



U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 041 51974 Office: VERMONT SERVICE CENTER

Date: MAR 30 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: SELF-REPRESENTED

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 Acting Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further investigation and entry of a new decision.

The petitioner is a marble and granite installation firm. It seeks to employ the beneficiary permanently in the United States as a marble setter. 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 submits additional evidence and asserts that the petitioner has had the continuing 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 \$20.13 per hour, which amounts to \$41,870.40 per annum. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claims to have worked for the petitioner since May 2000.

On Part 5 of the visa petition, the petitioner claims to have been established on November 1, 1998, to currently employ over sixty-nine workers, to have a gross annual income of approximately 8.1 million dollars. In support of the beneficiary's proposed wage offer of \$41,870.40 per year, the petitioner submitted a copy of its Form 1120,

U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner files its federal tax returns using a fiscal year running from November 1st to October 31st of the following year. Thus, the 2001 return reflects the petitioner's information from November 1, 2001, until October 31, 2002. It contains the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

2001

Taxable Income before NOL	\$ 9,783
Deduction (Form 1040)	
Current Assets (Sched. L)	\$ 20,264
Current Liabilities (Sched. L)	\$183,290
Net current assets	-\$ 163,026

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.¹ 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 possible 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 the Form 1120, 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 reviewed the petitioner's financial data contained within its corporate tax return of 2001 and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 20, 2001. The director notes that the record suggests that an employment relationship had existed between the petitioner and the beneficiary, but no documentation of such employment had been submitted.

On appeal, counsel contends that the evidence sufficiently establishes the petitioner's ability to pay the proffered wage. He submits copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001, 2002, and 2003 on appeal. They show that the petitioner paid the beneficiary \$32,164 in 2001, \$49,759.23 in 2002, and \$46,791.97 in 2003. Counsel also supplies a copy of the petitioner's 2002 tax return on appeal, along with a copy of an Internal Revenue Service (IRS) application for an extension of time that allowed its filing until July 15, 2004. This tax return covered the period between November 1, 2002 and October 31, 2003. It shows that the petitioner declared net income of \$97,468 and had net current assets of \$370,673. Counsel further provides a brief letter from the petitioner's accounting firm simply stating that the petitioner is stable and can pay the proffered wage. Finally, counsel submits on appeal, two copies of the beneficiary's payroll records from March and April 2004. As of the period ending April 25, 2004, the record shows that the petitioner had paid the beneficiary \$15,857.62

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.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during a given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

In this case, a comparison of the beneficiary's earnings and the tax returns involves a review of the fiscal year period from November 1st to October 31st of the following year. Here, a review of the beneficiary's wages for the last two months of 2001 amounts to approximately \$5,361 based on a monthly average of his wages reported on the 2001 W-2. The first ten months of 2002 show that he earned about \$41,466 or a combined total of \$46,827 for the period covered by the 2001 tax return. As this exceeds the proffered wage of \$41,870, it is proof of the petitioner's ability to pay for this period.

For the period covered by the 2002 tax return, the evidence shows that the beneficiary's wages for the last two months of 2002 can be estimated at \$8,293. Based on the beneficiary's 2003 W-2, his wages for the first ten months of 2003 were approximately \$38,993, yielding a combined total of \$47,286 in wages paid during the period covered by the corresponding tax return for 2002. This amount also demonstrates the petitioner's ability to pay the proffered wage for this period.

Although we find that the petitioner has established its ability to pay the proffered wage through the actual wages paid to the beneficiary for the period covered by the 2001 and 2002 tax return, the visa priority date is April 20, 2001. The case will be remanded in order to clearly determine whether the petitioner's ability to pay the proffered wage for this period, which includes a timeframe from April 20, 2001 to October 31, 2001, has been established.²

It is noted that if a 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 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*,

² It is noted that CIS electronic records show that EAC0426350712 and EAC0326350704, filed by this petitioner, were approved on November 2, 2004, and October, 23, 2003, respectively. The priority date of EAC0426350712 is April 30, 2001 and the priority date of EAC0326350704 is April 24, 2001. As a petitioner filing on behalf of multiple beneficiaries must show that its continuing financial ability covers the collective certified wages for all beneficiaries as of each respective priority date, in some cases, it is relevant to review to what extent the same financial information may have been utilized to determine a petitioner's ability to pay multiple beneficiaries with the same or similar priority dates.

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, 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. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

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) for the period mentioned above. The director may also investigate any other issues as he/she deems appropriate. 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.

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.