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U.S. Citizenship  
and Immigration  
Services

*RB6*

**JUN 22 2005**



FILE: WAC-03-111-51805 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

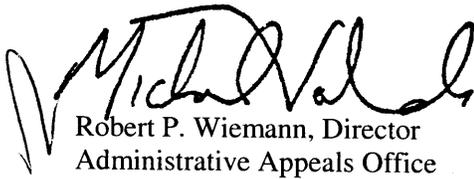
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company engaged in semiconductor design. It seeks to employ the beneficiary permanently in the United States as a design engineer. 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.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either 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 petition's priority date, which is the date 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). The priority date in the instant petition is June 21, 2001. The proffered wage as stated on the Form ETA 750 is \$43.75 per hour, which amounts to \$91,000.00 annually. On the Form ETA 750B, signed by the beneficiary on June 6, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 25, 2003. On the petition, the petitioner claimed to have been established in February 1998, to currently have eleven employees, and to have a gross annual income of \$1.2 million. In the item on the petition for net annual income the petitioner wrote "N/A." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated May 15, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director acknowledged receipt of the petitioner's unsigned Form 1120 federal tax return for 2001, but stated that that form was not acceptable evidence. The director specifically requested "certified IRS computer printouts for the petitioner for Tax Year 1999, 2000 and 2001."

In response to the RFE, the petitioner submitted additional evidence, including, among other evidence, signed copies of its federal tax returns for 1999, 2000, 2001 and 2002, and a copy of a Internal Revenue Service Form 2506 dated June 30, 2003 showing a request to the IRS by the petitioner for copies of the petitioner's tax returns for 1999, 2000 and 2001. The petitioner's submissions in response to the RFE were received by CIS on August 7, 2003.

In a decision dated October 8, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that although the petitioner's tax returns show losses, other evidence submitted on appeal establishes the petitioner's ability to pay the proffered wage during the relevant period.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on June 6, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has been employed by the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: \$8,739.00 for 1999; \$42,978.00 for 2000; -\$1,043,610.00 for 2001; and -\$233,668.00 for 2002. The record before the director closed on August 7, 2003 with the petitioner's submissions in response to the RFE. As of that date, the petitioner's return for 2002 was its most recent return available.

The net income figures for 1999 and 2000 are not directly relevant to the instant petition, since the priority date is June 21, 2001. Since the net income figures for 2001 and 2002 are negative, those figures fail to establish the ability of the petitioner to pay the proffered wage in those years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$26,333.00 for the end of 1999; \$380,488.00 for the end of 2000; -\$925,019.00 for the end of 2001 and -\$1,069,507.00 for the end of 2002. The figure for the end of 2000 is the same in accounting terms as that for the beginning of 2001, therefore it is relevant to the instant petition, in which the priority date is August 7, 2001. The net current assets figure of \$380,488.00 is sufficient to establish the petitioner's ability to pay the proffered wage of \$91,000.00 per year as of the priority date. However, the figures for the petitioner's net current assets at the end of 2001 and at the end of 2002 are negative. Therefore those figures fail to establish the petitioner's ability to pay the proffered wage in succeeding years.

The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence in the form of either annual reports, federal tax returns, or audited financial reports. As discussed above, the petitioner's federal tax returns fail to establish the petitioner's ability to pay the proffered wage during the relevant time period. The record lacks copies of any annual reports or audited financial statements of the petitioner.

The record contains copies of payroll records, medical insurance records, pension payment records and federal and state quarterly reports of the petitioner, submitted for the first time on appeal. Those records show the payment of salaries to employees of the petitioner and of other payroll expenses during various pay periods and quarters during the years at issue in the instant petition. Evidence showing that the petitioner has a history of

meeting its employee expenses may help to establish that the petitioner is a stable and responsible employer, but establishing that the petitioner has met its obligations to its present and past employees does not sufficiently carry the petitioner's burden of proof. The petitioner is required to establish its ability to pay the additional compensation expenses which will result from hiring the beneficiary.

Records pertaining to payroll expenses are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Payroll expenses and other amounts relating to employee compensation are among the expenses which affect a petitioner's net income. No evidence was submitted to demonstrate that the funds spent by the petitioner on its expenses related to its payroll are not reflected on its tax returns, such as the amounts shown on the Form 1120, line 13, for salaries and wages, and on line 24, for pension, profit-sharing, and similar plans. For these reasons, the documents pertaining to payroll expenses and to other employee compensation expenses add no significant information to the tax return evidence discussed above.

The record contains a copy of a letter dated July 7, 2003 from the petitioner's president stating that the petitioner has the ability to pay the proffered wage, evidence also newly submitted on appeal. The regulation at 8 C.F.R. § 204.5(g)(2) allows for a statement by a financial officer of a petitioner as a form of acceptable evidence for petitioners which have 100 or more employees. But even assuming that the petitioner's president would qualify as a financial officer of the petitioner, the petitioner lacks the minimum number of employees for that provision to be applicable, since the petitioner states on the I-140 petition that it has eleven employees, and since the payroll records in evidence indicate no more than eleven employees at any time.

The record contains copies of unaudited financial statements for 2002 and for the first seven months of 2003. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In his decision, the director correctly summarized the information on the petitioner's tax returns and found that the information on those returns did not establish the petitioner's ability to pay the proffered wage during the relevant period. The director's decision to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director.

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.