



U.S. Citizenship
and Immigration
Services

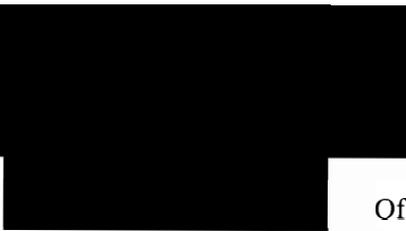
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JAN 30 2007

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

WAC-01-230-51640

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 employment-based preference visa petition was initially approved by the Director, California Service Center. After further review, the director served the petitioner with notice of intent to revoke the approval of the petition. In a Notice of Revocation the director ultimately revoked the approval of the Immigration Petition for Alien Worker (Form I-140). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be withdrawn, and the petition's approval will be reinstated.

The petitioner is a tire sales and auto repair company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. In his notice of revocation, 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 revoked the petition accordingly. The AAO affirmed the director's decision, noting that the petitioner failed to establish its ability to pay the proffered wage during the relevant years through wages paid to the beneficiary because the AAO cannot assume that all of the beneficiary's income for the years 1997 through 2001 was received from the petitioner without copies of W-2 forms, 1099 Miscellaneous Income forms, or other evidence; that the petitioner's net income for 1997 through 2001 was not sufficient to pay the proffered wage and for the two years 1997 and 2001 the net income was not sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage even if it were assumed that all of the beneficiary's income shown on his tax returns was received from the petitioner; and that the petitioner failed to establish its ability to pay the proffered wage through its net current assets for 1997 through 2001 because it did not submit Schedule Ls for 1997 through 1999, however, for 2000 and 2001 its net current assets would have been sufficient to pay the difference between wage actually paid to the beneficiary and the proffered wage if the beneficiary's income shown on his tax returns for 2000 and 2001 had been established as compensation from the petitioner.

On motion, counsel asserts that the petitioner had the ability to pay the proffered wage through wages actually paid to the beneficiary in 1997 and that the petitioner had the ability to pay the proffered wage in 2002 through 2004. Counsel submits new evidence to support his assertions. The relevant evidence newly submitted on motion includes the beneficiary's individual tax return for 1997, 2002, 2003 and 2004; the beneficiary's W-2 forms for 2002, 2003 and 2004; copies of checks issued for the beneficiary in 2003 and 2004; and the petitioner's tax returns for 1997, 2002 and 2003.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

The record shows that the motion 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.

As set forth in the director's June 2, 2003 notice of revocation and the AAO's April 1, 2005 decision, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 C.F.R. § 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 July 8, 1997. The proffered wage as stated on the Form ETA 750 is \$18.70 per hour (\$38,896 per year). On the Form ETA 750B, signed by the beneficiary on July 3, 1997, the beneficiary claimed to have worked for the petitioner since May 1994. The evidence in the record of proceeding shows that the petitioner is structured as a corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$581,000, to have a net annual income of \$30,000, and to currently employ four workers.

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 motion.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 record contains the beneficiary's individual tax returns for 1997 through 2002, the beneficiary's W-2 forms for 2002, 2003 and 2004, and copies of checks or paystubs in 2003 and 2004. The beneficiary's tax returns show that the beneficiary reported on Line 12 business income of \$18,250 in 1997, \$18,750 in 1998, \$19,475 in 1999, \$19,477 in 2000, \$22,750 in 2001 from his sole proprietorship with any W-2 forms or 1099 forms. Counsel does not submit any evidence to prove that each of these figures was the beneficiary's compensation of employment from the petitioner on motion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, counsel's reliance on the beneficiary's income reflected on his individual tax returns in determining the petitioner's ability to pay the proffered wage through wages actually paid to the beneficiary is misplaced. Therefore, the petitioner failed to establish that it hired and paid any compensation to the beneficiary in the years 1997 through 2001. The beneficiary's individual tax returns and W-2 forms show that the petitioner paid the beneficiary wages of \$19,000 in 2002, \$24,000 in 2003 and \$24,000 in 2004. The record also contains copies of checks issued by the petitioner for the beneficiary in 2002 through 2004, however, the petitioner did not submit any evidence showing that these checks were paid to the beneficiary beyond the amounts reflected on the beneficiary's W-2 forms. The petitioner also submitted W-2 forms for someone else. 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. Therefore, the petitioner failed to demonstrate that it paid the beneficiary the full proffered wage during the years 1997 through 2004, but partial wages in 2002, 2003 and 2004. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage in each of years 1997 through 2001, and the difference of \$19,896 in 2002, \$14,896 in 2003 and \$14,896 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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 letter from the petitioner's accountant asserts that the depreciation expense is not actual expenses, thus should be considered as part of ability to pay the proffered wage in the instant case. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 contains the petitioner's tax returns for 1997 through 2003. These tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$38,896 per year from the priority date in 1997 and the difference between wages actually paid to the beneficiary and the proffered wage in 2002 onwards:

- In 1997, the Form 1120 stated a net income¹ of \$(68,428).
- In 1998, the Form 1120 stated a net income of \$30,128.
- In 1999, the Form 1120 stated a net income of \$43,356.
- In 2000, the Form 1120 stated a net income of \$31,921.
- In 2001, the Form 1120 stated a net income of \$(29,802).
- In 2002, the Form 1120 stated a net income of \$(29,140).
- In 2003, the Form 1120-A stated a net income² of \$2,457.

Therefore, for the years 1997 through 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$38,896 per year except for 1999; the petitioner did not have sufficient net income to pay the difference of \$19,896 in 2002, and \$14,896 in 2003 between wages actually paid to the beneficiary and the proffered wage.

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

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

² Taxable income before net operating loss deduction and special deductions as reported on Line 24 of the Form 1120-A.

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.

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.

- The petitioner's net current assets during 1997 were \$128,180.
- The petitioner's net current assets during 1998 were \$148,190.
- The petitioner's net current assets during 2000 were \$267,994.
- The petitioner's net current assets during 2001 were \$222,172.
- The petitioner's net current assets during 2002 were \$184,937.
- The petitioner's net current assets during 2003⁴ were \$191,875.

Therefore, for the years 1997 through 2003, the petitioner had sufficient net current assets to pay the proffered wage.

The evidence presented in the tax returns as submitted by the petitioner demonstrates that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor to the present. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has established that it had the continuing ability to pay the beneficiary 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The motion to reopen is granted. The previous decision of the AAO, dated April 1, 2005, is withdrawn. The petition's approval is reinstated.

⁴ A corporation's year-end current assets are shown on Form 1120-A, Part III, Balance Sheets per Books, lines 1 through 6 and its year-end current liabilities are shown on lines 13 and 14.