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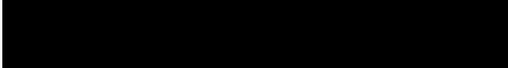
U.S. Citizenship
and Immigration
Services

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FILE: WAC-02-288-52716 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 2005**

IN RE: Petitioner: 
Beneficiary: 

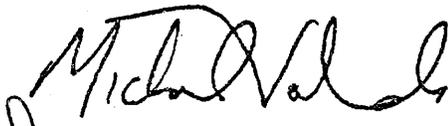
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 dismissed.

The petitioner is a watch and clock dealer and service center. It seeks to employ the beneficiary permanently in the United States as a watch repairer. 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 December 26, 1995. The proffered wage as stated on the Form ETA 750 is \$14.79 per hour, which amounts to \$30,763.20 annually.

This is a substitution case. The visa petition was previously approved for a different beneficiary and Citizenship and Immigration Services' (CIS) records indicate that the visa was returned and never used. On the Form ETA 750B, signed by the substituted beneficiary, the beneficiary did not claim to have worked for the petitioner. The substituted beneficiary is qualified to perform the duties of the proffered position. Thus, while the AAO reviewed the record of proceeding to ensure satisfactory compliance with the statutory and regulatory requirements concerning substitutions, this will not be an issue for discussion on appeal.

This is also a successor-in-interest case. The ETA 750A was filed by [REDACTED] located at the petitioner's address, and the visa petition was filed by [REDACTED] Inc. An agreement for Purchase and Sale of Assets submitted on appeal demonstrates that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company, [REDACTED]. Thus, while the AAO reviewed the record of proceeding to ensure satisfactory compliance with the statutory, regulatory, and precedent requirements concerning successorship, this will not be an issue for discussion on appeal. The Purchase and Sales of Assets agreement was ratified on November 13, 1996, after the date of the filing of the ETA 750 and prior to the filing of the visa petition. Thus, in addition to illustrating its own continuing ability to pay the proffered wage from the date of contract ratification, the petitioner must establish the financial ability of the predecessor enterprise to have

paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

On the petition, the petitioner claimed to have been established on June 1, 1999¹ and to currently employ three workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for the year 1999.

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 February 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 sought evidence from the date of the priority date in 1995 to the present time. In addition, the director requested quarterly wage reports and any W-2 forms issued to the beneficiary. The director also requested that the petitioner submit a formal withdrawal letter of its intention to terminate the approval of its first visa approval.

In response, the petitioner's counsel submitted a letter in which he stated that they were enclosing tax returns for 1997 through 2002, but included the following explanation:

There is no income tax return for the year 1995 as the business was open only for less than five days in 1995, and the income for that short period of time was picked up in the year 1996 return. The 1996 income tax return is unavailable. The 2002 income tax return is not ready since the employer's fiscal year ends in June of 2003.

Counsel stated that no W-2 forms were available for the beneficiary since the beneficiary was never employed by the petitioner. The petitioner submitted its Forms 1065, U.S. Partnership Returns of Income, for 1997, 1998, and 1999, and its Form 1120 Corporate tax returns for the years 1999 and 2001.

Counsel states in his letter that the petitioner also submitted a letter with its intent to withdraw the previously approved petition, but no letter is contained in the record of proceeding. The AAO notes that the petitioner's representative signed counsel's letter approving the letter's form and content.

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

Tax return information for the petitioner while it was structured as a partnership:

	<u>1997</u>	<u>1998</u>	<u>1999²</u>
Net income ³	\$21,582	\$20,538	-\$570
Current Assets	\$93,901	\$111,489	\$106,830
Current Liabilities	\$71,063	\$4,613	\$3,777

¹ The petitioner's tax returns indicated that it incorporated on June 1, 1999, but prior to that was established as a business entity formed as a partnership on December 1, 1996.

² For the period January 1, 1999 through May 31, 1999.

³ Ordinary income (loss) from trade or business activities as reported on Line 22.

Net current assets	\$22,838	\$106,876	\$103,053
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Tax return information for the petitioner while it was structured as a corporation and reporting for fiscal years beginning on June 1 of each year:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ⁴	-\$149	\$n/a	-\$114
Current Assets	\$69,603	\$n/a	\$73,576
Current Liabilities	\$6,500	\$n/a	\$1,252
Net current assets	\$63,103	\$n/a	\$72,324

In addition, counsel submitted copies of the petitioner's quarterly wage reports for all four quarters in 2001 and the last quarter of 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 April 21, 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 sought the petitioner's 2002 tax return.

In response, the petitioner's counsel stated in a letter, dated May 6, 2003, that the petitioner's 2002 tax return had not been prepared yet since its fiscal year runs from June 1, 2002 through May 31, 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, on October 2, 2003, denied the petition.

On appeal, counsel asserts, without citation to legal authority, that CIS's approval of the first visa petition "eliminates the need to submit its 1995 and 1996 income tax" returns and "precludes CIS from revisiting the issue of the petitioner's ability to pay the wage from the period covering the date the priority date was established to the date the first I-140 was approved in the absence of fraud." Counsel states that the Agreement for Purchase and Sale of Assets shows that the petitioner paid \$65,000 to acquire the predecessor business and "[t]hat sum would have been enough to cover the proffered wage in 1996." Counsel also asserts that the petitioner previously explained that it could not obtain its predecessor entity's tax returns and the director erred by failing to request alternative evidence for 1995 and 1996. Finally, counsel adds together the petitioner's net income and net current assets in 1997 to conclude that the petitioner had sufficient funds to establish its continuing ability to pay the proffered wage beginning on the priority date. Counsel cites to Board of Alien Labor Certification Appeals (BALCA) precedent to support many of his assertions. The petitioner submits its Agreement for Purchase and Sale of Assets as described above.

At the outset, counsel is mistaken concerning his assertion that CIS is precluded from revisiting the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date for this visa petition based on its past approval of a different petition premised upon the same ETA 750A. The petitioner has withdrawn the

⁴ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

first petition⁵. Withdrawal by a petitioner results in automatic revocation of the petition retroactive to the date of approval, without appellate, review, or reinstatement rights. See 8 C.F.R. § 205.1(a)(3)(iii)(C); see also *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985); *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987); and 57 Fed. Reg. 41053 (Sept. 9, 1992). Regardless, the AAO is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Additionally, the AAO does not contain the complete record of proceeding of the first approval nor did the director discuss that record of proceeding in his decision. If the previous immigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Additionally, counsel's citation to BALCA case law is without merit. Counsel does not provide legal authority to establish how BALCA case law, which falls under the Department of Labor, is binding on the Department of Homeland's CIS. Counsel also does not provide an explanation of how the facts contained in the BALCA case law apply to the petitioner's case.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 1995, 1996, 1997, 1998, 1999, 2000, or 2001.

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.

⁵ This intention is ascribed to the petitioner's representative's signature on counsel's letter indicating a letter of such intent was provided, although such letter is not contained in the record of proceeding. Regardless, the petitioner must withdraw the first visa petition in order to pursue a substitution case. See Memo, Crocetti, Assoc. Comm., Adjudications, HQ 204.25-P (Mar. 7, 1996), reprinted in 73 Interpreter Releases 444-46 (Apr. 8, 1996); Memo, Farmer, Admin. Regional Management, DOL (Mar. 22, 1996) reprinted in 73 Interpreter Releases 447-48 (Apr. 8, 1996).

The predecessor entity's net income was not provided for 1995 or 1996. The petitioner's net income for 2000 was not provided. The petitioner's net incomes for 1997, 1998, 1999, and 2001 were \$21,582, \$20,538, -\$570 and -\$149 in 1999, and -\$114, for each year respectively. None of those amounts are greater than the proffered wage of \$30,763.20. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net income for any relevant year.

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.⁶ 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. The petitioner failed to provide its predecessor entity's net current assets for 1995 or 1996 and its own net current assets information for 2000. The petitioner's net current assets during the other years in question, 1997, 1998, 1999, and 2001, were \$22,838, \$106,876, \$103,053 and \$63,103 in 1999, and \$72,324, for each respective year. The petitioner's net current assets in 1998, 1999 and 2001 were greater than the proffered wage of \$30,763.20 and thus illustrate the petitioner's continuing ability to pay the proffered wage out of its net current assets in those years. The petitioner's net current assets in 1997 were less than the proffered wage of \$30,763.20 and thus do not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date out of its net current assets in that year. The petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its or its predecessor entity's net current assets for 1997.

The AAO also rejects counsel's argument that the petitioner's net current assets can be added to its net income in 1997 or any other year in order to have sufficient funds to pay the proffered wage as it double-counts the petitioner's income contrary to the utilization of either a cash-basis or accrual-basis of general accounting principles. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income, which is a figure that summarizes the petitioner's revenues, costs, and expenses over a period of time. Schedule L reflects figures for a specific point in time used to compose the final summary presented on the income statement's net income figure. Thus, to add the figures together essentially double counts money and distorts the true picture of the petitioner's financial standing.

⁶ 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.

Despite its demonstration of having sufficient net current assets to pay the proffered wage in 1998, 1999, and 2001, the petitioner failed to submit evidence sufficient to demonstrate that it or its predecessor entity had the ability to pay the proffered wage during 1995, 1996, 1997, or 2000. The petitioner has not demonstrated that any other funds were available to pay the proffered wage⁷. Therefore, the petitioner has not established that it had 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 dismissed.

⁷ For example, evidence of liquefiable and unencumbered personal assets of its partners when the petitioner was structured as a partnership.