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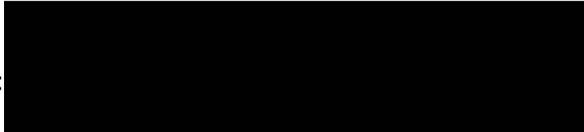
**U.S. Citizenship
and Immigration
Services**

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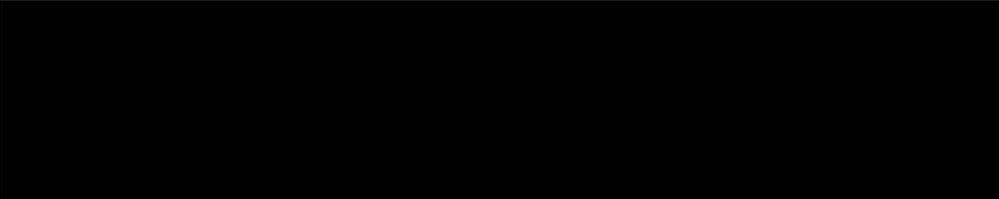
FILE: LIN 06 018 51513 Office: NEBRASKA SERVICE CENTER Date: JUL 25 2007

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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consultancy. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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.

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

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 7, 2000. The proffered wage as stated on the Form ETA 750 is \$57,400 per year.

The Form I-140 petition in this matter was submitted on October 24, 2005. On the petition, the petitioner stated that it was established during 1980 and that it employs ten workers. The petition states that the petitioner's gross annual income is \$1,137,732 and that its net annual income is \$162,880. On the Form ETA

750, Part B, signed by the beneficiary on October 7, 2005, the beneficiary claimed to have worked for the petitioner since August 2005. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Dayton, Ohio.

The AAO reviews *de novo* issues raised on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) Form 941 quarterly returns, (3) copies of monthly statements pertinent to the petitioner's bank accounts, and (4) a letter and other documents pertinent to the petitioner's placement of web designers with end-users. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on December 27, 1991, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$228,224 as its Schedule K, Line 23 Income. At the end of that year the petitioner had current assets of \$363,298 and current liabilities of \$0, which yields net current assets of \$363,298.

During 2002 the petitioner declared Schedule K, Line 23 Income of \$13,708. At the end of that year the petitioner had current assets of \$20,499 and current liabilities of \$7,299, which yields net current assets of \$13,200.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$13,206. At the end of that year the petitioner had current assets of \$32,443 and current liabilities of \$6,576, which yields net current assets of \$25,867.

During 2004 the petitioner declared Schedule K, Line 23 Income of \$181,172. At the end of that year the petitioner had current assets of \$210,362 and current liabilities of \$4,105, which yields net current assets of \$206,257.

The quarterly returns provided cover the last quarter of 2001; all four quarters of 2002, 2003, and 2004; and the first two quarters of 2005. They show that the petitioner paid total wages of \$237,641.52, \$223,530, \$209,487.60, \$214,494, \$186,271.96, \$192,706.28, \$167,060.63, \$164,778.13, \$178,687.91, \$143,303.98, \$138,672.32, \$140,493.24, \$156,278.32, \$138,850.88, and \$147,067.82 during those quarters, respectively.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The documents pertinent to the petitioner's placement of its employees show that it placed one employee for \$50 per hour, one for \$55 per hour, and one for \$80 per hour. The duration of those placements is unknown to this office.

The acting director denied the petition on December 6, 2005.

On appeal counsel stated that the petitioner is able to show its continuing ability to pay the proffered wage beginning on the priority date with bank statements, citing a May 4, 2004 memorandum from William R. Yates, the Associate Director for Operations of Citizenship and Immigration Service.

In a letter dated December 27, 2005 and submitted on appeal, the petitioner's president stated that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date, citing the petitioner's bank statements and a credit line as evidence of that ability. The petitioner's president implies that the petitioner's bank balances represent additional funds beyond those shown on the tax returns with which the petitioner could pay wages, and urges that the sum of the petitioner's net current assets and its monthly bank balances is a statistic that shows ability to pay the proffered wage.

The petitioner's president cites 8 C.F.R. § 204.5(g)(2) and a May 4, 2004 memorandum from the Associate Director for Operations for the proposition that bank account balance statements are acceptable evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's president noted that the petitioner's low end-of-year net current assets during 2002 and 2003 followed, and were occasioned by, the petitioner's payment of a large Schedule K, Line 20 distribution of the petitioner's assets to its shareholders during 2002. Counsel stated that the petitioner could have retained those distributed assets and thus had net current assets sufficient to show the petitioner's ability to pay the proffered wage during those years.

Further, the petitioner's president asserted that the beneficiary would generate sufficient revenue to cover the proffered wage. Further still, the petitioner's president noted that the per hour fee the petitioner charges for the employees it provides to other companies exceeds the hourly wage it pays them, and urges that this demonstrates that the petitioner will be able to pay the proffered wage. The petitioner's president asserts that a software engineer will generate approximately \$100,000 annually in revenue, but provided no evidence in support of that assertion.

Finally, the petitioner's president asserted that the nature of the petitioner's business and the information technology skill of its owners demonstrate that it will be able to pay the proffered wage.

Counsel's reliance on credit available to the petitioner is misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel's reliance on the bank statements in this case is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. The memorandum of the Associate Director states that bank statements may be provided in certain instances, but was not intended to, and did not, alter the governing regulations. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.² Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Even if bank balances were an appropriate index of a petitioner's ability to pay the proffered wage, the addition of the petitioner's bank balances to its net current assets would be inappropriate. A corporate taxpayer's end-of-year net current assets include its end-of-year cash, including cash held in bank accounts. To add bank balances to net current assets would be duplicative, at least in part.

The petitioner asserted that the beneficiary would generate revenue in excess of the amount necessary to pay his wages. This office is willing to consider revenue that the beneficiary will demonstrate, but only if the petitioner demonstrates the amount the beneficiary would generate, and the expenses that employing the beneficiary would generate and the amount it would be offset by expenses.

In the instant case, the petitioner has demonstrated that it placed three of its employees for hourly charges considerably greater than the hourly amount of the proffered wage³ in this case. Whether the petitioner's employees are always placed at fees greater than the proffered wage has not been demonstrated. Whether the petitioner has historically placed all of its employees, or whether they are sometimes idle for some period is unknown to this office. Whether the petitioner has sufficient additional customers waiting for the petitioner's services that it would be able to place an additional employee is also unknown.

If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

³ The proffered wage in this case is stated on the Form ETA 750 as \$57,400 per year. That amount, paid annually for 40 hours of work per week, equals \$27.60 per hour.

Furthermore, a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a later date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). The petitioner must demonstrate not only the ability to pay the proffered wage prospectively, but that it has had that ability since the priority date.

The assertion that the petitioner could have retained the assets it distributed during 2002 and then showed the ability to pay the proffered wage during 2002 and 2003 with its net current assets does not convince this office. Absent a compelling reason, this office will not accept the argument that a petitioner has demonstrated its ability to pay the proffered wage because it could have handled its finances differently and shown either greater net income or greater net current assets.

The petitioner paid a distribution to, and at the behest of, its shareholders. A distribution may or may not be optional. The company may be obliged, by contract for instance, to pay it. The shareholders may require some particular amount. One cannot, by looking at an S-corporation's tax returns, determine whether a company could have retained its assets, rather than paying them out as a distribution.

CIS policy is that net current assets greater than the annual amount of the proffered wage demonstrate a petitioner's ability to pay the proffered wage during a given year. This office will not adjust a petitioner's net current assets based on the assertion that they would have been higher if the petitioner had not paid a distribution.

The petitioner argues that the nature of its business and the expertise of its owners demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In a clear case, such as that illustrated by *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), this office will find that the totality of circumstances demonstrates that a petitioner is able to pay additional wages, even though its tax returns, in themselves, do not sufficiently support that finding. In the instant case, the petitioner asserts that its owners are unusually adroit at information technology. The evidence in support of that assertion, however, is essentially self-certification. That is, it includes information the petitioner published about itself on its web page and the petitioner's president's statements on appeal, including that the petitioner had provided IT professionals to Fortune 500 companies, et cetera. It includes no extrinsic evidence. Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In *Matter of Sonogawa* the petitioner was a couturière whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a dressmaker. The instant record includes no such independent evidence of the petitioner's preeminence. The petitioner's asserted skill in information technology does not demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 examine whether the petitioner employed 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, although the beneficiary claims to have worked for the petitioner, the petitioner submitted no evidence of wages it paid to the beneficiary since the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities

projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$57,400 per year. The priority date is June 7, 2000.

The petitioner submitted no evidence pertinent to its ability to pay the proffered wage during 2000. The petitioner has not demonstrated its ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year, however, the petitioner had net current assets of \$363,298. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$13,708. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$13,200. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$13,206. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$25,867. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 the petitioner declared ordinary income of \$181,172. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2004.

The petition in this matter was submitted on October 24, 2005. On that date the petitioner's 2005 tax return was unavailable. No evidence pertinent to 2005 was subsequently requested. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

LIN 06 018 51513

Page 9

beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.