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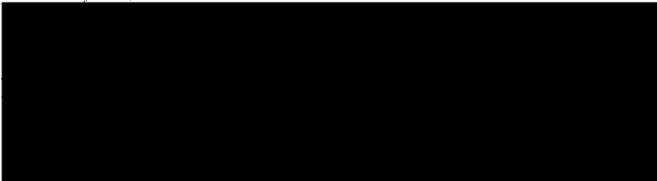
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JUL 24 2006

SRC 04 127 51565

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

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a religious translator. 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.

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 November 20, 2003. The proffered wage as stated on the Form ETA 750 is \$36,000 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation.¹ On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$120,292.62, and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on November 12, 2003, the beneficiary claimed to have worked for the petitioner since January 2001.

With the petition, the petitioner submitted the following documents:

- An original certified ETA 750;
- The petitioner's letter of January 20, 2004 in support of the petition;
- An October 27, 2003 letter of [REDACTED] the beneficiary's former employer;

¹ The petitioner's January 20, 2004 letter states, "In the fall of 1997, the Korean extension work became a Greenville, South Carolina corporation by the name of [the petitioner]."

- The beneficiary's coursework transcripts from Bob Jones University, of Greenville, South Carolina; and,
- The petitioner's compiled financial statements for the year 2003.²

On December 2, 2004, the director issued a Request for Evidence (RFE) seeking additional evidence pertinent to the petitioner's ability to pay the proffered wage. The director specifically requested the petitioner's income tax return for the year 2003 along with the corresponding W-2s (Wage and Tax Statements).

In response, the beneficiary submitted his own W-2s for the years 2002 and 2003, but stated that no income tax returns exist for the church, as it is a tax-exempt organization. The beneficiary also submitted the petitioner's December 21, 2004 letter in answer to a question in the RFE as to why the petitioner only had one employee, the beneficiary. The senior minister, [REDACTED], stated he donates his time as a full-time pastor to the church and supports himself through his other business. He also indicated that the beneficiary serves as an associate minister.³

The director denied the petition on February 4, 2005, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits the following:

- The petitioner's Labor Condition Application filed on behalf of the beneficiary for an H-1B visa to employ the beneficiary as an "assistant minister;"
- A South Carolina Employment Security Commission Prevailing Wage Determination dated September 2, 2003, stating that \$16.85 is the prevailing hourly wage for a permanent position at the Interpreters and Translators Wage Level 2 in Greenville-Spartanburg-Anderson, South Carolina;
- The petitioner's monthly bank statements for October 2003-January 2005;
- A January 23, 2002 borrower's settlement statement showing the petitioner took out, a \$200,000 real estate mortgage loan, maturity date January 22, 2007, with the remaining principal due as of January 24, 2005, of \$147,802.01;
- Complete CPA's annual financial compilation reports (not audited) showing the petitioner's net income for year 2001 was \$18,241.49, with \$3,900 in salaries; for year 2002, \$61,587.28, with nothing listed for salary expense; for year 2003, (\$6,120.68) in net loss, with \$17,386.32 in salaries; and for year 2004, \$37,245.48 net income, with \$16,802.70 in salaries; and,
- The beneficiary's W-2s for year 2002 showing \$7,800 in wages, \$7,200 in housing allowance, or \$15,000 combined; for year 2003, 7,800 in wages, \$7,200 in housing, \$15,000 combined; and for 2004, \$8,850 in wages and \$7,200 in housing; for \$16,050 combined.

Counsel notes that the beneficiary held a nonimmigrant H-1B visa to work as an assistant minister for the petitioner from January 2001 through September 2004. Counsel asserts that despite the petitioner's profit and loss statement for 2003 showing a net loss of (\$6,120.68), the petitioner can show its ability to pay the proffered wage based upon the petitioner's current assets of \$30,426.06 cash, according to the petitioner's

² The income statement lists revenues of \$120,292.62 and expenditures of \$126,413.30, netting "Excess Expenditures" of (\$6,120.68).

³ "Our church has grown so that we no longer need only one full time pastor, but we need an additional pastor. [The beneficiary] was asked by the congregation to fill that role."

financial statements for year 2003, which counsel asserts is confirmed by the petitioner's December 31, 2003 ending bank balance of \$30,183.90. In addition, counsel asserts the petitioner need only establish its ability to pay the proffered wage in 2003 by showing it had sufficient cash to pay the proffered wage for 2003, pro-rated from the November 20, 2003 priority date, or \$3,945.20. Further, counsel asserts that the petitioner should be credited, against the \$36,000 proffered wage, with the \$15,000 the petitioner paid the beneficiary.

Counsel further asserts that the petitioner purchased a church building and grounds at a \$310,000 purchase price, with \$147,802.01 as the remaining balance on the mortgage. As a result, counsel asserts, for 2003 the petitioner had net assets of \$265,053.16, \$30,426.06 of which was cash as of the close of year 2003. Counsel makes similar assertions regarding the petitioner's assets and wages paid to the beneficiary for the year 2004.

Finally, counsel asserts that as the evidence shows the petitioner's average monthly bank balance for the period from the priority date through January 2005 was \$7,918.61, which covers the monthly proffered wage of \$3,000 and establishes the petitioner's ability to pay the proffered wage from the priority date to the present time.

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 as an assistant minister \$15,000 in both years 2002 and 2003, and paid him \$16,050 in 2004. Therefore, the petitioner has not established that it employed and paid the beneficiary as a religious translator the full proffered wage during the period from the priority date through 2004. Instead, the petitioner paid partial wages for a different position in the years 2003 and 2004. The petitioner is obligated to demonstrate that it could pay the entire salary of a religious translator.⁴

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, typically 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:

⁴ A letter from the petitioner indicates that the congregation has grown such that it needs a second minister. However, the record of proceedings is not clear that the beneficiary's position is that of minister.

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.

Here, the petitioner has not submitted federal tax returns to demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,000 per year from the priority date.

Instead, counsel has submitted financial statements of the petitioner, including its profit and loss statements for 2003 and 2004 purporting to show net income. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies of financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal counsel has also submitted the petitioner's monthly bank statements relating to the period from the priority date through January 2005. In particular, counsel asserts that these statements reflect an average balance of \$7,918.61. Counsel's reliance on the bank statements in this case is misplaced. 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 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. Bank statements only show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. We note, however, that the statements reflect the account balance dipped to \$338.12 on December 2, 2004.

Therefore, for the years 2003 and 2004, the petitioner did establish that it not had sufficient net income to pay the beneficiary the proffered wage.

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, the idea 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.⁶ 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. Here, the record does not contain any income tax returns or audited financial statements for the petitioner, preventing a determination of its net current assets for the years in question from its tax returns.

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.

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.

⁶ 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.