



U.S. Citizenship
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APR 05 2007

FILE: WAC 05 114 51314 Office: CALIFORNIA SERVICE CENTER Date:

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a distribution company. It seeks to employ the beneficiary permanently in the United States as a computer operator. 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 8, 2002. The proffered wage as stated on the Form ETA 750 is \$18.38 per hour, which amounts to \$38,230.40 annually. The ETA 750B, signed by the alien beneficiary, who is a substitution for the original beneficiary, indicates that the alien has not worked for the petitioner.

On Part 5 of the visa petition, filed on March 16, 2005, it is claimed that the petitioner was established on January 1, 1995, employs two workers, has a gross annual income of \$1,048,602, and a net annual income of \$58,376. As evidence of its continuing financial ability to pay the certified wage of \$38,230.40 per year, the petitioner submitted copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2002, 2003, and 2004. They indicate that the petitioner files its returns using a standard calendar year. These tax returns contain the following information:

	2002	2003	2004
Ordinary Income ¹	\$ 29,784	\$ 15,931	\$ 3,303

¹ For the purpose of this review, ordinary income will be treated as net income.

Current Assets (Sched. L)	\$302,866	\$354,407	\$343,707
Current Liabilities	\$210,345	\$266,199	\$285,331
Net Current Assets	\$ 92,521	\$ 88,208	\$ 58,376

As shown in the table, besides net income, CIS will also examine a petitioner's net current assets as an alternative method of reviewing a petitioner's ability to pay a proposed wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² Current assets are found on line(s) 1(d) to 6(d) of Schedule L on a corporate petitioner's tax return and current liabilities are listed on line(s) 16(d) to 18(d). Net current assets represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. 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 director denied the petition on November 8, 2005, concluding that the petitioner's evidence did not demonstrate a continuing financial ability to pay the proffered wage of \$38,230.40 per year. The director apparently determined that the petitioner's current payroll did not demonstrate that the petitioner could or would pay the proffered wage. The director also questioned, but did not articulate a specific finding related to the beneficiary's work experience letters' dates appearing to overlap each other.

On appeal, counsel asserts that the letters' dates do not conflict as one letter relates to training that the beneficiary received in Iran. Upon review, the record reflects that the beneficiary was employed from 1999 to January 3, 2005 (the date she signed the ETA 750B) for [REDACTED]. As evidenced by copies of two letters contained in the file, she also acquired computer training from [REDACTED] which was completed in 2000, and also obtained computer training at the Rojan Institute in Iran, which was completed in December 2003. Although the translation of the Rojan Institute letter is ambiguous, we accept counsel's explanation that it simply means that she completed training. It is concluded that the beneficiary's required two years of employment experience as a computer operator is sufficiently established.

Counsel's reliance on the bank statements and tax returns of another entity is not persuasive. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) addressed whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the 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 may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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

² 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.

petitioner's ability to pay the proffered wage. Here, there is no indication that the petitioner has employed and paid wages to the beneficiary.

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 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). 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.

In this case, as set forth above, the petitioner had \$92,521 in net current assets in 2002; \$88,208 in net current assets in 2003, and \$58,376 in net current assets in 2004. The petitioner has had sufficient resources to pay the proffered wage in each of those years. Based on the evidence contained in the record, we do not find that the evidence warrants the director's determination that the petitioner does not have the ability or intent to pay the proffered salary.

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.