



U.S. Citizenship
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FILE: WAC 04 029 52188 Office: CALIFORNIA SERVICE CENTER Date: **MAR 24 2006**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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 employment based immigrant 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 flower shop. It seeks to employ the beneficiary permanently in the United States as a floral designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the **employment system of the Department of Labor**. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 10, 2001. The proffered salary as stated on the labor certification is \$12.38 per hour or \$25,750.40 per year.

With the petition, the petitioner, through counsel, submitted copies of its 2001 and 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation. The petitioner's 2001 tax return reflected an ordinary income or net income of \$20,248 and net current assets of \$12,305. The petitioner's 2002 tax return reflected an ordinary income or net income of -\$5,881 and net current assets of \$0. The director considered this documentation insufficient and on June 4, 2004, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of April 10, 2001 and continuing to the present. The petitioner was informed that the evidence must be either in the form of copies of annual reports, federal tax returns with appropriate signatures and dates, or audited financial statements. The director specifically requested complete copies of the beneficiary's 2001 through 2003 Forms W-2, Wage and Tax Statements. In addition, the director notified the petitioner that it had failed to submit a copy of its 2003 federal tax return.

In response, counsel submitted additional copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Tax Returns for an S Corporation, a copy of the petitioner's 2003 Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, and copies of cancelled paychecks for the beneficiary for parts of 2003 and 2004. The beneficiary's cancelled paychecks for part of 2003 totaled \$15,500, and the beneficiary's cancelled paychecks for part of 2004 totaled \$4,609.68. It is noted that one check dated August 14, 2004 was not included in the total of \$4,609.68 as it was marked non-negotiable.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 20, 2004, denied the petition.

On appeal, counsel submits a copy of the petitioner's 2003 Form 1120S, U.S. Tax Return for an S Corporation and copies of the petitioner's bank statements for the period between January 1, 2001 and October 8, 2004. Counsel asserts that the petitioner has established its ability to pay the proffered wage since its tax returns has had an increase in gross receipts every year for the past three years, and since the petitioner has always maintained a monthly corporate bank account balance that could have more than paid the beneficiary's monthly salary of \$2,145.86. The petitioner's 2003 Form 1120S reflects an ordinary income or net income of \$13,414 and net current assets of \$0. The petitioner's bank statements reflect a range from a high of \$44,874.96 to a low of \$33.43.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 through 2003 at a salary equal to or greater than the proffered wage. While the petitioner did provide cancelled checks for the beneficiary for parts of 2003 and 2004, those checks only totaled \$15,500 in 2003 and \$4,609.68 in 2004. The petitioner is obligated to show that it can pay the difference between the proffered wage and the actual wages paid to the beneficiary. In 2003, that difference would have been \$10,250.40 (\$25,750.40 proffered wage - \$15,500 wages paid to the beneficiary in 2003 = \$10,250.40). The petitioner's net income in 2003 was \$13,414. The petitioner has established that it could pay the difference between the proffered wage and the actual wages paid to the beneficiary in 2003. Tax returns for 2004 and cancelled checks for 2001 and 2002 were not submitted.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would

allow the petitioner to “add back to net cash the depreciation expense charged for the year.” *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a 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. 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.¹ 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 a corporation’s end-of-year 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 petitioner’s net current assets during 2001 and 2002 were \$12,305 and \$0, respectively. The petitioner could not have paid the proffered wage in 2001 and 2002 from its net current assets.

Counsel asserts that the petitioner has established its ability to pay the proffered wage since it has shown that gross receipts have increased each year for the past three years, and because the petitioner has always maintained a monthly corporate bank account balance sufficient to pay the beneficiary’s monthly wage of \$2,145.86. While counsel is correct that the petitioner has increased its gross receipts each year in 2001 through 2003, that increase does not assure that the petitioner has the ability to pay the proffered wage. Gross receipts must be considered in conjunction with the cost of doing business, resulting in ordinary income or net income. CIS does not merely take into account one item on a tax return, but must consider the whole financial picture presented by the tax return.

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, such as the petitioner’s taxable income (income minus

¹ 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.

deductions) or the cash specified on Schedule L that was considered below in determining the petitioner's net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has provided pertinent tax returns for three years, 2001 through 2003, with each tax return reflecting net income and net current assets less than the proffered wage. There is also no evidence of the petitioner's reputation throughout the industry.

The 2001 tax return reflects an ordinary income or net income of \$20,248 and net current assets of \$12,305. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2001. No evidence was provided of the wages paid to the beneficiary in 2001, therefore, the AAO cannot determine if the petitioner was able to pay the difference between the proffered wage and the actual wages paid to the beneficiary.

The 2002 tax return reflects an ordinary income or net income of -\$5,881 and net current assets of \$0. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2002. No evidence was provided of the wages paid to the beneficiary in 2002, therefore, the AAO cannot determine if the petitioner paid the proffered wage in 2002.

The 2003 tax return reflects an ordinary income or net income of \$13,414 and net current assets of \$0. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2003. However, the record of proceeding shows wages paid to the beneficiary in 2003 of \$15,500. When adding the wages paid to the beneficiary and the net income, the result is more than the proffered wage of \$25,750.40

(\$15,500 wages paid to the beneficiary in 2003 + \$13,414 net income = \$28,914; \$28,914 - \$25,750.40 proffered wage = \$3,163.60 more than the proffered wage).

In 2004, the record of proceeding shows that the beneficiary was paid \$4,609.68, \$21,140.72 less than the proffered wage. Tax returns for 2004 were not submitted.

The petitioner has submitted insufficient evidence of its 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.