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U.S. Citizenship
and Immigration
Services

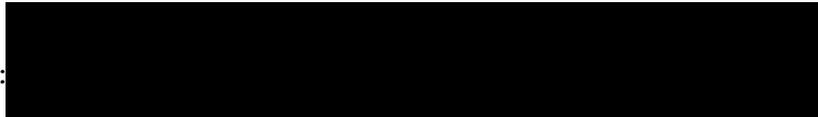
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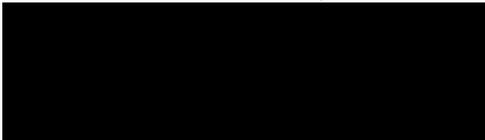
FILE: EAC 03 006 52372 Office: VERMONT SERVICE CENTER Date: SEP 27 2005

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 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.

The petitioner is a furniture manufacturing company. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 19, 1997. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which amounts to \$31,200 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 1997 as well as a letter of employment verification from the beneficiary's previous employer in Portugal.¹

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 23, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal tax returns from 1998 to 2002, with all schedules and attachments, or annual reports for 1998 to 2002 accompanied by audited or reviewed financial statements. The director also requested that if the petitioner had employed the beneficiary from 1997 to 2002, it submit copies of the beneficiary's W-2 Forms.

¹ The petitioner's tax return indicates the petitioner's tax year runs from October 1, 1997 to September 30, 1998.

In response, the petitioner submitted the first pages of Forms 1120 corporate tax returns for the years 1998 to 2001. The petitioner also resubmitted its federal income tax return from 1997, and explained that the 2002 federal income tax return was not available.

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 April 28, 2004, denied the petition. The director stated that the petitioner had not submitted all relevant schedules and attachments to the tax returns, and that none of the petitioner's income tax returns showed sufficient taxable income to pay the proffered wage of \$31,200. With regard to the petitioner's 1997 tax return, the director examined Schedule L and stated that the petitioner's current liabilities exceeded current assets by \$150,093.

On appeal, counsel submits the front page of the petitioner's bank statement for each of the twelve months in 1997. Counsel states that this evidence proves the petitioner's ability to pay the proffered wage of \$15 per hour as of November 19, 1997. Counsel states that the petitioner's ending balance for November 1997 is \$82,894.38, and that the average ending balance for all of the months in 1997 exceed the annual offered wage of \$31,200.

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statement(s) for tax year 1997. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement for November 1997 somehow reflect additional available funds that were not reflected on its 1997 tax return. It is noted that the petitioner does have substantial balances in several months of 1997, but it is also noted that in June 1997, the monthly balance was \$26,289.32, less than the proffered wage. Thus, the petitioner did not have monthly balances in its banking account that exceeded 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 to have employed the beneficiary as of the 1997 priority date. Thus, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 1997 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). 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 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. As established by the front pages of the petitioner's tax returns from 1997 to 2002, the petitioner's net income for these years is as follows: in 1997, \$23,329; in 1998, \$8,382; in 1999, -\$4,659; in 2000, -\$480; and in 2001, \$2,361. None of these figures is sufficient to pay the proffered wage of \$31,200.

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. 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.

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 correctly noted by the director, the petitioner only submitted a Schedule L with the petitioner's 1997 tax return. Therefore the AAO can only examine the petitioner's tax return for 1997 with regard to net current assets. The 1997 tax returns reflect the following information:

	1997
Taxable income ³	\$ 23,329
Current Assets	\$ 31,941
Current Liabilities	\$ 182,034
Net current assets	\$ -150,093

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997. In 1997, as previously illustrated, the petitioner shows a taxable income of \$23,329, and negative net current assets of \$150,093, and has not, therefore, demonstrated the ability to pay the proffered wage in 1997. Although counsel asserted that the petitioner had sufficient funds in its banking account to pay the proffered wage, as stated previously, the

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.

petitioner's bank statements are not viewed as probative evidence of the petitioner's ability to pay the proffered wage, based on the average monthly balance. Furthermore, the petitioner's bank balances as of 1997 do not establish the petitioner's ability to pay the proffered wage in the ensuing years from the priority date to 2001. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary from 1998 to 2001. As previously noted, the petitioner did not have sufficient net income in these years to pay the proffered wage. In addition, the petitioner did not submit sufficient documentation to examine whether the petitioner's net current assets were sufficient to pay the proffered wage from 1998 to 2001.

It is noted that the petitioner's income tax return for 1997 establishes that the petitioner's owner is the sole shareholder/officer. Furthermore the record reflects significant officer compensation for the years 1998 to 2001, with compensation for the years 1998 to 2001 being four to five times greater than the proffered wage. However neither counsel nor the petitioner provide the petitioner's complete tax returns or any evidence that this discretionary compensation could be available to pay the proffered wage, or to pay the difference between the petitioner's net income and the proffered wage. Without more persuasive evidence, CIS is unable to determine if the petitioner has any other funds available to pay the proffered wage from 1997 to 2001.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. 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.