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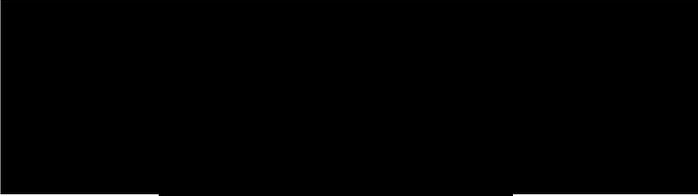
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U.S. Citizenship
and Immigration
Services

BB

MAY 03 2005



FILE:

EAC 03 133 50579

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)(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

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.

According to the ETA 750, the petitioner is a sporting goods/and apparel distribution and supply company. It seeks to employ the beneficiary permanently in the United States as a media director. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is an annual salary of \$92,913.

With the petition, the petitioner submitted the petitioner's sole shareholder's IRS Form 1040 for the years 1999, 2000, and 2001, and also submitted documentation with regard to the beneficiary's academic and work credentials. The petitioner stated that it was established in 1995, has three employees, and a net annual income of \$150,000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 7, 2003, the director requested additional evidence pertinent to that ability. The director specifically noted the adjusted gross income figures on the petitioner's

personal income tax returns and stated that they were not sufficient to pay the proffered wage of \$92,913 and also comfortably support the petitioner's family. The director requested that the petitioner provide evidence that it had the ability to pay the proffered wage as of January 14, 1998 and onward. The director stated that if the petitioner was organized as a corporation, then the petitioner should submit its corporate income tax returns for the period in question. The director also stated that if the petitioner was organized as a sole proprietorship, the petitioner should submit Form 1040 for 1998 and 2002 as well as the corresponding Schedules C. Also with regard to sole proprietorships, the director stated that the petitioner should submit an itemized list as to the petitioner's monthly experiences for 2001 and 2002. The director also stated that audited annual reports or financial reports could be submitted as evidence. The director also stated that if the beneficiary was ever employed by the petitioner, the petitioner should submit copies of the beneficiary's Form W-2 forms, and that a list of the petitioner's employees, with their salaries for 2001 and 2002 be provided.

With regard to the beneficiary's qualifications, the director noted that the documentation submitted by the petitioner only established that the beneficiary possessed seven months of work experience as of the date of filing the petition, and that the petitioner needed to submit evidence to establish that the beneficiary possessed the requisite two years of experience as of the priority date. The director also stated that the petitioner needed to submit an advisory evaluation of the beneficiary's formal or baccalaureate education.

In response, the petitioner submitted a state of New Jersey form, WR-30 Employer Report of Wages Paid, that identified the names and quarterly compensation of its employees for the years 2001 and 2002. The petitioner also submitted Form 1120 corporate tax returns for the petitioner for the years 1998, 2000, and 2001. Schedule K of these returns identified the petitioner's business activity as "retail, shoes." The petitioner also submitted a document entitled Certificate of Employment apparently used for a visa application that stated the beneficiary had worked for M-Net Music Network, Inc. in Korea for two years and identified the beneficiary's working section as cameraman.

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 September 25, 2003, denied the petition. The director stated that the petitioner was a business, and a corporation, and as such, it was considered a separate and distinct legal entity from its owners or stockholders. As a result, the director determined that the petitioner's owner's personal income tax provided little evidentiary weight in establishing whether the petitioner had the ability to pay the proffered wage. The director then examined the petitioner's corporate income tax returns, and stated that based on the petitioner's income and net current assets in 1998, 2000, and 2001, the petitioner did not have the ability to pay the proffered annual salary as of the priority date and to the present. The director did not address the beneficiary's qualifications in his decision.

On appeal, counsel states that the petitioner had substantial volume of sales from 1999 to 2002. Counsel states that, with the exception of the tax year 2002 that was affected by the September 11, 2001 terrorist attacks, the petitioner has grown in revenue and business size. Counsel states that the net income of the petitioner is not the dispositive factor in determining an employer's ability to pay the proffered wage when the sales volume/gross revenues are substantial. Counsel states that when the business volume is substantial, companies typically allocate and reinvest available funds for the continuing growth of the company. Counsel also examines the petitioner's

available inventory and depreciation value and other assets to determine the petitioner's ability to pay the proffered wage.

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 did not claim that it employed and paid the beneficiary the full proffered wage in 1998 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). Contrary to counsel's assertion, showing that the petitioner's gross or sales 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.

With regard to the petitioner's net income, since the priority date is January 14, 1998, and the petitioner's fiscal year runs from July 1 to June 30 of the respective year, the petitioner needed to submit its federal corporate income tax returns that covered the period from June 1997 to at least June 2001 to establish that it had sufficient net income to pay the proffered wage from January 1998 to the present.¹ The petitioner did not submit its 1997 corporate income tax return; therefore the petitioner cannot establish that it is capable of paying the proffered wage as of the priority date through examination of its corporate income tax return. In addition, the petitioner did not submit its corporate income tax return for 1999 in response to the director's request for further evidence, but rather submitted it on appeal. Counsel provides no explanation for the omission or the inclusion of the income tax return on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal with regard to the petitioner's 1999 corporate income tax return. Nevertheless, the AAO will examine the record as presently constituted in the present proceedings.

¹ The petitioner's 1997 federal corporate income tax return would run from July 1, 1997 to June 30, 1998, and thus, include the priority date of January 14, 1998.

With regard to the petitioner's net income for the years 1998, 2000, and 2001, the petitioner's income tax returns indicate the following net incomes: \$4,099 in 1998, \$852 in 2000, and \$763 in 2001. It is noted that even if the AAO had examined the petitioner's corporate income tax return for 1999, the petitioner's net income for 1999 is \$4,376. None of these figures is sufficient to pay the proffered wage of \$92,915.

Nevertheless, counsel is correct that 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. Although the director did examine the petitioner's net current assets in his decision, the AAO will examine this issue more extensively to provide further clarification.

Net current assets are the difference between the petitioner's current assets and current liabilities.² 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. As stated previously, the petitioner did not submit its corporate income tax return for 1997, and submitted its 1999 corporate income tax return on appeal. Neither year will be examined with regard to the petitioner's net current assets. The tax returns reflect the following information for the remaining years:

	1998	2000	2001
Taxable income ³	\$ 4,099	\$ 852	\$ 763
Current Assets	\$ 65,500	\$ 79,929	\$ 89,000
Current Liabilities	\$ 7,770	\$ 18,516	\$ 24,733
Net current assets	\$ 57,730	\$ 61,413	\$ 64,267

The petitioner has not demonstrated that it paid any wages to the beneficiary. In 1998, as previously illustrated, the petitioner shows a taxable income of \$4,099, and net current assets of \$57,730. The petitioner's net current assets in 1998 are not sufficient to pay the proffered wage of \$92,915. In the year 2000, the petitioner shows a taxable income of \$852 and net current assets of \$61,413. The petitioner's net current assets for 2000 are also

² 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.

³ 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.

insufficient to pay the proffered wage. Finally, in 2001, the petitioner shows a taxable income of \$763, and net current assets of \$64,267. The petitioner's net current assets for 2001 also do not establish that the petitioner is capable of paying the proffered wage of \$92,915. As stated previously, the petitioner did not submit its corporate income tax return for the period of time in which the priority date occurs. Nor did the petitioner submit its 1999 corporate income tax return when requested. With regard to those years that the petitioner did provide evidence, the petitioner's net current assets are not sufficient to pay the proffered wage in any of the respective years.

Although counsel on appeal states that large sales volume, or depreciation and similar accounting items are dispositive in these matters, as previously discussed, counsel's assertions are not persuasive. Thus, the petitioner has not established that it possesses additional funds or sources of revenues available to pay the proffered wage. Accordingly, the petitioner has not established that it has the capability 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.