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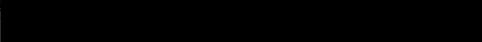
U.S. Citizenship
and Immigration
Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: JUN 27 2005

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 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 sustained. The petition will be approved.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a sample maker. 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 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 January 2, 2001. The proffered wage as stated on the Form ETA 750 is \$463.00 per week, which amounts to \$24,076 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on May 22, 1995, to have a gross annual income of \$2,783,599, and to currently employ 130 workers. In support of the petition, the petitioner submitted its 2002 corporate tax return and quarterly wage reports for the last quarter in 2002 and the first three quarters of 2003.

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 December 24, 2003, 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 annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence pertaining to 2001 and 2003.

In response, the petitioner submitted Form 1120 Corporate tax returns for 2001, along with a letter from its certified public accountant (CPA) that the petitioner's 2003 corporate tax return had not been filed yet.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$16,054	\$24,560
Current Assets	\$41,789	\$72,600
Current Liabilities	\$46,320	\$24,986
Net current assets	-\$4,531	\$47,614

In addition, counsel submitted copies of the petitioner's quarterly wage reports for all four quarters in 2003. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Counsel also submitted a copy of a liaison question and answer transcription between the California Service Center and the American Immigration Lawyers Association (AILA) highlighting a reference to an international national standard operating procedure that a petitioning entity's continuing ability to pay the proffered wage could be demonstrated by showing that its net current assets are greater than or equal to the proffered wage. Counsel asserted in an accompanying cover letter that the "petitioner's net current assets, \$272,996.00 is greater than or equal to the salary offered . . ."

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 26, 2004, denied the petition, citing the petitioner's insufficient net income and negative net current assets in both 2001 and 2002².

On appeal, counsel asserts that the director miscalculated the petitioner's net current assets and, citing another letter submitted on appeal from the petitioner's CPA, that the petitioner's negative cash book balances for 2001 and 2002 were due to checks issued for the following year's expenses. Counsel also states that the petitioner's "book balances are kept artificially low at the end of the tax year for tax planning purposes." Counsel asserts that the position is not new and the petitioner pays other employees performing the same or similar duties. Moreover, counsel states that the director failed to consider the totality of circumstances pertaining to the petitioner's continuing ability to pay the proffered wage in contravention of precedent set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner submits a letter from its CPA stating much of what counsel iterates on appeal as well as noting that the petitioner pays millions in its cost of labor, pays officer salaries of over \$100,000, and by adding depreciation back to its net income, reflects "solid net income." The petitioner also resubmits copies of its corporate tax returns, and submits for the first time on appeal W-3 and W-2 forms evidencing wages paid to the petitioner's employees but none to the beneficiary, and copies of the petitioner's bank statements.

Counsel's reliance on the balances in the petitioner's bank accounts 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

² The director states that the petitioner's net current assets in 2001 were -\$62,250 and for 2002, were -\$40,622, and he did not describe his calculations.

that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 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, contrary to the petitioner's CPA's assertion. 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 wage³. 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 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.

³ Apparently both counsel and the director miscalculated the petitioner's net current assets in this case.

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.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of only \$16,054 and negative net current assets has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2001. In 2002, however, the petitioner shows a net income of \$24,560 and net current assets of \$47,614, 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 2002.

Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, 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). The petitioner has been in business for 10 years and according to its quarterly wages reports, and W-3 and W-2 forms, employs over 100 employees. The petitioner's gross income was between \$2-4 million in both years and they pay salaries, wages, and officer's compensation each year of \$1-2 million. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage. The petitioner has, therefore, based upon the limited and unique factual circumstances of this case, shown 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 sustained. The petition is approved.