

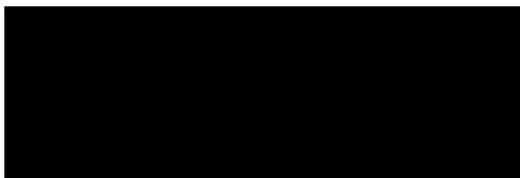
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U.S. Citizenship
and Immigration
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Invasion of personal privacy

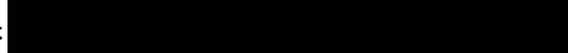
MAR 03 2005



FILE: 
EAC 02 284 50643

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: 
Beneficiary: 

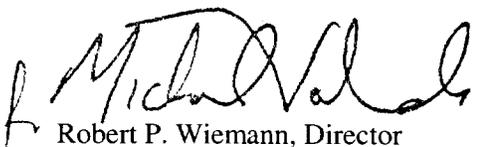
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 Acting Director, Vermont Service Center, denied the employment-based immigrant visa petition. The petitioner, through counsel, filed a Form I-290B, Notice of Appeal to the Administrative Appeals Office, on March 31, 2004. However, in his brief, counsel made a request to “reopen and reconsider under § 103.3(a)(2)(ii) and (iii) and § 103.5 of the regulations.” The acting director dismissed the motion on June 30, 2004. Since the petitioner filed a Form I-290B and since the acting director could not find grounds to approve the petition on motion, the appeal should have been forwarded to the AAO without the acting director taking any action. The petition is now before the Administrative Appeals Office (AAO) on appeal. The decision of the acting director on motion will be withdrawn and the appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is an auto body shop. It seeks to employ the beneficiary as an auto body repairer. As required by statute, the petition was accompanied by certification from the Department of Labor. The acting director denied the petition because she determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, Section 203(b)(3)(A)(i) of 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.

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.

Eligibility in this matter hinges on the petitioner’s continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 17, 2001. The proffered salary as stated on the labor certification is \$19.36 per hour or \$40,268.90 per year.

With the petition, counsel submitted a copy of the petitioner’s 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner’s 2001 tax return reflected an ordinary income of -\$15,228 and net current assets of -\$420. The acting director considered this documentation insufficient and on October 15, 2003, she requested additional evidence pertinent to the petitioner’s continuing ability to pay the proffered wage from the priority date of April 17, 2001 and continuing to the present. The acting director specifically requested the

petitioner's 2002 federal tax return and copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements, if the petitioner employed the beneficiary in those years.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and a copy of the deed, title insurance and real estate market analysis for the petitioner's business property. The 2002 tax return reflected an ordinary income of -\$4,633 and net current assets of \$20,375. Counsel states:

We also attach a photocopy of the deed, title insurance and real estate market analysis for the business property, which documents that the business property, not including the business, had a value of between \$195,000 and \$230,000 and that the business itself had a value of @ \$100,000 before the application for alien employment certification was filed. Since the statute for financial guarantees evaluates property for support purposes at 20% the same standard applied in the instant case which shows an ability of between \$39,000 and \$46,000, which equal or exceeds the offered wage of \$40,269. The market analysis also shows a present value of between \$275,000 and \$350,000 for the property and \$175,000 for the business. By the same analysis the real estate in the business alone shows an ability to support at the level of \$55,000 to \$70,000, well in excess of the offered wage.

What is significant is the petitioner's "ability" to pay. Ability to pay includes assets as well as income. This petitioner is in the position of owning their premises not merely renting their premises and, therefore, the asset value of the company meets the requirements of ability to pay. In terms of § 204.5(g)(2) of the Regulations this is an appropriate case in which to consider assets based on documentation from the petitioner's records.

The beneficiary was not employed by the petitioner at any time. Employment will begin upon adjudication of the pending application for adjustment.

The acting 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 March 22, 2004, denied the petition.

On March 31, 2004, counsel filed an appeal with a brief and additional evidence that consisted of a bank statement, showing a balance of \$35,297.48 for the period February 1, 2004 through February 29, 2004 and a statement showing a line of credit of \$40,000 as of January 28, 2004. However, in his brief, counsel requested a motion to reopen and reconsider. The acting director dismissed the motion on June 30, 2004.

On appeal, counsel, states:

You state that [business] property has a value. However, this is an asset not available to pay wages and if the business is sold to pay wages there would no longer be a business.

This statement is in error since the ability to pay was based on the real estate and not the business value. The real estate could well be sold and the business relocated to rental space

without diminishing the business one penny. The business property could be used as collateral for a business loan as is common in many businesses and the availability of that loan is ability to pay. Attached is proof of a \$40,000 line of credit as documentation of the availability of such a loan. Also attached please find a copy of the business' current bank account showing an average balance well in excess of the annual offered wage. There is no question of "ability" to pay the offered wage and certainly not one as stated in your decision of March 22, 2004.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary in 2001 and 2002 at a salary equal to or greater than the proffered wage.

As an alternative 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, 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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

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

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 2001 and 2002 were -\$420 and \$20,375, respectively. The petitioner could not have paid the proffered wage in 2001 or 2002 from its net current assets.

Counsel provides a copy of the petitioner's bank balance for the period February 1, 2004 through February 29, 2004 and contends that the petitioner's bank balance establishes the petitioner's ability to pay the proffered wage. However, counsel'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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

Counsel also points the petitioner's line of credit as evidence of its ability to pay the proffered wage. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Finally, counsel asserts that the petitioner could have sold the property the business is own and relocated to a rental property to pay the proffered wage. Counsel has not, however, provided any estimates of rental or relocation costs that would offset the liquidation of the petitioner's property. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any event, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. *See* 8 C.F.R. § 103.9(a). In addition, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. The unambiguous language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record.

The 2001 tax return reflects an ordinary income of -\$15,228 and net current assets of -\$420. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

The 2002 tax return reflects an ordinary income of -\$4,633 and net current assets of \$20,375. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2002.

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 decision of the acting director on motion is withdrawn. The appeal is dismissed.