



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 18 2005
EAC 03 164 50943

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:
[REDACTED]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction-engineering firm. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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.

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 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:

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 either 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 petition's priority date, which is the date 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). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$22.73 per hour, which amounts to \$47,278 annually.

The I-140 petition was submitted on March 26, 2003. On the petition, the petitioner claimed to have been established in 1999, to currently have four employees, but made no specific claims as to its gross annual income or net annual income.

In support of the petition, the petitioner submitted¹:

- Counsel's signed Form G-28;
- A translated letter of support from the beneficiary's prior employer; and,
- An original Form ETA 750 application, with Department of Labor confirming that it had approved a correction on the application for the proffered wage, as requested by the director.

¹ Despite counsel's letter of January 10, 2003, stating that enclosed is a "Copy of Employer's 2001 Tax Returns," the return was not a part of the record of proceedings.

In a request for evidence (RFE) dated July 21, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, including for a copy of the petitioner's fiscal 2001 federal income tax return covering the April 18, 2001 priority date. In the alternative, the RFE asked for the petitioner's annual report for 2001 with audited or reviewed financial statements. The director also asked if the petitioner had inserted the correction of the proffered wage onto the certified Form ETA 750 application.

In response to the RFE, the petitioner submitted on October 16, 2003:

- The petitioner's calendar-year 2001 Form 1065 partnership tax return that reported a \$91,451 ordinary income loss;
- Form W-2's issued in the name of the beneficiary and in the name of someone else who shared the beneficiary's last name²;
- The petitioner's Form 941 Employer's Quarterly Federal Return for six 2001-2002 quarters report having only one employee;
- A letter dated October 15, 2003, from the petitioner's longtime company CPA's letter asserts the petitioner lost money in 2001 because the petitioner used the "completed contract method of accounting as prescribed by the Internal Revenue Code" on its income tax return, such that the 2001 tax return failed to reflect actual earnings if any work remained under its job contracts; and,
- A letter from a lawyer representing the CPA dated October 15, 2003, asserting that federal law prevents the CPA from divulging payroll documentation the petitioner's counsel had requested.

In a decision dated June 22, 2004, the director noted the applicant on the ETA 750 application was not the petitioner, [REDACTED] but instead [REDACTED]. The director denied the petition on other grounds, however, that of not establishing the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Noting the \$8,590 paid to the beneficiary according to the 2001 Form W-2, and the \$91,451 loss on the petitioner's 2001 Form 1065 return, the director stated the petitioner did not submit any documents to support the CPA's assertion that the petitioner's income for 2002 and 2003 would reflect profits deferred from 2001 because of the accounting system to which the CPA's letter had referred. Therefore, the director denied the petition.

On appeal, counsel submits a brief and additional evidence.³

Counsel states on appeal that in 2000, the petitioner had "spun off [REDACTED] in explaining why the petitioner had filed the petition instead of [REDACTED]. Counsel asserts that the petitioner "has in fact been in business for over 12 years." Counsel asserts one of the owners of the petitioner, [REDACTED] showed a net profit of \$76,111 as an engineer⁴ on Schedule C of his Form 1040 return for 2001, more than enough to establish the petitioner's ability to pay the \$47,278 proffered wage.

Counsel asserts that [REDACTED] Schedule C business income of \$76,111 for 2001, the source for which was [REDACTED] according to the CPA's letter of October 1, 2004. This would be enough to

² Counsel asserts the 2002 W-2 to [REDACTED] was submitted in error as it pertains to [REDACTED] brother."

³ On the Form I-290B, stamped received on July 2, 2004, counsel indicated the need for 90 more days, or until September 22, 2004, to submit a brief and evidence to accommodate his and the CPA's summer vacations. The director received the brief and added evidence on November 23, 2004, while the AAO received them on December 14, 2004, even though counsel's enclosure letter bore the date of October 1, 2004.

⁴ [REDACTED] Schedule C makes no mention of either the petitioner or of [REDACTED]

establish the petitioner's ability to pay the proffered wage. Counsel asserts that "since the Petitioner is in fact [REDACTED] which has always shown a profit and has been in existence since 1975."

Counsel further asserts the petitioner "will show a profit in 2004," because the completed contract method of accounting is the reason for the petitioner's tax loss in 2001. However, counsel documents neither the corporate relationship ("spinoff") between [REDACTED] nor the basis for counsel's prediction, that the petitioner's 2004 profits "will show a profit," thereby compensating for its artificially low income reported in 2001, all because of its accounting system.⁵ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

At the outset, this office notes that the financial documents of both the petitioner and [REDACTED] material because the petitioner must establish that the two companies are one and the same or that one is a successor in interest to the other. To establish a company as a successor in interest, counsel would need to show its assumption of all rights, duties, obligations, and assets of the original company seeking to employ the beneficiary, and moreover that it continues to operate the same type of business as the original employer. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). The petitioner must address the question of how the two companies are related and include evidence of the relationship in any future proceedings in this matter

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B. However, the record of proceedings includes on the 2001 Form W-2 establishing payment to the beneficiary of \$8,590 in wages. Since the proffered wage is \$47,278, the petitioner must show that it can pay the remainder of the proffered wage for each year, which is \$38,688.40 in 2001.

If the petitioner does not establish its ability to pay, such as by showing that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, then the focus shifts to

⁵ It is unclear whether the "payroll records" would have helped establish the petitioner's ability to pay the proffered wage in 2001 even absent the CPA's lawyer insisting the law forbade disclosure to counsel and to the director.

the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner (i.e. [REDACTED]) is a limited liability company. In the instant case, the petitioner's Form 1065 tax return for 2001 shows an ordinary loss of \$91,451 loss. By contrast, counsel points to Schedule C of [REDACTED] 2001 Form 1040 return that shows a \$76,111 net profit from the engineering business. But by solely focusing on Schedule C's gain, counsel would have this office overlook the half of the petitioner's \$91,451 loss reported on its Form 1065 return for that year, a loss which this office finds more accurately reflected in [REDACTED] 2001 adjusted gross income figure of \$35,104. Counsel cannot satisfy its burden of proof by pointing to [REDACTED] \$76,111 profit in 2001 in substitution of the petitioner's \$91,451 ordinary income tax loss for that year. We note that while counsel is correct, that in a partnership, CIS may consider the assets of its general partners, CIS will also consider the liabilities of the general partner. [REDACTED] Form 1040, Schedule E, also shows a loss from the partnership [REDACTED] of \$45,726.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not demonstrated its continuous ability to pay the proffered wage as of the priority date of the petition and until the beneficiary obtains lawful permanent residence.

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.

⁶ Mr. Marchetti is a 50-percent co-owner of the petitioner.