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U.S. Citizenship
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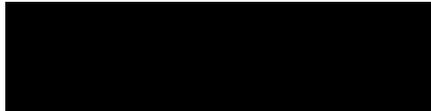
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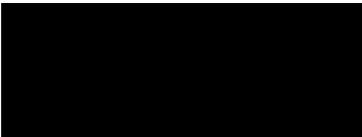
Date: MAY 18 2005

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body shop. It seeks to employ the beneficiary permanently in the United States as an auto body painter. 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 merely affirms that his arguments on appeal were earlier presented in his May 27, 2003, letter to the record.

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) provides:

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. 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 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 March 19, 2001. The proffered wage as stated on the Form ETA 750 is \$24.55 per hour, based on a 35-hour week, which amounts to \$44,681 per annum. On the Form ETA 750B, signed by the beneficiary on March 14, 2001, the beneficiary claims to have worked for the petitioner since 1996.

On Part 5 of the visa petition, filed June 26, 2002, the petitioner claims to have been established in 1987 and to currently employ three workers. The petitioner initially did not provide any supporting documentation to establish its ability to pay the beneficiary's proposed wage offer of \$44,681 per year. The director issued a request for additional evidence on March 31, 2003. In accordance with 8 204.5(g)(2), he advised the petitioner

that it must demonstrate the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Evidence must consist of federal tax returns, annual reports or audited financial statements. The director specifically requested that the petitioner supply copies of its 2000 and 2001 federal tax returns, as well as copies of the beneficiary's Wage and Tax Statements (W-2s) for 2000 and 2001.

In response, the petitioner, through counsel, submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner files its returns using a standard calendar year. The 2001 tax return reveals that the petitioner reported \$13,000 in officer compensation, no labor costs, \$66,560 in salaries and wages paid, and net taxable income of \$28,786 before the net operating loss (NOL) deduction. Schedule L of the return indicates that it had -\$23,297 in current assets and \$112,739 in current liabilities, resulting in -\$136,036 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of demonstrating a petitioner's financial ability to pay the proposed wage offer. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's year-end 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 also provided a copy of Internal Revenue Service (IRS) Form 1099-MISC for 2001, which was issued to the alien beneficiary. Item 7 reflects that the petitioner paid \$6,710 to him as "non-employee compensation."

Counsel's contends in his transmittal letter, dated May 27 2003 that the petitioner's depreciation expense should be added back to the net income for the 2001 tax year. He also asserts that the petitioner had labor costs of \$13,000, including compensation for a part-time employee. Counsel states that if the beneficiary were employed full-time, he would be able to replace this part-time employee. Counsel then notes that the petitioner has assets of \$20,462 and did pay the beneficiary \$6,710 for part-time work in 2001. He maintains that if the petitioner's depreciation, assets, and monies paid to the beneficiary and other part-time employee were combined, it would demonstrate the petitioner's ability to pay the certified wage of \$44,681 per annum.

The director reviewed the petitioner's net income and net current assets as shown on its 2001 corporate tax return and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of March 19, 2001. The director denied the petition on September 16, 2003. The director noted that it was more appropriate to consider the petitioner's net current assets rather than total assets as advocated by counsel, and found that there was no support in the record to add the petitioner's depreciation expense deduction back to the petitioner's net income. The director further concluded that counsel misidentified the \$13,000 as labor costs and also noted that regarding the beneficiary as a replacement for another part-time

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 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.

employee is less convincing in light of the fact that the beneficiary was already employed as a contractor at the time the wages were paid to the other employee.

As stated above, the arguments set forth in counsel's May 27, 2003, letter are renewed as the basis for the appeal of the director's denial of the petition.

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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the facts reveal that the petitioner employed the beneficiary as an independent contractor and paid him \$6,710 in 2001. Even if this sum were considered a dollar for dollar equivalent amount of direct wages paid during this period, it represents \$37,971 less than the proffered salary of \$44,681.

CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as asserted here by counsel. 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. 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. Noting that the depreciation, or decreased value of the assets of a business to be a relevant factor in reviewing the financial viability in a business, the court in *Chi-Feng Chang v. Thornburgh*, *supra* at 536, stated:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and *net income figures* in determining petitioner's ability to pay.

In this case, as set forth on its 2001 corporate tax return, the petitioner's reported net taxable income of \$28,786 could not cover the \$37,971 shortfall resulting from a comparison of the compensation paid to the beneficiary and the proffered wage.

As noted above and by the director, counsel's assertion that the petitioner's total assets of \$20,462 should have been considered in the determination of the ability to pay the proffered wage is not persuasive. 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 would be necessarily balanced by the petitioner's total liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, as stated above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage because they represent cash or cash equivalent assets that would be readily available to pay a proffered salary.

In this matter, the petitioner's 2001 net current assets of -\$136,036 is far below the amount needed for the additional \$37,971 in proposed salary.

As noted by the director, counsel's claim of \$13,000 paid in labor costs in 2001 is not reflected on the tax return, which fails to specify any labor costs on Schedule A, line 3. As noted by the director there is an amount of \$13,000 shown as officer compensation on page 1. That the alien was intended to directly replace an unidentified worker during a time, which the record suggests that the petitioner employed the alien simultaneously with this part-time employee, undercuts the petitioner's argument because, as noted by the director, the beneficiary was already employed as a contractor at the time these wages were paid to the other employee. The petitioner has not documented the position, duties, wages and termination of the unidentified worker who performed the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him. Moreover, expenses already paid out are not generally available to prove the ability to pay the beneficiary's wage offer as of the priority date of the petition. It is additionally noted that 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).

As stated above, neither the petitioner's net taxable income, nor its net current assets was sufficient to cover the additional \$37,971 needed to pay the proffered salary in 2001. Based on the evidence contained in the record, the AAO concludes that the petitioner has failed to convincingly demonstrate its continuing financial ability to pay the proffered as of the priority date of the petition.

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.