



U.S. Citizenship
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MAR 14 2007

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

LIN-05-037-52741

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a computer security coordinator (Unix systems administrator). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal 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 August 12, 2005 denial, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 DOL. 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The instant petition is for a substituted beneficiary.¹ Here, the original Form ETA 750 was accepted on April 3, 2003. The proffered wage as stated on the Form ETA 750 is \$70,000 per year. The Form ETA 750 states that the position requires Bachelor of Science Degree in Computer Science or computer related field or equivalent and five years of experience in the job offered or in the related occupation of enterprise

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

environment. The I-140 petition was submitted on November 18, 2004. On the petition, the petitioner claimed to have been established in 2002, to have a gross annual income of \$1.2 million, and to currently have 17 employees. With the petition, the petitioner submitted a copy of the original Form ETA 750² and a new Form 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on October 26, 2004, the beneficiary claimed to have worked for the petitioner since August 2004.

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 appeal.³ Relevant evidence in the record includes the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2003 and 2004, and Form 1120X Amended U.S. Corporation Income Tax Return for 2003 and 2004, the petitioner's bank statements for its business checking account covering from January 2004 to May 2005, the petitioner's financial statements as of December 31, 2003, the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2004, the petitioner's payroll records, the beneficiary's W-2 forms and pay stubs for 2004 and 2004, and W-2 forms and payroll records for other beneficiaries. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

On appeal, counsel submits amended tax returns for 2003 and 2004 and asserts that amended tax returns with [REDACTED]'s method of accounting and re-calculation show that the petitioner had the ability to pay the proffered wage to all the beneficiaries from the priority date with net current assets.

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 petitioner did not claim and submit any evidence that the petitioner paid any compensation to the beneficiary in 2003. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The priority date in the instant case is April 3, 2003. Therefore, the petitioner failed to establish its ability to pay the proffered wage

² The record indicates that the original copy of the certified Form ETA 750 was filed with another petition and the petition was denied.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

for the year of the priority date through the examination of wages paid to the beneficiary. However, the petitioner submitted the beneficiary's W-2 forms for 2004, and paystubs for 2004 and 2005. Counsel asserts that the petitioner has been paying the beneficiary at the proffered wage rate since August 2004. However, these documents show that the petitioner paid the beneficiary \$21,000 in 2004 and has paid \$48,000 as of August 31, 2005. The evidence establishes that the petitioner has been paying the beneficiary at the proffered wage rate in 2005, however, it does not establish that the petitioner paid the full proffered wage in 2004, instead it paid the partial proffered wage. The petitioner is obligated to demonstrate that it could pay the full proffered wage in 2003 and the difference of \$49,000 between wages actually paid to the beneficiary and the proffered wage in 2004.⁴ Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 court 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

⁴ [REDACTED] used prorated wage for 2003 to establish the petitioner's ability to pay in his letter dated September 6, 2005. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The record contains the petitioner's tax returns for 2003 and 2004. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$70,000 in 2003 and the difference of \$49,000 between wages actually paid to the beneficiary and the proffered wage in 2004:

- In the year of 2003, the Form 1120 stated a net income⁵ of \$44,342.
- In the year of 2004, the Form 1120 stated a net income of \$47,805.

Therefore, for the years of 2003 and 2004, the petitioner did not have sufficient net income to pay 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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.⁶ 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 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 2003 were \$33,561.
- The petitioner's net current assets during 2004 were \$51,612.

Therefore, for the year of 2003, the petitioner had insufficient net current assets to pay the proffered wage of \$70,000 while the petitioner's net current assets were sufficient to pay the difference of \$49,000 between wages actually paid to the beneficiary and the proffered wage in 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the 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.

⁵ Taxable income before net operating loss deduction and special deductions on Line 28 of the Form 1120.

⁶ 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 petitioner asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. On appeal, the petitioner submits an analysis letter with supporting documents from [REDACTED]. While the petitioner filed its tax returns using cash accounting method for 2003 and 2004, [REDACTED] used accrual accounting method to amend the tax returns for these two years. The amended tax returns increased the petitioner's net current assets from \$33,561 to \$269,282 for 2003 (eight times) and from \$51,612 to \$313,612 for 2004 (six times) without changing the petitioner's income.

The AAO does not concur with [REDACTED] argument. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS. This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

In addition, [REDACTED] amended tax returns indicate in its Schedule K that the amended tax returns are still using "Cash" accounting method instead of "Accrual" method although he asserts in his analysis that the accounting method used in amended tax returns was changed. One of the changes in the amended tax return for 2003 is that the petitioner's cash amount at the end of the year 2003 was changed from \$33,561 to \$121,262. [REDACTED] did not explain how the petitioner's cash amount at the end of the year could change depending on the accounting method used, and on what documents he based the change. The amended tax returns added accounts receivable of \$202,000 for 2003 and \$340,000 for 2004 and accounts payable of \$54,000 for 2003 and \$78,000 for 2004. [REDACTED] did not explain how every added figure is rounded to an even thousand. These figures cast a doubt on reliability of the amended tax return calculations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, the AAO cannot consider the petitioner's amended tax returns for 2003 and 2004 as primary regulatory-prescribed evidence to establish the petitioner's ability to pay in the instant case.⁷

⁷ Additionally, because the petitioner amended its returns in the middle of proceedings, CIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. The amended returns submitted by the petitioner simply indicate that were received by the IRS, the returns are not certified copies. A petitioner may not make material changes to a petition in an effort to make a deficient

The record of proceeding contains the petitioner's bank statements. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The record of proceeding also contains the petitioner's financial statements for 2003 prepared by Nelson & Nelson, Certified Public Accountants, LLP. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Furthermore, CIS records show that the petitioner has filed 25 Immigrant Petition for Alien Worker (Form I-140) and numerous I-129 nonimmigrant petitions since 2003⁸. Many of them have already been approved. Therefore, the petitioner must show that it had sufficient income or net current assets to pay all the wages from the priority date to the date each of the beneficiaries obtains the permanent residence. Since the petitioner has not shown the ability to pay for the instant beneficiary in 2003, it is doubtful it can show the ability to pay on the other beneficiaries. Therefore, the AAO did not review the evidence in the record of proceeding to determine if the petitioner also demonstrates its ability to pay all other beneficiaries their proffered wages.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in 2003, the year of the priority date.

petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

⁸ The petitioner filed 9 I-140 immigrant petitions in 2003, 5 in 2004, 3 in 2005, 7 in 2006 and 1 in 2007. The petitioner also filed 176 I-129 nonimmigrant petitions during the years 2003 through 2007 despite the fact that it has 17 employees. [REDACTED]'s assertion that the petitioner has the ability to pay four beneficiaries fails to take into account all of the petitions filed by the petitioner.

The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage beginning on the priority date.

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 not met that burden.

ORDER: The appeal is dismissed.