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02



FILE: [REDACTED]
SRC-03-104-53122

Office: TEXAS SERVICE CENTER Date:

MAY 02 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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 HW & SW development and consulting services firm. It seeks to employ the beneficiary permanently in the United States as a senior network engineer. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.¹ The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 18, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$58,800.00 annually.

¹ The I-290B was originally received on November 9, 2004. A copy of the petitioner's denial notice, which the director requested, was received on November 19, 2004. The director then issued a letter on November 22, 2004 instructing the petitioner to submit this appeal to the Dallas District Office. Counsel, in a letter dated December 20, 2004, correctly notes that the original filing was timely and the director erred in returning the appeal to the petitioner.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Evidence submitted on appeal includes language from an AAO decision and copies of evidence already in the record. Other relevant evidence in the record includes copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002, and 2003, and the petitioner's bank statements in 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

Counsel states on appeal that the petitioner has established its ability to pay the proffered wage in 2001 because the combination of the petitioner's net income and net assets is greater than the prorated proffered wage, and the petitioner has clearly shown its ability to pay the proffered wage in 2002 and 2003 because the petitioner's net income is greater than the proffered wage in 2002 and the combination of the petitioner's net income and net assets is greater than the proffered wage in 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary did not claim to have worked for the petitioner.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

court specifically rejected the argument that the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner’s Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002, and 2003. The record before the director closed on October 12, 2004 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date the petitioner’s federal tax return for 2004 was not yet due. Therefore the petitioner’s tax return for 2003 is the most recent return available.

Where an S corporation’s income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s Form 1120S. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner’s tax returns show the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$16,668.00	\$58,800.00*	-\$42,132.00
2002	\$60,461.00 ³	\$58,800.00*	\$1,661.00
2003	\$13,322.00	\$58,800.00*	-\$45,478.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2003.

As an alternative means of determining the petitioner’s ability to pay the proffered wage, CIS may review the petitioner’s net current assets. Net current assets are a corporate taxpayer’s current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation’s current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation’s 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner’s ability to pay.

³ Page 3 is missing from both copies of the petitioner’s 1120S U.S. Income Tax Return for an S Corporation for 2002, and line 23 of the Schedule K is on that page. Line 23 of the Schedule K is also listed on the Schedule M-1, and because it is listed as \$0.00, the AAO will consider the petitioner’s net income for 2002 to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s Form 1120S.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	\$42,408.00	\$58,800.00*
2002	\$111,553.00	\$58,800.00*
2003	\$62,823.00	\$58,800.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001.

Counsel states that “[f]or the year 2001, the petitioner must demonstrate the ability to pay the *prorated* proffered wage of \$39,200.00.” Counsel is, in essence, requesting that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. CIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel also states that for 2001, “[t]he petitioner's *net income* is \$31,214.00 and the *net assets* are \$42,408.00. Thus, the net income combined with the net assets is \$73,622.00, which is clearly greater than either the prorated proffered wage of \$39,200.00 or even the annual proffered wage.” Counsel is referring to the petitioner's net current assets when stating net assets.

As stated above, where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K. Thus, the petitioner's net income for 2001 is not \$31,214.00, as shown on line 21 of page one of the petitioner's Form 1120S. Rather, the petitioner's net income for 2001 is \$16,668.00. This decision would not be different if the \$31,214.00 figure were used.

Moreover, the approach of combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective “snapshot” of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel

that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer such as the petitioner in this case who reports taxes pursuant to accrual convention, accounts receivable.

Counsel likewise states that the director erred in "including line 19 of [the] Schedule L in [her] calculations [of the petitioner's net current assets for 2001]." Current liabilities, as noted by counsel and as stated above, are shown on lines 16 through 18 of the Schedule L. Thus, AAO does not include line 19 of the Schedule L when calculating the petitioner's net current assets.

Counsel also states that petitioner has the ability to pay the proffered wage in 2002 because the petitioner's net income is greater than the proffered wage, and the petitioner has the ability to pay the proffered wage in 2003 because "the net income combined with the net assets is \$105,394.00, which is clearly greater than the annual proffered wage." As stated above, the approach of combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage is unacceptable. The petitioner, however, has established its ability to pay the proffered wage in 2002 and 2003, as shown above.

The record contains the petitioner's bank statements. 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 deductions) or the cash specified on Schedule L that the AAO has already considered in determining the petitioner's net current assets. Moreover, the record contains the petitioner's bank statements from 2002, and the petitioner has already established its ability to pay the proffered wage in 2002 with its federal tax return for 2002.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.