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FILE:

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EAC 05 014 50220

Office: VERMONT SERVICE CENTER

Date: MAR 21 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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification 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.

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.

8 C.F.R. § 204.5(g)(2) states:

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 either 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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. See 8 CFR § 204.5(d). Here, the petition was filed with CIS on October 15, 2004. The proffered wage as stated on the Form ETA 750 is \$1,062.71 per week, which equals \$55,260.92 per year.

On the petition, the petitioner stated that it was established during 1891 and that it employs 2,700 workers. The petition states that the petitioner's gross annual income is \$300 million. The space reserved for the petitioner to state its net income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on October 6, 2004, 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 Jamaica, New York.

The AAO reviews *de novo* issues raised in decisions challenged 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) audited financial statements, (2) check stubs showing wage payments by the petitioner to the beneficiary, and (3) a letter dated August 19, 2005 from the petitioner's vice-president of finance. 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 audited financial statements provided show the petitioner's performance during 2003 and 2004 and its assets and liabilities at the end of those years.

During 2003 the petitioner had net cash from operating activities of \$9,104,000, net cash from investing activities of \$515,000, and net cash used in financing activities of \$10,591,000, which yields a decrease in cash and cash equivalents (net loss) during that year of \$972,000. At the end of that year the petitioner had current assets of \$68,165,000 and current liabilities of \$79,415,000, which yields negative net current assets. This office notes that, because the priority date of the instant petition is October 15, 2004 evidence pertinent to the petitioner's finances during previous years is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date.

During 2004 the petitioner had net cash from operating activities of \$6,215,000, net cash from investing activities of \$7,047,000, and net cash used in financing activities of \$14,553,000, which yields a decrease in cash and cash equivalents (net loss) during that year of \$1,291,000. At the end of that year the petitioner had current assets of \$61,302,000 and current liabilities of \$72,845,000, which yields negative net current assets.

The check stubs show that between June 10, 2005 and August 26, 2005 the petitioner's paid the beneficiary wages of \$13,924.56. The petitioner's vice-president's August 19, 2005 letter states that the petitioner has the ability to pay the proffered wage.

The director denied the petition on August 8, 2005. On appeal, counsel submitted the pay stubs and the August 19, 2005 letter described above, which had not previously been in the record. Counsel asserted that

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 record as now constituted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel noted that the petitioner has approximately 2,500 full-time employees.

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 Sonegawa*, 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 established that it employed and paid the beneficiary \$13,924.56 between June 10, 2005 and August 26, 2005. The petitioner did not demonstrate that it paid any wages to the beneficiary at any other 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, 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).

Showing that the petitioner's gross receipts 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 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, however, 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 the 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, those expected to be 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 net of 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 typically² 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 \$55,260.92 per year. The priority date is October 15, 2004.

The petitioner's audited financial statements show that during 2004 it had a net loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. 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's audited financial statements do not show that it was able to pay the proffered wage during 2004.

As was noted above, however, 8 C.F.R. § 204.5(g)(2) states that,

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.

The visa petition states that the petitioner employs 2,700 workers. The petitioner's audited financial statements show that the petitioner paid approximately \$150 million in salaries and wages during both 2003 and 2004. That amount is consistent with employment of approximately 2,700 workers. The August 19, 2005 letter from the petitioner's vice-president's states that the petitioner is able to pay the proffered wage. Under these circumstances this office finds that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date pursuant to the requirements of 8 C.F.R. § 204.5(g)(2).³

² The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

³ This office notes that, as the August 19, 2005 letter was provided on appeal, the record as constituted when the decision of denial was issued did not include a letter from a financial officer of the petitioner stating that the petitioner had the ability to pay the proffered wage. As the petitioner's financial statements were the only relevant evidence then in the record, and they do not support the petitioner's ability to pay the proffered wage, the decision of denial was correct when entered. The basis for that denial was overcome on appeal.



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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 met that burden.

ORDER: The appeal is sustained. The petition is approved.