

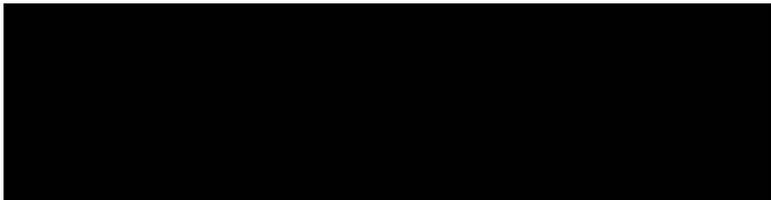
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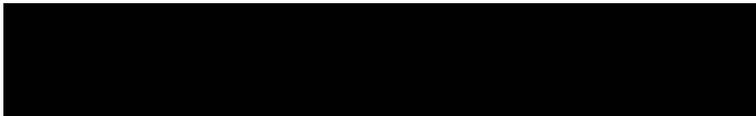
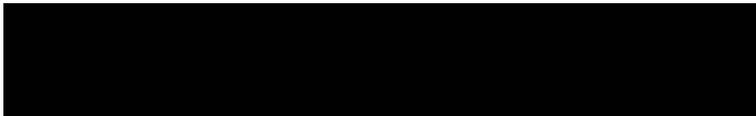
U.S. Citizenship
and Immigration
Services

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FILE:  Office: VERMONT SERVICE CENTER Date: APR 25 2006
EAC-03-212-52047

IN RE: Petitioner: 
Beneficiary: 

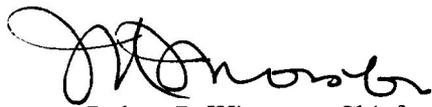
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Chief
Administrative Appeals Office

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

The petitioner is an ornamental iron works business. It seeks to employ the beneficiary permanently in the United States as an ornamental iron worker. 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, counsel submits a brief.

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 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on July 20, 2000. The proffered wage as stated on the Form ETA 750 is \$914.90 (\$47,574.80 per year). The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$1,300,000, to have a net income of \$50,000, and to currently employ 12 workers. According to the 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, he claimed to have worked for the petitioner since January 2000.

The petitioner submitted the petition with the first page of the petitioner's tax return for 2001 and W-2 form issued by the petitioner to the beneficiary in 2001 pertinent to its ability to pay the proffered wage. Therefore, the director issued a request for evidence (RFE) on June 23, 2004, requesting the following evidence of the petitioner's ability to pay: its 2000 tax return or annual report accompanied by audited or reviewed financial statements, the beneficiary's W-2 form and individual tax return for 2000, and accredited profit/loss statements, bank account records, or personnel records for 2000. In response the petitioner submitted its tax

return for 2000, its bank statements for 2000, and the beneficiary's W-2 form and individual tax return for 2000. On September 29, 2004 the director denied the petition, finding that the petitioner's tax return for 2000 and wages paid to the beneficiary did not establish that it had the ability to pay the proffered wage beginning on the priority date through its net income or net current assets.

On appeal, counsel asserts that the beneficiary was paid \$15,680 in the year 2000 and that the petitioner's corporate bank account balances for each month commencing in July of 2000 exceeded not only the monthly salary for the beneficiary, but the annual salary as well.

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. In the instant case, the beneficiary's W-2 forms show that the petitioner, as counsel claims on appeal, paid the beneficiary \$15,680 in 2000, which was \$31,894.80 less than the proffered wage; the petitioner paid the beneficiary \$34,600 in 2001, which was \$12,974.80 less than the proffered wage; and the petitioner paid the beneficiary \$40,880 in 2002, which was \$6,694.80 less than the proffered wage.¹ Therefore, the petitioner established that it paid the beneficiary partial wages in 2000, 2001 and 2002. The petitioner is still obligated to demonstrate its ability to pay the differences between wages paid to the beneficiary and the proffered wage from the priority through the present.

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 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.

¹ The AAO took from evidence submitted in connection with the adjustment of status application.

(Emphasis in original.) *Chi-Feng* at 537

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000 through 2001. The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage or the difference between the wage already paid to the beneficiary and the proffered wage from the priority date:

Tax Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	\$(13,920) ²	\$31,894.80	\$(45,814.80)
2001	\$59,154	\$12,974.80	\$46,179.20

Therefore, the petitioner had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage for the year 2001, but did not have sufficient net income to pay the difference between the wage actually paid to the beneficiary and the proffered wage for the year 2000.

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. We reject, however, counsel's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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 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. Schedule L attached to the petitioner's Form 1120S 2000 tax return yields current assets of \$44,029 (cash of \$36,529 and inventories of \$7,500), and current liabilities of \$239,565 (account payable of \$228,708 and mortgages, notes, bonds payable in less than 1 year of 10,857), thus, net current income of \$(195,536). Therefore, the petitioner did not have sufficient net current assets to pay the difference of \$31,894.90 between the wage already paid to the beneficiary and the proffered wage for the year 2000.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

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

The record does not contain any evidence to establish the petitioner's ability to pay the difference between wages paid to the beneficiary and the proffered wage in the years 2002 to present.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, except for the year 2001 the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts on appeal that: "[t]he total cash available at the end of the 2000 fiscal year, as shown in Schedule L, was \$36,529, \$4,634.10 more than the shortfall for the year 2000 (taking into account the beneficiary's 2000 wages of \$15,680.00) of \$31,894.90". Current assets consist of cash, inventories and other current assets. Counsel's reliance on current assets without balancing them against current liabilities is misplaced. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. 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 net income and wages actually paid to the beneficiary.

On appeal counsel argues that the petitioner's bank account balance in 2000 was sufficient to establish its ability to pay the proffered wage since the monthly balances, especially from July to December of 2000, exceeded not only the monthly salary for the beneficiary but also for the proffered annual salary. Counsel's reliance on the balances 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 statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.