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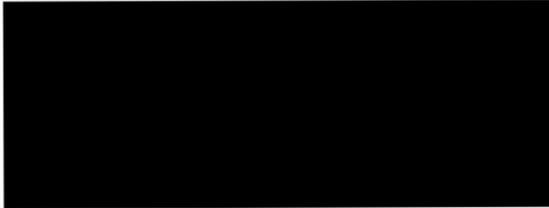
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC-04-036-51172 Office: VERMONT SERVICE CENTER Date: OCT 24 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:



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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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 appeal will be dismissed.

The petitioner is a luggage repair and shipping company. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or Form ETA 750), 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.

Counsel filed a timely appeal with additional evidence.¹

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 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour (\$33,280 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered or two (2) years of experience in the related occupation of shipping and

¹ 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

receiving clerk. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since January 1997. On the petition, the petitioner claimed to have been established in 1970, to have a gross annual income of \$311,183.70, and to have a net annual income of \$151,263.34. The petitioner did not provide information on the current number of its employees.

With the petition, the petitioner submitted the first page of its Form 1120, U.S. Corporation Income Tax Return for 2000 pertinent to its ability to pay the proffered wage.

The director denied the petition on October 1, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that with evidence submitted previously and on appeal the petitioner did show the ability to pay the proffered wage.

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 record of proceeding contains copies of the beneficiary's W-2 forms for 1999 through 2003. However, since the priority date in the instant case is April 27, 2001, the AAO will consider the beneficiary's W-2 forms for 2001 through 2003 only. The W-2 forms show that the petitioner paid the beneficiary \$24,132.00 in 2001, \$23,953.28 in 2002 and \$24,351.92 in 2003, which are \$9,148.00 in 2001, \$9,326.72 in 2002 and \$8,928.08 in 2003 less than the proffered wage respectively. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage during these years. Instead the petitioner is still obligated to demonstrate that it could pay the difference of \$9,148.00 in 2001, \$9,326.72 in 2002 and \$8,928.08 in 2003 between wages actually paid to the beneficiary and the proffered wage.

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, 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). On appeal counsel asserts that depreciation should be added back to the net income as part of available funds to pay the proffered wage. Counsel's reliance on the petitioner's depreciation expense is misplaced. Similarly, showing that the petitioner paid wages in excess of the proffered wage or its gross receipts exceeded 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:

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.

The record of proceeding contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years 2000 through 2003. The tax returns show that the petitioner is structured as a C corporation and the petitioner's fiscal year lasts from June 1 to May 31. The tax returns demonstrate the following financial information pertinent to the petitioner's ability to pay the proffered wage from the priority date:

In the fiscal year 2000 (6/1/2000-5/31/2001), the Form 1120 stated net income² of \$(30,275.54).
In the fiscal year 2001 (6/1/2001-5/31/2002), the Form 1120 stated net income of \$25,308.47.
In the fiscal year 2002 (6/1/2002-5/31/2003), the Form 1120 stated net income of \$(1,524.31).
In the fiscal year 2003 (6/1/2003-5/31/2004), the Form 1120 stated net income of \$(26,186.94).

Therefore, for the fiscal years 2000, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$33,280 or the difference between wages actually paid to the beneficiary and the proffered wage while the petitioner's net income was sufficient to cover the difference of \$9,148.00 in the calendar year 2001 between wages actually paid to the beneficiary and 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. 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.³ 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.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

³ 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.

However, counsel submitted only the first page of the petitioner's tax returns for 2000 through 2003 without all schedules and attachments. Without the schedule L of the Form 1120, the AAO cannot assess its net current assets to see whether the petitioner had sufficient net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage and further to establish its ability to pay in 2000, 2002 and 2003. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, the petitioner failed to establish that it had sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in its fiscal years 2000, 2002 and 2003.

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.

On appeal, counsel asserts that the petitioner may rely on both income and assets to help demonstrate its ability to pay according to the language in Mr. Yates' memorandum. The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's understanding of the language in that memorandum is misplaced. The memorandum clearly uses "Net Current Assets" instead of "assets" and also uses "or" meaning the petitioner may rely on either its net income or net current assets, but not a combination of net income and net current assets. Combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage is also 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 ways of 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 who reports taxes pursuant to accrual convention, accounts receivable.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.