



U.S. Citizenship
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Services

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FEB 06 2007

FILE: WAC 05 066 52012 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



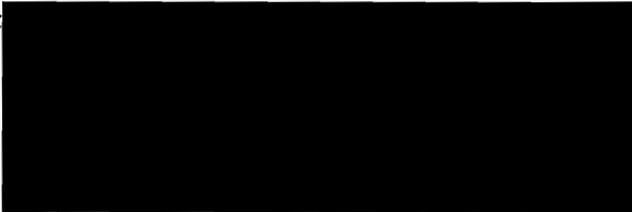
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

CC: 

DISCUSSION: The preference visa petition was denied by the Director (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 ready mix concrete delivery company. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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, the petitioner¹ submits additional evidence and asserts that it has established its 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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$21.27 per hour or \$44,241.60 per annum. The ETA 750B, signed by the beneficiary on March 25, 2001, indicates that he has worked for the petitioner since October 1995.

¹ The petitioner filed the appeal and will be treated as self-represented on appeal. A courtesy copy will be provided to counsel of record.

The preference petition, filed on January 6, 2005, indicates at Part 5 that the petitioner was established in 1927, claims a gross annual income of \$24,000, a net annual income of \$28,000, and currently employs fifty-five workers.

In support of its continuing ability to pay the proffered salary of \$44,241.60 per year, the petitioner initially supplied copies of its state quarterly wage reports for the last quarter of 2003 and the first three quarters of 2004. The third quarter of 2004 reflected that it carried 49 workers on its payroll. It is noted that the beneficiary's name appears on all of the quarterly wage reports. It is not clear if the social security number appearing beside the beneficiary's name is valid. The figures reflect that this individual was paid \$13,255 for the last quarter in 2003; \$9,817 for the first quarter in 2004; \$10,889.55 during the second quarter in 2004; and \$16,161.50 in the third quarter of 2004. These wages total \$50,123.05.

On May 16, 2005, the director requested additional evidence of the petitioner's ability to pay the certified salary beginning at the priority date and continuing until the present. He advises the petitioner that this evidence should consist of either copies of annual reports, federal tax returns, or audited financial statements and cover 2001 to the present. The director also requested a summary of monthly living expenses, assuming that the petitioner is a sole proprietorship. The director additionally requested documentation establishing that the beneficiary possesses two years of experience in the job offered as stipulated by the labor certification, and advising the petitioner that the relevant prior employer should describe the job, duties, and dates of the beneficiary's employment.

In response, the petitioner provided a letter signed by [REDACTED] the petitioner's vice-president. He states that the beneficiary has worked for the petitioner as a diesel mechanic since October 1995. He further describes the beneficiary's duties and adds that the offer of employment is permanent contingent upon satisfactory performance. [REDACTED] also states that a significant amount of paperwork is involved in making financial statements available and that sending them by mail would not be an effective method to provide review. He offers to provide an alternate arrangement by appointment with CIS.

On July 13, 2005, the director denied the petition. The director accepted the documentation of the beneficiary's experience as provided by [REDACTED], but noted that the petitioner had not provided any additional evidence of its ability to pay the proffered salary. The director found that the cumulative wage figures presented on the statements which the petitioner submitted into the record are not determinative of the petitioner's ability to pay the proffered wage as they represented funds already expended by the petitioner, rather than funds available to pay the proffered wage.

On appeal the petitioner submits copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, and 2004. The tax returns indicate that they were filed using a standard calendar year. They reflect the following:

	2001	2002	2003	2004
Ordinary Income ²	\$ 436,398	\$ 19,781	-\$ 7,903	\$ 662,432

² For the purpose of this review, ordinary income will be treated as net income.

Current Assets (Sched. L)	\$1,517,338	\$ 1,122,352	\$1,437,372	\$1,739,869
Current Liabilities (Sched. L)	\$ 672,084	\$ 703,046	\$ 921,775	\$ 943,301
Net Current Assets	\$ 845,254	\$ 419,306	\$ 515,597	\$ 796,568

Besides net income, CIS will examine a petitioner’s net current assets as a measure of a petitioner’s liquidity during a given period and as an alternative method to demonstrate its ability to pay the certified wage. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ They represent a measure of a petitioner’s liquidity during a given period and a alternative 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(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation’s year-end 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.

On appeal, the petitioner provides a letter, dated August 3, 2005, that is signed b [redacted] and addressed to the immigration organization that employed counsel. [redacted] recounts that the provision of the tax returns represents the most efficient way to establish the ability to pay with as little paper as possible. [redacted] then attaches a summary of some of the entries on each of the tax returns. His figures for net income are consistent with those listed above for 2001 and 2004, but the net income numbers for 2002 and 2003 are not those reflected on the corresponding tax returns and are not consistent with those noted by this office above.

It is noted that 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 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 petitioner’s ability to pay the proffered wage. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner’s net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period.

In this case, the underlying record indicates that the beneficiary claimed employment with the petitioner since 1995. The state quarterly wage reports filed by the petitioner showed the beneficiary’s name as one of the employees carried on the payroll. We believe that the director should have requested additional evidence from the petitioner to allow it the opportunity to document and clarify the actual level of compensation that may have been paid to the beneficiary during the relevant period. See 8 C.F.R. § 103.2(b)(8). Given this omission by the director, we believe sufficient latitude exists to examine the tax returns provided on appeal notwithstanding the petitioner’s failure to submit any of the requested financial information in response to the director’s request on May 16, 2005.

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.

It is noted that if a petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will also examine the net income figure or net current assets amounts, as referenced above, which are reflected on the petitioner's federal income tax return(s), 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) 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 taxable 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, in 2001, the petitioner established its ability to pay the proffered wage of \$44,241.60 because its net income of \$436,398 could easily cover payment of the certified salary.

In 2002, the petitioner's net current assets of \$419,306 could also cover payment of the beneficiary's wage offer and thus demonstrated the petitioner's ability to pay in this year.

Similarly, in 2003, although the petitioner's net income showed a loss, its net current assets of \$515,597 were more than enough to pay the proffered wage and establish its ability to pay in this year.

Finally, in 2004, the petitioner's reported net income of \$662,432 far exceeded the proffered salary of \$44,241.60 and demonstrated the petitioner's ability to pay the proposed offer during this period.

Accordingly, the AAO concludes that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

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.