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EAC-04-110-52190

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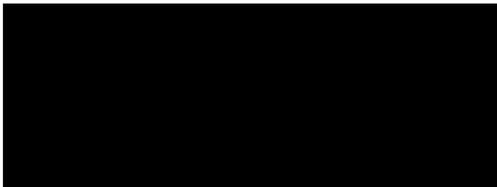
IN RE:

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 a computer consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 statement and additional evidence.¹

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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).

¹ 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.

Here, the Form ETA 750 was accepted on November 7, 2003. The proffered wage as stated on the Form ETA 750 is \$77,500 per year. The Form ETA 750 states that the position requires four (4) years college study, Bachelor's degree in computer science, engineering or related field and two (2) years experience in the job offered or related occupation. On the Form ETA 750B signed by the beneficiary on September 3, 2003, he did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$338,998, to have a net annual income of \$43,035, and to currently employ fifteen (15) workers.

With the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002 pertinent to its ability to pay the proffered wage.

On September 29, 2004 the director denied the petition, finding that the record did not establish the petitioner had the ability to pay the proffered wage at the time of filing.

On appeal, counsel argues that the petitioner did establish its ability to pay the proffered wage beginning on the priority date with prorating the proffered wage for 2003 from the priority date, combining net income with net current assets and submits the petitioner's 2003 tax return, bank statements and the beneficiary's paystubs for 2004.

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, counsel submits a letter on appeal from [REDACTED] stating that Optech Consulting, Inc. had received \$10,656 from the petitioner for the beneficiary's services from November to December 2003. However, this letter cannot be considered as evidence that the petitioner paid the beneficiary compensation for services rendered in the proffered position in November and December 2003. The record does not contain any evidence to support this letter. Instead, the record shows that the beneficiary started his employment with the petitioner in February 2004.² On appeal, counsel submits copies of the beneficiary's paystubs from the petitioner for a period from February 1, 2004 to September 30, 2004. Those paystubs reflect that the petitioner paid \$48,000 to the beneficiary which is \$29,500 less than the proffered wage. The paystubs show that the petitioner compensates the beneficiary at the level of \$6,400 per month, which is \$58.33 per month less than the proffered wage. The petitioner is obligated to demonstrate that it could pay the difference between wages actually paid to the beneficiary and the proffered wage in 2004. Further, the compensation paid in 2004 cannot establish that the petitioner paid or had the ability to pay the proffered wage in 2003. The petitioner did not submit any evidence to show that the petitioner hired and paid the beneficiary any compensation in 2003, the year of the priority date.

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

² In the brief letter accompanying the instant appeal, counsel states that: "[the beneficiary] joined [the petitioning] company on February 15, 2004." The first paystub issued by the petitioner to the beneficiary is for the pay period from February 1, 2004 to February 29, 2004. Form G-325A signed by the beneficiary on February 14, 2004 also indicates that the beneficiary has been employed with the petitioner since February 2004.

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 its gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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 clearly 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.

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

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 and 2003. The evidence indicates that the petitioner is an S corporation. According to the tax returns the petitioner's fiscal year is based on a calendar year. The priority date in the instant case is November 7, 2003, therefore, the tax return for 2002 is not necessarily dispositive. The AAO concurs with counsel's argument and will review the petitioner's tax return for 2003 only. The 2003 tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$77,500 per year in 2003.

In 2003, the Form 1120S stated net income³ of \$47,898.

Therefore, for the year 2003 the petitioner did not have sufficient net income to pay the proffered wage of \$77,500.

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

³ Income (loss) from Line 23, Schedule K of Form 1120S. Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

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.⁴ 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.

Calculations based on the Schedule L's attached to the petitioner's tax return for 2003 yields that the petitioner had net current assets of \$16,405 in 2003. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage for the year 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date, i.e. November and December of 2003. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

On appeal counsel submits the petitioner's bank statements for November 2003 through the present. 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 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 was considered in determining the petitioner's net current assets.

⁴According 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.

Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

In addition, CIS record shows that the petitioner filed Immigrant Petitions for Alien Worker (Forms I-140) for 68 more workers with CIS Vermont Service Center during the period from 2003 to 2005.⁵ Therefore, the petitioner must show that it had sufficient income to pay all the wages at their priority dates. There are also more than 200 nonimmigrant petitions for temporary workers (Forms I-129) filed by the petitioner during this period.⁶ While the petitioner claims on the instant petition that it employs 15 workers, it is unlikely that the petitioner has the continuing ability to pay all the proffered wages to each beneficiary from their own priority date until the beneficiary obtains lawful permanent residence.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in the year of the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

⁵ One more I-140 petition was filed on December 17, 2003, 25 more I-140 petitions were filed in 2004 and 42 more I-140 petitions were filed in 2005.

⁶ CIS record shows that the petitioner filed two hundred and three (203) of I-129 nonimmigrant petitions for temporary workers during the period from 2004 to 2006.