



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: NOV 07 2005

SRC-03-117-51626

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:

SELF-REPRESENTED

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a sailboat builder. It seeks to employ the beneficiary permanently in the United States as an operation manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the petitioner submits additional evidence.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$34,176 per year. The Form ETA 750 states that the position requires 4 years college study and Bachelor of Science Degree in Marine Science.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1959, to have a gross annual income of \$551,873.47, and to currently employ 12 workers. According to the incomplete copies of tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 15, 2001, the beneficiary claimed to have worked for the petitioner since October 2000.

With the petition, the petitioner submitted the following documents as evidence for its ability to pay the proffered wage to the beneficiary: the first page of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2000¹.

The director denied the petition on July 29, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that in accordance with the recent memorandum (May of 2004) from [REDACTED] of the US Citizenship and Immigration Service (CIS), an employer can satisfy the "ability to pay" issue by demonstrating that it has, in fact, been paying the alien's wage and submits sample copies of payroll records as additional evidence.

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, on the Form ETA 750B, signed by the beneficiary on February 15, 2001, the beneficiary claimed to have worked for the petitioner since October 2000. However, no evidence for the beneficiary's compensation was submitted with the initial filing of the petition, nor did the director issue a Request for Additional Evidence (RFE).

On appeal, the petitioner submits Employment Security Commission of North Carolina's Form NCUI 101, Employer's Quarterly Tax and Wage Report for the third quarter of 2003, and the second quarter of 2004. The petitioner also submits Form 1099 for the year of 2003 for DECZEWA CO, but does not explain the purpose of the submission and the relationship between the beneficiary in instant case and DECZEWA CO. Form NCUI 101 shows that the petitioner paid the beneficiary \$600.00 during the third quarter of 2003. This rate of pay would be approximately \$2,400.00 per year. It also shows that the petitioner paid \$8,100 to the beneficiary during the second quarter of 2004. That rate of pay would be approximately \$32,400.00. No evidence was submitted for 2001 and 2002. The record of proceeding does not contain complete evidence and information that would allow CIS to determine the petitioner's ability to pay the proffered wage during that period with documentary evidence as the first means of prima facie proof that it employed the beneficiary at a salary equal to or greater than the proffered wage. If the petitioner paid an amount less than the proffered wage, it would be obligated to demonstrate its ability to pay the difference between wages actually paid and the proffered wage in any relevant year.

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

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that 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 the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$34,176.00 per year from the priority date. In 2001, the Form 1120 stated net income² of \$(38,543.84). Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the 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.³ 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 the total of a corporation's end-of-year net current assets and

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. However, the record of proceeding does not contain copies of Schedule L for 2001 and 2000, and tax returns for 2002 and subsequently available years. Thus, the AAO cannot determine whether the petitioner's net current assets during these years were sufficient to pay the beneficiary the proffered wage or the difference between the proffered wage and wages paid, if any.

The foregoing analysis provides that in her decision, the director correctly determined that the petitioner's net income in the year of 2001 failed to establish the petitioner's ability to pay the proffered wage; however she failed to issue an RFE consistent with the requirement of 8 C.F.R. § 103.2(b)(8) which holds that the adjudicator must issue an RFE in cases where initial evidence is missing. In this instance, the initial evidence, as set forth at 8 C.F.R. § 204.5(g)(2), is annual reports, federal tax returns, or audited financial statements. The petitioner submitted incomplete tax returns and therefore, the record of proceeding did not contain complete initial evidence at the time the director's decision was issued. As such the director did not consider the petitioner's net current assets as an alternative means of determining the petitioner's ability to pay the proffered wage. Therefore, the petition must be remanded to the director for the issuance of an RFE, reconsideration of the petitioner's ability to pay the proffered wage in the year 2001 and for consideration of any additional years with documentation the director deems appropriate.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action consistent with this decision.