



U.S. Citizenship
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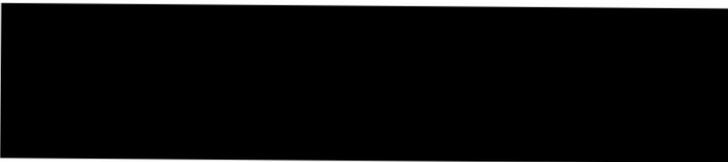


FILE: WAC 05 159 52957 Office: CALIFORNIA SERVICE CENTER Date: JUN 19 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, California 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 an automotive parts recycler. It seeks to employ the beneficiary permanently in the United States as an automotive parts repairer/rebuilder. 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.

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 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.

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 April 15, 2002. The proffered wage as stated on the Form ETA 750 is \$19.15 per hour, which equals \$39,832 per year.

The Form I-140 petition in this matter was submitted on May 18, 2005. On the petition, the petitioner stated that it was established during 1997 and that it employs five workers. The petition states that the petitioner's gross annual income is \$250,000 and that its net annual income is \$25,000.¹ On the Form ETA 750, Part B,

¹ The tax returns submitted show gross receipts of \$181,818, \$110,545, \$226,157, and \$216,030 during 2001, 2002, 2003, and 2004, respectively. They show taxable income before net operating loss deduction and special deductions of \$0, -\$1,525, \$247, and \$3,081. The evidence in the record does not support the

signed by the beneficiary on March 18, 2002, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Lancaster, California.

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.²

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) California Form DE-6 quarterly wage reports, (3) copies of monthly statements pertinent to the petitioner's bank account, (4) a copy of the petitioner's lease, (5) Form REG Notices to Dismantler, and (6) an aerial photo. 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 June 8, 2000, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$0. The corresponding Schedule L shows that at the end of that year the petitioner declared current assets of \$2,577 and no current liabilities, which yields net current assets of \$2,577. This office notes, however, that because the priority date is April 15, 2002, evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2002 the petitioner declared a loss of \$1,525 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$247. The corresponding Schedule L shows that at the end of that year the petitioner declared current assets of \$7,311 and no current liabilities, which yields net current assets of \$7,311.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,081. The corresponding Schedule L shows that at the end of that year the petitioner declared current assets of \$8,991 and no current liabilities, which yields net current assets of \$8,991.

The petitioner's quarterly wage reports cover the last three quarters of 2002, all four quarters of 2003 and 2004, and the first three quarters of 2005. During those quarters the petitioner employed from two to five workers, except during the last quarter of 2002 when it had no employees. The petitioner paid wages during those quarters of between \$3,150 and \$11,100, except during the last quarter of 2002 when it paid no wages.

petitioner's assertion that its gross annual income is \$250,000 and its net annual income is \$25,000.

² 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).

Those wage reports do not show that the petitioner employed the beneficiary during any of those quarters. During 2003 and 2004, the years for which all four quarterly reports were submitted, the petitioner paid total annual wages of \$32,400 and \$42,600, respectively.

The director denied the petition on January 14, 2006.

On appeal, counsel asserted that the evidence previously submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel stated that the petitioner's business was depressed because the petitioner closed from August 2002 to January 2003 due to "Highly sensitive family matter." Counsel did not elaborate. Counsel also stated that the petitioner is willing to post a performance bond of twice the annual amount of the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) makes no allowance for a petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date by posting a bond.

Counsel's statement that the petitioner closed for a period since the priority date based on some unspecified type of family difficulty, rather than for a business reason, is insufficient to support the burden of proof. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The record does not demonstrate that the petitioner's poor performance was the result of family problems rather than business problems, nor does it demonstrate that the poor performance is uncharacteristic and unlikely to recur.

The aerial photograph and the petitioner's lease demonstrate that the petitioner does, in fact, operate an automotive parts recycling business. The aerial photograph demonstrates that the petitioner had numerous vehicles on its lot. The dismantling notices show that the petitioner dismantled approximately 189 vehicles from June 25, 2004 to September 22, 2005. That evidence does not, however, demonstrate that the petitioner is able to pay an additional \$39,832 in wages, nor any other amount.

Counsel's reliance on the bank statements in this case is 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.³

³ 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.

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.

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, the petitioner did not establish that it employed and paid the beneficiary.

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 \$39,832 per year. The priority date is April 15, 2002.

During 2002 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 net income during that year. At the end of that year the petitioner had net current assets of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence to demonstrate that it had any other funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions, its net income, of \$247. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$7,311. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence to demonstrate that it had any other funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2003.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions, its net income, of \$247. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$7,311. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence to demonstrate that it had any other funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2004.

The petition in this matter was submitted on May 18, 2005. On that date the petitioner's 2005 tax return was unavailable. On October 11, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

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

The petitioner failed to demonstrate that the petitioner had the ability to pay the proffered wage during 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.