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FILE:

WAC-03-244-53215

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 16 2006**

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a computer software engineer. 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 and additional evidence.²

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), 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).

Here, the Form ETA 750 was accepted on July 27, 2001. The proffered wage as stated on the Form ETA 750 is \$88,213 per year. The Form ETA 750 states that the position requires four (4) years of college studies and Bachelor's degree in related field.

¹ While the instant petition was pending with the AAO on appeal, the petitioner filed an identical petition for the instant beneficiary on June 22, 2005 (USCIS Receipt Number: WAC-05-188-51517), which is pending with the California Service Center.

² 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.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$1,912,613, and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based a calendar year. On the Form ETA 750B, signed by the beneficiary on May 14, 2001, the beneficiary claimed to have worked for the petitioner since May 2000.

The petition was filed on August 27, 2003 with the following supporting documents concerning the petitioner's ability to pay the proffered wage: the petitioner's federal tax returns for 2001 and 2002, and bank statements for the petitioner's business accounts.

On July 28, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability. The director specifically requested a copy of the beneficiary's W-2 forms for years 2001 to 2003 and copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last six (6) quarters.

In response, the petitioner submitted the beneficiary's W-2 forms for 2001 through 2003, paystubs from August 16 through September 30, 2004, the petitioner's 2003 tax return and Form DE-6 for all four quarters of 2003 and the first two quarters of 2004.

The director denied the petition on December 20, 2004, finding that the evidence submitted with the petition and in response to the RFE had not demonstrated that the petitioner had the continuing ability to pay the proffered wages in multiple pending petitions although for the years from 2001 to 2003 it appeared that the petitioner could pay the instant beneficiary's proffered wage.

On appeal, counsel asserts that the petitioner is currently paying the beneficiary the proffered wage and that the petitioner's net current assets reflected on amended tax returns are greater than the amount of the proffered wages and establishes the petitioner's ability to pay the proffered wages from the priority date.

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 petitioner submitted the beneficiary's W-2 forms for 2001 through 2004 and current paystub dated January 20, 2005. The W-2 forms show that the petitioner paid the beneficiary in the amount of \$50,000 in 2001, \$37,500 in 2002, \$22,500 in 2003, \$88,221 in 2004 and is currently paying at the level of \$7,352 monthly. The petitioner established that it had the ability to pay the proffered wage in 2004 through wage paid to the beneficiary. The petitioner also established that it was currently paying the proffered wage.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since 2004 and 2005, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the wage rate paid in 2004 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is July 27, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004 and 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Therefore, the petitioner is still obligated to demonstrate that it could pay the difference of \$38,213 in 2001, \$50,713 in 2002, and \$65,713 in 2003 between wages actually paid to the beneficiary and the proffered wage.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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.

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

The record of proceeding contains the petitioner's tax returns for 2001 through 2003. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage.

In 2001, the Form 1120 stated net income³ of \$4,759.

In 2002, the Form 1120 stated net income of \$16,114.

In 2003, the Form 1120 stated net income of \$22,964.

Therefore, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage in year 2001, 2002 or 2003.

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. 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. The tax returns submitted with the petition reflect net current assets of \$54,266 in 2001, \$74,392 in 2002, and \$101,605 in 2003 respectively. The director denied the petition because the petitioner had insufficient net current assets to pay the proffered wages of all beneficiaries (two approved petitions and four other pending petitions) in each of these years although it appeared that the petitioner's net current assets were sufficient to pay the difference between wages actually paid to the instant beneficiary and the proffered wage only.

CIS records show that the petitioner has multiple immigrant petitions approved by or pending with the California Service Center. In 2003 and 2004 the petitioner filed the Immigrant Petition for Alien Worker (Form I-140) for six more workers (among them two petitions were approved and four petitions are still pending).⁵ Therefore, the petitioner must show that it had sufficient income to pay all the wages from their

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁴ 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.

⁵ They are WAC-03-211-53355 filed on July 14, 2003 with the priority date of July 16, 2001 and approved on November 19, 2003; WAC-04-113-53127 filed on March 15, 2004; WAC-04-173-53176 filed on May 28, 2004; WAC-05-010-50487 filed on October 8, 2004; WAC-03-212-52054 filed on July 14, 2003 and approved on March 27, 2004; and WAC-04-252-52024.

priority dates. On appeal, counsel asserts that the amended tax returns for 2001 through 2003 show that the petitioner has sufficient net current assets to pay the difference between wages actually paid to the all seven beneficiaries and the proffered wages and submits the seven beneficiaries' W-2 forms for 2001 through 2003 and the petitioner's amended tax returns for 2001 through 2003. The petitioner submits a detailed statement of proffered wage payments for the six beneficiaries including the instant beneficiary as Exhibit #2 with the CPA letter. The payment statement indicates that the total proffered wage for the six beneficiaries are \$540,676, and the petitioner paid the beneficiaries \$298,660 in 2001, \$264,282 in 2002 and \$310,853 in 2003. However, this statement establishes that the petitioner failed to demonstrate its ability to pay all proffered wages through wages actually paid to the beneficiaries. Therefore, the petitioner is obligated to demonstrate it could pay the difference between wages actually paid to the beneficiaries and the proffered wage \$242,016 in 2001, \$276,394 in 2002 and \$229,823 in 2003.

On appeal counsel also submits the petitioner's amended tax returns for 2001, 2002 and 2003. The amended tax returns increase the petitioner's net current assets from \$54,266 to \$292,711 for 2001, from \$74,392 to \$348,466 for 2002 and from \$101,605 to \$169,315 for 2003. The petitioner does not explain how the professional tax preparer miscalculated such a large amount of assets and expenses in the original tax filing and how the petitioner found the miscalculation of almost \$250,000 in net current assets after almost five years later and immediately after CIS denied its immigrant petitions because it had insufficient net current assets to pay the proffered wage. Nor does the petitioner submit any documentary evidence to support its amendments to the tax returns for 2001 through 2003. However, even if the amended tax returns were fully reliable and it is proved that the amendments are a *bona fide* correction of miscalculation on tax, as previously discussed the petitioner still failed to demonstrate its continuing ability to pay the proffered wages of all beneficiaries because it did not establish wages already paid to the beneficiaries and their proffered wages because the amended tax return for 2003 indicates that the petitioner had net current assets of \$169,315 in 2003 while the difference between wages actually paid to the beneficiaries and the proffered wage in 2003 were \$229,823.

Counsel submits a letter from an accountant requesting that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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.

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's assertions on appeal cannot overcome the director's decision that the petitioner failed to demonstrate its continuing ability to pay the proffered wage of all beneficiaries 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.