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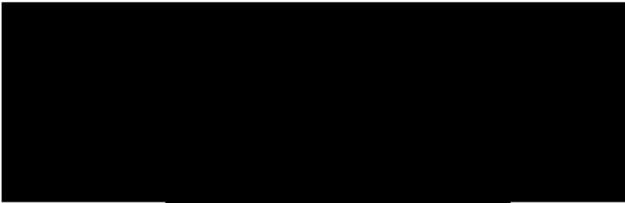
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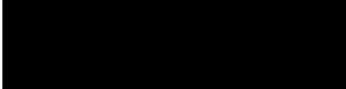
U.S. Citizenship
and Immigration
Services

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BC



FILE:



Office: VERMONT SERVICE CENTER

Date: OCT 24 2006

EAC-04-209-51602

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the 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 garment manufacturing and tailoring company. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 August 9, 2001. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour (\$20,020 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B signed by the beneficiary on August 1, 2001, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have

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.

been established in 1986, and to currently employ three (3) workers. The petitioner did not provide information on its gross annual income and net annual income on the form.

With the petition, the petitioner submitted its unaudited financial statements as of December 31, 2001 pertinent to its ability to pay the proffered wage.

On November 12, 2004, the director issued a request for additional evidence (RFE) requesting the petitioner submit additional evidence to establish that it had the ability to pay the proffered annual salary of \$20,020 as of August 9, 2001, the date of filing and continuing to the present. The director specifically requested the petitioner submit its 2001-2003 United States federal income tax returns, with all schedules and attachments or as an alternative submit annual reports for 2001-2003 which are accompanied by audited or reviewed financial statements and the beneficiary's Form W-2 Wage and Tax Statement.

In response, the petitioner submitted its unaudited financial statements for 2001, 2002 and 2003, and bank statements for a business checking account under name [REDACTED] from January 2001 to December 2003.

The director denied the petition on March 31, 2005, finding that the evidence submitted with the petition and in response to the RFE 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 the petitioner has been paying the proffered wage to the beneficiary and the petitioner's financial reports indicate that the petitioner has net income more than the proffered wage in 2001, therefore, the petitioner was able 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 petitioner submits on appeal the beneficiary's tax return and W-2 form for 2004 evidencing that the petitioner paid the beneficiary \$4,026 in 2004. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage in 2004. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage in 2001 through 2003 and the difference of \$15,994 between wages actually paid to the beneficiary and the proffered wage in 2004.

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). Reliance on the petitioner's gross receipts, depreciation/amortization deduction or wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of 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 2001 and 2002. The tax return shows that the petitioner is structured as a C corporation and the petitioner's fiscal year is based on a calendar year. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,020 per year from the priority date.

In 2001, the Form 1120 stated net income² of \$(2,339)

In 2002, the Form 1120 stated net income of \$42,907.

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage while the petitioner established that it had sufficient net income to pay the beneficiary the proffered wage of \$20,020 in 2002.

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

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

However, counsel submits only the first two pages of the petitioner's tax return for 2001 without all schedules and attachments. Without the schedule L to 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 and further to establish its ability to pay in 2001. 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 proffered wage in 2001, and further failed to demonstrate its ability to pay the proffered wage through its net current assets for 2001.

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The record closed before the director on January 31, 2005 when the response to the RFE was received. By that time the petitioner's 2003 tax return should have been available. However, the petitioner did not submit its tax return or other regulatory-prescribed evidence of its ability to pay the proffered wage for 2003. Counsel does not submit the petitioner's 2003 tax return on appeal, nor does he explain why the 2003 tax return is not submitted. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 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's financial reports indicate sufficient net income for 2001. The record contains the petitioner's financial statements for 2001 through 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel also asserts that the petitioner has been paying the beneficiary at the proffered wage rate. However, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is August 9, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004, when counsel claims the petitioner actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In addition, the petitioner did not establish that it paid the full proffered wage in 2004 and counsel did not provide evidence to demonstrate that the petitioner had been paying the wages in 2005.

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.