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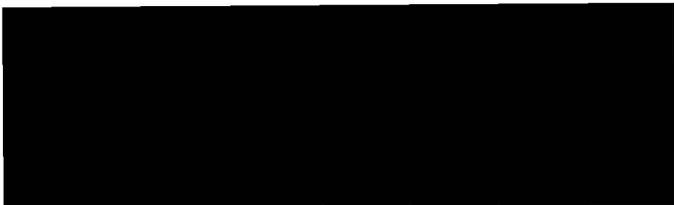
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 004 52526 Office: VERMONT SERVICE CENTER

Date: SEP 01 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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) 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, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$25.06 per hour,¹ which amounts to \$52,124.80 annually. The ETA 750B, signed by the beneficiary on January 20, 2001, does not indicate that he has worked for the petitioner.

On Part 5 of the visa petition, filed on October 4, 2004,² it is claimed that the petitioner was established in 1979. As evidence of its continuing financial ability to pay the certified wage of \$52,124.80 per year, the petitioner provided copies of its 2001 and 2002 Form 1120, U.S. Corporation Income Tax Return. These returns reflect that the petitioner files its tax returns using a standard calendar year.

The 2001 return reflects that the petitioner reported taxable income of \$3,851.87 before the net operating loss (NOL) deduction.³ Schedule L of the tax return indicates that the petitioner had \$10,849.22 in current assets and \$3,588.38 in current liabilities, resulting in \$7,260.84 in net current assets. Besides net taxable income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration

¹ The director misquoted the hourly wage as \$25.60 per hour.

² The director's decision notes that a previous petition, filed on April 9, 2003, had been denied.

³ For the purpose of this review, the taxable income before the NOL deduction will be treated as the petitioner's net taxable income.

Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The 2002 tax return indicates that the petitioner reported \$2,982.13 in taxable income before the NOL deduction. Schedule L was left blank. Along with the tax returns, the petitioner provided copies of its bank statements for 2001 (omitting March 2001), 2002, and 2003.

Upon review of the net taxable income figure and net current assets revealed on the petitioner's 2001 tax return and the net taxable income figure of the 2002 corporate tax return, the director determined that neither amount(s) represented a sufficient resource to pay the proffered wage. He concluded that the evidence did not demonstrate the petitioner's ability to pay the certified salary and, on January 4, 2005, denied the petition.

On appeal, counsel notes that a previous petition filed on behalf of this beneficiary had included an assertion that one of the petitioner's officers had suffered injury and that the beneficiary was needed to perform his duties. He argues that this contention should be included in the consideration in the present matter. Counsel further asserts that the director failed to give sufficient weight to the petitioner's bank balances as represented on his bank statements and cites three AAO decisions from 1992, 1995, and 1997, where bank statements were accepted to establish a petitioner's ability to pay a proffered wage.

In this matter, the AAO will not consider an argument relating to injury to one of the petitioner's officers, which was not raised in the underlying record in this case and has been submitted here without supporting documentation. The evidence related to this assertion may have been part of another case, but it is noted that each petition's filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). As such, counsel's claims relating to this contention do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence of the injury, the wages paid, the officer's duties, etc.

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 that period. If the petitioner establishes by documentary evidence that it may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If, during a given period, any shortfall between the actual wages paid and the proffered wage can be covered by either a petitioner's net taxable income or net current assets, then the petitioner is deemed to have demonstrated its ability to pay the certified wage for the designated period of time. In this case, the record does not contain any evidence that the petitioner has employed the beneficiary.

⁴ 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.

If the petitioner does not establish that it may have 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 expense deductions. 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). 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.

It is further noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that the evidence demonstrating a petitioner's ability to pay the proffered wage must include either federal tax returns, audited financial statements, or annual reports. If a petitioner believes that its tax returns do not accurately reflect its financial position, it may elect to provide one of the other two forms of evidence.

In this respect, the reliance on the petitioner's bank statements is misplaced. 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," in this case it has not been established why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the 2001 and 2002 tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

Relevant to counsel's reference to the prior AAO cases, it is noted that these three decisions may offer guidance depending on the facts presented in a particular case but do not constitute binding precedents such as those defined within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

In this case, while the evidence shows that in 2001, neither the petitioner's \$3,851.87 in net taxable income, nor its net current assets of \$7,260.84 was sufficient to pay the proffered wage. Similarly, in 2002, the petitioner's net taxable income of \$2,982.13 was not sufficient to pay the certified salary of \$52,124.80 per year. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's determination that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date as required by 8 C.F.R. § 204.5(g)(2).

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.