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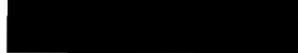
U.S. Citizenship
and Immigration
Services

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File:



Office: VERMONT SERVICE CENTER

Date: SEP 07 2006

EAC-03-095-50389

In re:

Petitioner:

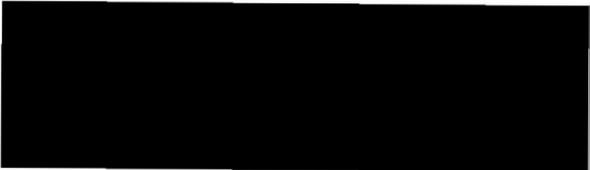
Beneficiary:



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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides building maintenance services and seeks to employ the beneficiary permanently in the United States as a supervisor, janitorial. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's January 7, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtained permanent residence.

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 appeal.¹

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on January 7, 1998. The proffered wage as stated on Form ETA 750 for the position of a supervisor, janitorial is \$19.62 per hour, \$29.44 for overtime, 40 hours per week, which is equivalent to \$40,809.60 per year. The labor certification was approved on January 30, 2002,² and the petitioner filed the I-140 on the beneficiary's behalf on January 2, 2003. On the I-140, counsel failed to list the following information related the petitioning entity: date established; gross annual income; net annual income; and current number of employees.

The Service Center issued a Request for Evidence ("RFE") on August 25, 2004, requesting that the petitioner submit "additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$40,809.60 per year, as of January 7, 1998, the date of filing and continuing to the present." [*Emphasis in original*]. The RFE additionally requested that the petitioner submit copies of the beneficiary's W-2 statement(s), and that the petitioner should submit the petitioner's 1998 federal tax return, or annual report.

In response to the RFE, the petitioner submitted a letter that the beneficiary would replace workers who were no longer with the company, and further that the beneficiary would replace work that the owner would be doing, and the owner would shift to take on more managerial tasks. In a letter dated November 15, 2004, the petitioner listed three workers who left on December 1, 2000, April 1, 2001, and November 13, 2003 respectively. The petitioner attached 1998 W-2 statements for the employees showing that the employees were paid \$2,329.50, \$7,669.50, and \$1,968.59, which totaled \$11,967.59. The beneficiary's W-2 reflected earnings of \$15,175.93 for 1998, less than the proffered wage. The owner's earnings totaled \$41,345.00 in 1998. The petitioner submitted a 1998 federal tax return, but did not submit tax returns for any other year. The petitioner additionally submitted financial statements for the years ended 1997, 1998, 1999, and 2000.

The case was then denied on January 7, 2005, based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner then appealed to the AAO.

We will examine the petitioner's ability to pay based on standards enumerated and then consider the petitioner's additional arguments. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 case at hand, on Form ETA 750B, signed by the beneficiary, the beneficiary did not list that he worked for the petitioner, but rather listed that he was "self employed" from October 1994 to the present (date of signature: December 26, 1997). However, on Form G-325A submitted with the beneficiary's I-485 Adjustment of Status application, he listed that he was employed with the petitioner as a Supervisor from January 1997 to the present (date of signature: November 19, 2002).

The record contains evidence of wage payment for the year 1998, in which the beneficiary was paid \$15,175.93. This was the only year that the petitioner submitted a W-2 Form for the beneficiary.³ The

² Counsel was unable to submit the original ETA 750 forms, and CIS requested a duplicate copy of the certified labor certification from DOL.

³ We note that the beneficiary submitted a copy of his 2001 tax return and 2001 W-2 statement with his I-485 application, which exhibits that the beneficiary was paid \$15,520.00 in the year 2001.

amount that the petitioner paid the beneficiary in wages is significantly less than the proffered wage, and, therefore, is insufficient to demonstrate the petitioner's ability to pay 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. 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). 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,809.60 per year from the priority date. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	not submitted ⁴
2002	not submitted
2001	not submitted
2000	not submitted
1999	not submitted
1998	\$20,205

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage, even if the wages paid to the beneficiary were added to the net income.⁵

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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

⁴ The petitioning company failed to submit tax returns for any year except 1998.

⁵ For example, in the year 1998, even if the wages paid to the beneficiary were added to the petitioner's net income, this would only equate to \$35,380.93, still less than the proffered wage. We have no further tax return or W-2 information for other years.

⁶According 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.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets were as follows:

<u>Tax year</u>	<u>Net current assets</u>
2003	not submitted
2002	not submitted
2001	not submitted
2000	not submitted
1999	not submitted
1998	-\$22,360

As demonstrated above, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage, even if the wages paid to the beneficiary were added to the net current asset totals.

To address counsel's additional arguments, counsel contends: "attached herewith is the letter of the petitioner dated November 15, 2004, with Forms W-2 [for five employees] which show a total income of \$88,693.52 in 1998 which is enough to show that the petitioner has the ability to pay the proffered wage to the beneficiary at the time of the priority date is established and continuing up to the present until the beneficiary obtains his lawful permanent residence. Moreover, the current business of the petitioner is growing and has expanded to Orange County in Upstate New York."

Counsel resubmitted 1998 W-2 statements for three employees showing that the employees were paid \$2,329.50, \$7,669.50, and \$1,968.59, which totaled \$11,967.59, along with the beneficiary's W-2 reflecting earnings of \$15,175.93 for 1998. **The owner's earnings totaled \$41,345.00 in 1998. The petitioner additionally resubmitted its 1998 federal tax return, but again did not submit tax returns for any other year.**

First, we note that 8 C.F.R. § 204.5(g)(2), which as noted above, provides 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.*

[Emphasis added].

In only providing W-2 statements for 1998, counsel has not demonstrated the petitioner's ability to pay for any other year⁷ continuing until the beneficiary obtains permanent residence. Further, counsel has added all the wages paid to beneficiary, to other employees, and the owner to total the wages and conclude that the petitioner can pay the proffered wage.

The petitioner contends that, in accordance with a letter dated November 15, 2004, the beneficiary would replace workers who were no longer with the company, and further that the beneficiary would replace work that the owner would be doing, and the owner would shift to take on more managerial tasks. The petitioner

⁷ And the wages paid to the beneficiary, in the amount of \$15,175.93, similarly do not demonstrate the petitioner's ability to pay the proffered wage in 1998.

listed three workers who left on December 1, 2000, April 1, 2001, and November 13, 2003, and that the beneficiary would replace those workers in addition to the owner.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the three other employees listed would involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the worker's positions, and duties. If the petitioner's theory is that the wages from the three workers no longer employed would now be available in wages to pay the beneficiary in the present case, this would not be convincing as the workers were terminated in different years, 2000, 2001, and 2003, and the petitioner has only provided wage information for one year, 1998. The employees might have been paid less in subsequent years, or already replaced by other workers. Further, had the petitioner submitted federal tax returns for the years 1999 through 2003, the reduction in wages might have been reflected in a higher net income, which would have been more persuasive evidence, should the net income had been sufficient to demonstrate the petitioner's ability to pay the proffered wage.

Further, the petitioner contends that the beneficiary would take over the position of the owner, who would take on different, business supervisory duties: "I'll be doing managerial works in the business and because my time is very limited to supervise and coordinate crew of cleaners, Mr. Ramon will replace my position." The petitioner's owner has supplied his W-2 statement for 1998 only as well. Even if the beneficiary were to take on the duties of the owner, and be paid what the owner was paid for the supervisory position, the beneficiary would not be a "replacement worker" as the owner will take on different responsibilities, and still receive a salary. The owner has not indicated what his new wages would be, or alternatively, that he would not be paid in his new role.⁸

The petitioner additionally submitted financial statements for the years ended 1997, 1998, 1999, and 2000. However, the regulation at 8 C.F.R. § 204.5(g)(2) provides 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. 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.⁹

Based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Accordingly, the petition was properly denied.

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.

⁸ Further, the beneficiary's G-325A Form reflects that he is already working for the petitioner as a Supervisor, but paid substantially less than the proffered wage.

⁹ Further, the information contained in the financial statements does not provide compelling evidence that the petitioner can pay the proffered wage. The financial statements list a net income of -\$29,348 for 2000, \$11,249 for 1999, and \$18,541 for 1998.



ORDER: The appeal is dismissed.