax year 2001, the petitioner demonstrated that it paid wages of \$6,750 to the beneficiary during 2001. In 2001, the petitioner shows a taxable income of \$9,338 and net current assets of -\$218,727. Thus, the petitioner did not have the ability to pay the difference between the proffered wage and the actual wages paid during 2001, namely, \$31,438, based solely on its net income or net current assets. As previously stated, the petitioner's monthly bank balances in 2001 are not viewed as evidence of additional funds available to pay the proffered wage. With regard to the use of the officer/shareholder's compensation in 2001 to pay the proffered wage, the compensation in 2001 was \$12,600. Converse to 1999, the AAO would find it less reasonable that the sole shareholder would forego all officer compensation in a given year. Nevertheless, this sum, combined with the beneficiary's salary of \$6,750, the petitioner's net income of \$9,338, would only amount to \$28,697, \$9,491 short of the proffered wage. Without more persuasive evidence, the petitioner did not have sufficient financial resources to pay the proffered salary in 2001. Therefore, although the petitioner has established that it had the ability to pay the proffered wage during 1999, 2000, and 2002, it has not established that it had the ability to pay the proffered wage in 2001. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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.