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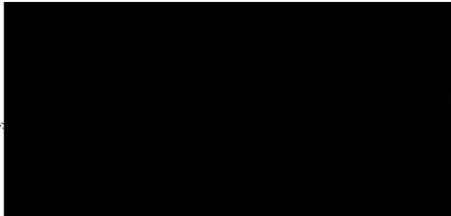


FILE: EAC 04 024 53379 Office: VERMONT SERVICE CENTER Date: JUL 26 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

51

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 case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a contracting firm. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied 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 and denied the petition accordingly.

On appeal, counsel provides additional evidence and contends that the petitioner has had the financial ability to pay the proffered salary.

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 at 8 C.F.R. § 204.5(g)(2) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$19.35 per hour, which amounts to \$40,248 per annum. On the Form ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary claims to have worked for the petitioner since June 2000.

On Part 5 of the visa petition, filed on November 3, 2003, the petitioner claims to have been established in 2000, to have a gross annual income of \$264,467 and to currently employ four workers. In support of its ability to pay the proposed wage offer, the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S

Corporation for 2001 and 2002. They reflect that the petitioner files its federal tax returns using a standard calendar year. The petitioner also provided a copy of its 2000 corporate tax return covering the period between June 1, 2000 when it was incorporated and December 31, 2000. These returns contain the following information pertinent to ordinary income, current assets and liabilities, and net current assets, although it is noted that the 2000 return is less relevant to the petitioner's ability to pay beginning at the priority date of April 20, 2001.

	2000	2001	2002
Ordinary Income ¹	\$ 12,791	\$ 1,048	\$ 4,086
Current Assets (Sched. L)	\$ 17,158	\$ 5,747	\$ 15,494
Current Liabilities (Sched. L)	\$ 6,274	\$ 1,362	\$ 1,323
Net current assets	\$ 10,884	\$ 4,385	\$ 14,171

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's **net current assets as a readily available resource out of which a proffered wage may be paid.** A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on June 21, 2004, based on her finding that the petitioner's net income and net current assets were each insufficient to pay the proffered salary in 2001, the year covering the priority date. The director concluded that the evidence failed to demonstrate the petitioner's continuing ability to pay the proposed wage offer. In this case, because the record shows that the beneficiary claims employment with the petitioner, a request for additional evidence should have been offered to the petitioner to allow it to provide documentation of compensation paid to the beneficiary. *See* 8 C.F.R. § 103.2(b)(8). This case will be remanded for that purpose.

On appeal, counsel cites a letter from the petitioner's accountant submitted on appeal as evidence that the petitioner has had the continuing ability to pay the certified wage. This letter, dated July 14, 2004, is signed by [REDACTED] CPA. [REDACTED] contends that the cash method of accounting was used to prepare the petitioner's tax returns and does not reflect revenue that was not received by the petitioner before the end of the tax year. He asserts that the petitioner's revenue and customer base will continue to increase. He also claims that had the petitioner been able to legally employ the beneficiary, it would have been able to accept other jobs and increase its revenue to cover the beneficiary's salary.

¹ Ordinary income will be treated as net taxable income for the purpose of this review.

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.

Relevant [REDACTED]'s assertion as to the accounting method chosen file the petitioner's tax returns with the Internal Revenue Service (IRS), it is noted no legal authority has been cited by which the choice of a particular accounting method should be determinative of a petitioner's ability to pay the proffered wage. This assertion is not persuasive. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology. It is noted that this office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns that the petitioner had actually submitted to IRS.

We are not persuaded by the assertion that it is appropriate to rely on tax returns or financial statements prepared pursuant to one method, but then seek to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as hypothesized pursuant to the assertions made to the underlying record.

We also [REDACTED] projections as to the future of the petitioner's business and the consequences of not being able to legally employ the beneficiary are not persuasive in demonstrating the petitioner's continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires either audited financial statements, federal tax returns, or annual reports to demonstrate a petitioner's ability to pay a given wage beginning at the priority date. It is noted that a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. Wages less than the proposed wage offer will also be given relevant consideration. In this case, as noted above, the case will be remanded to the director in order to allow her to give the petitioner an opportunity to provide this additional evidence for consideration.

Along with evidence that the petitioner may have employed and paid a beneficiary, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

If an examination of the petitioner's net taxable income or wages that may have been paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. As noted above, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, as the record currently stands, the 2001 tax return reflects that neither the petitioner's net taxable income of \$1,048, nor its net current assets of \$4,385 could meet the certified wage of \$40,248. Similarly, in 2002, the petitioner's net taxable income of \$4,086, as well as its net current assets of \$14,171, was well below the certified wage of \$40,248.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.³

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

³It is noted that one of the petitioner's two principal shareholders and beneficiary bear the same family name. While this may not be uncommon, it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration initially, this issue may also merit further investigation, including consultation with the DOL if necessary.