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U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **APR 11**

SRC 03 162 50376

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a jewelry repairer. 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 granting 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 April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$42,000 per year.

On the petition, the petitioner stated that it was established during 1999 and that it employs two workers. The petition states that the petitioner's gross annual income is \$181,543 and that its net annual income is \$250. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The Form ETA 750 indicates that the petitioner would employ the beneficiary in Douglasville, Georgia. The Form I-140 petition states that the petitioner would employ the beneficiary in Independence, Missouri. A letter dated May 16, 2003 from counsel states that the petitioner would employ the beneficiary in Atlanta, Georgia.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner is a corporation, that it incorporated on June 3, 1999, and that it reports taxes pursuant to the calendar year and cash convention accounting.

During 2001 the petitioner declared ordinary income of \$1,502. The corresponding Schedule L shows that at the end of that year the petitioner reported current assets of \$92,988 and current liabilities of \$19,416, which yields net current assets of \$73,572.

During 2002 the petitioner declared ordinary income of \$250. The corresponding Schedule L shows that at the end of that year the petitioner listed no current assets and no current liabilities,¹ which yields net current assets of \$0.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on July 8, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements.²

In response, counsel submitted (1) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) copies of monthly statements pertinent to the petitioner's bank account, (3) two Form 941 Employer's Quarterly Federal Tax Returns for unidentified quarters, and (4) a letter dated October 4, 2004.

The 2003 income tax return shows that the petitioner declared a loss of \$8,219 during that year. The corresponding Schedule L shows that at the end of that year the petitioner listed no current assets and no current liabilities.

The Form 941 quarterly returns provided show that the petitioner paid wages of \$8,000 during one of those unidentified quarters, and that it paid wages of \$9,000 during the other.

In his letter, counsel argued that the petitioner's total wage expense, the value of its inventory, and its bank balances are indices of the petitioner's ability to pay the proffered wage. Counsel characterized the sum of the petitioner's wage expense, its inventory, and its average monthly bank balance as its "positive cash flow and assets."³

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 October 13, 2004, denied the petition.

¹ In certain situations, entities filing Form 1120 are not required to list their assets and liabilities on Schedule L.

² That request incorrectly stated that the petitioner might demonstrate its ability to pay the proffered wage with a combination of its net income and its net current assets. For reasons explained below this office rejects that calculation.

³ Cash flow is typically defined as cash receipts minus disbursements from a given asset during a given period. Positive cash flow means merely that the cash flow from the asset is positive, rather than negative. That statistic cited by counsel as an index of the petitioner's ability to pay the proffered wage will be addressed, although it is not positive cash flow by any conventional definition.

On appeal, counsel submits (1) a letter, dated November 11, 2004, from the petitioner's accountant, (2) the petitioner's unaudited 2001, 2002, and 2003 financial statements, (3) additional copies of bank statements, and (4) a brief.

The November 11, 2004 letter from the petitioner's accountant stated, "If the income does not exceed \$250,000 we are not required by the Internal Revenue Service to complete the [Schedule L]." The accountant also stated that the amounts of the petitioner's year-end total assets for 2001, 2002, and 2003 were \$95,653.51, \$71,231.76, and \$46,059.18, respectively. The accountant also stated the amount of those year-end assets that was held as cash and inventory.

In the brief counsel reiterates the argument that the petitioner's bank balances, its total wage expense, its year-end total assets, and its segregated year-end cash and inventory are indices of its ability to pay the proffered wage. Counsel also argues that the petitioner's "positive cash flow and assets," are an index of its continuing ability to pay the proffered wage beginning on the priority date.⁴ Counsel states that the petitioner did not complete Schedule L of his 2002 and 2003 tax returns because it was told by its tax preparer that it was unnecessary if a corporation's income does not exceed \$250,000.⁵

The petitioner's 2001, 2002, and 2003 tax returns show, on page one, Item E, total year-end assets of \$95,654, \$10,225, and \$104, respectively. Those figures do not accord with the figures cited by the accountant and counsel, and taken from the petitioner's unaudited financial statements, which are \$95,653.51, \$71,231.76, and \$46,059.18, during those same three years, respectively.

The petitioner's unaudited financial statements are not convincing evidence. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner's unaudited financial statements, and the figures taken from them, will not be addressed further.

In any event, the figures cited by counsel and the accountant are the petitioner's total assets, rather than its net current assets. The distinction is further addressed below.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate

⁴ Although counsel does not define the phrase "positive cash flow and assets," the calculation he uses is the same as that described above.

⁵ Although a thorough study of tax law is beyond the scope of today's decision, according to the 2002 and later versions of Form 1120S, U.S. Income Tax Return for an S Corporation Schedule B, if a corporation's total receipts and its year-end total assets are less than \$250,000 it is not required to complete Schedule L. Although the accountant and counsel appear to be misstating the requirements for filing Schedule L, the petitioner's filing Schedule L with its 2001 return but not during subsequent years is consistent with the filing instructions.

cases,” the evidence must still be reliable in order for the petitioner to prevail. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁶

Counsel argues that the petitioner’s “positive cash flow” is an index of its ability to pay additional wages. Counsel defines the petitioner’s positive cash flow as the sum of the petitioner’s wage expense, its inventory, and its average monthly bank balance. The reason that the petitioner’s bank balances do not necessarily represent funds to pay additional wages is addressed above. The value of the petitioner’s inventory is included in the discussion, below, of the petitioner’s net current assets. The reason that the value of inventory is not, in itself, an index of ability to pay additional wages is also discussed. The reason that the petitioner’s total wage expense is not an index of the petitioner’s ability to pay the proffered wage is also discussed below.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner’s gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is also insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁷ or otherwise increased its net income,⁸ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner’s net income. 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 CIS should have considered income before expenses were paid rather than net income.

As none of the components of what counsel defines as “positive cash flow” are directly relevant to the petitioner’s continuing ability to pay the proffered wage beginning on the priority date the sum of those statistics is also not directly relevant.

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner’s continuing ability to pay the proffered wage beginning on the priority date. If the petitioner’s account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁷ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee’s wages, and that those obviated wages would be sufficient to cover the proffered wage. The petitioner would also be obliged, in that case, to demonstrate that replacing that employee with the beneficiary would not be contrary to the purpose of the instant visa category, which is to provide alien workers for positions for which U.S. workers are unavailable.

⁸ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner’s revenue than the amount of the proffered wage and the other expenses associated with employing the beneficiary.

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, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, the petitioner's year-end cash and those assets expected to be consumed or converted into cash or cash equivalent within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁹ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with the petitioner's net income and the wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage

⁹ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$42,000 per year. The priority date is April 20, 2001.

During 2001 the petitioner declared ordinary income of \$1,502. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$73,572. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$250. That amount is insufficient to pay the proffered wage. The petitioner lists no net current assets at the end of that year, and is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets.¹⁰ The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$8,219. That amount is insufficient to pay the proffered wage. The petitioner lists no net current assets at the end of that year, and is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

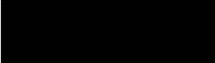
The petitioner failed to submit evidence that demonstrates that it had the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

Additional issues are raised by the record that were not addressed in the decision of denial.

Form ETA 750 indicates that the petitioner would employ the beneficiary in Douglasville, in Douglas County, Georgia. A May 16, 2003 letter from counsel states that the petitioner would employ the beneficiary in Atlanta, Fulton County, Georgia. The Form I-140 petition states that the petitioner would employ the beneficiary in Independence, Missouri. Because the Form ETA 750 is approved for employment in Douglas County, Georgia, and the petitioner has stated that it intends to employ the beneficiary elsewhere, the petitioner should have been obliged to demonstrate that the approved ETA 750 labor certification is valid for employment at that other location. Absent evidence in support of that proposition the petition should have been obliged for this additional reason.

A related issue is whether the proffered wage is equal to or greater than the predominant wage in the area of intended employment. Because the area of intended employment is unclear this office cannot determine whether the petitioner is offering the predominant wage. Because these additional issues were not discussed in the decision of denial, and the petitioner has not been accorded an opportunity to address them, today's decision on appeal does not rely, even in part, on either issue. If the petitioner attempts to overcome today's decision with a motion, however, it should address these issues.

¹⁰ Demonstrating that the petitioner was not obliged to file Schedule L is insufficient to demonstrate that it had sufficient net current assets to pay the proffered wage.



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The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.