



U.S. Citizenship
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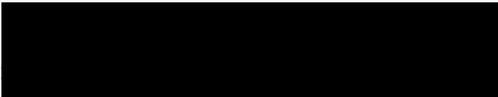
Office: CALIFORNIA SERVICE CENTER

Date: JAN 23 2006

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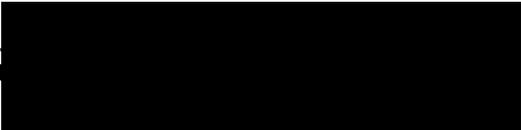
Petitioner:



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

The petitioner is a computer hardware supply and service company. It seeks to employ the beneficiary permanently in the United States as a computer hardware engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A brief;
- Unaudited balance sheets for the petitioner's fiscal years starting April 1, 2001 and April 1, 2002.
- The petitioner's bank statements for its three accounts;
- The beneficiary's monthly pay stubs ending October 29, 2004, with year total earnings of \$52,319; and,
- The beneficiary's W-2 Wage and Tax Statements for 2003 reporting a wage of \$61,741.27.

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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$40.38 per hour (\$84,000 per year).

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 \$822,874, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal years lasts from April 1 to March 31. On the Form ETA 750B, signed by the beneficiary on June 20, 2001, the beneficiary claimed to have worked for the petitioner since September 1998.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28;
- The original ETA 750;

- The petitioner's Form 1120 returns for fiscal years beginning on April 1, 2001 and on April 1, 2002; and,
- The petitioner's W-2 Wage and Tax Statements issued to the beneficiary for 2001 and 2002.

The director denied the petition on October 13, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts the petitioner had the ability to pay the proffered wage based upon its net current assets, bank statements and its record of paying the proffered wage during 2003 and 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, the petitioner established that it employed and paid the beneficiary \$45,037.80 in 2001 and \$42,253.94 in 2002. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through March 31, 2003. The petitioner paid partial wages in the amounts of \$45,037.80 in 2001 and \$42,253.94 in 2002, which is \$36,172.21 less than the proffered wage in 2001 and \$41,746.07 less than the proffered wage in 2002. The record establishes that the petitioner also paid the beneficiary wages of \$61,741.27 in 2003 and \$52,319 through October 29, 2004, both amounts less than the proffered wage of \$84,000 per year.

The petitioner is obligated to demonstrate that it could pay the difference between the 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).

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$84,000 per year from the priority date.

In 2001, the Form 1120 stated net income¹ of \$2,790.

In 2002, the Form 1120 stated net income of \$39,981.

Therefore, for the years 2001 through 2002, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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. 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 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 petitioner's net current assets during the year in question, were -\$59,545 for its fiscal year beginning April 1, 2001, and -\$14,479 for its fiscal year beginning April 1, 2002.

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 difference between the wage paid and 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 states that the petitioner's balance sheets show it had net current assets of \$153,229.10 for its fiscal year beginning April 1, 2001, and that it had \$162,293.72 in net current assets for its fiscal year beginning April 1, 2002. Counsel does not explain why the net current asset amounts derived from such balance sheets should differ from those on its Schedule L balance sheets attached to its Form 1120 returns for those years. However, counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. 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.

Counsel further asserts that the petitioner's bank account statements from its three bank accounts combined demonstrate the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts 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.

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.

Counsel asserts the petitioner has been paying the beneficiary at the proffered rate of pay during 2003 and 2004. The documents, however, show that the petitioner did not pay the full proffered in either of those years, nor does the evidence establish that the petitioner has continuously paid the proffered wage from the priority date and thereafter during the pertinent years.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns. The petitioner has not demonstrated its ability to 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 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.