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U.S. Citizenship
and Immigration
Services

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FILE:

EAC-03-139-51483

Office: VERMONT SERVICE CENTER

Date: **SEP 10 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 preference visa petition¹ was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tire recycling company. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic (head diesel-engine 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 (DOL). The director determined that the petitioner had not established its 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 March 23, 2006 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)(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).

¹ The instant petition is the second petition filed by the petitioner for the beneficiary. The petitioner filed another I-140 Immigrant Petition (EAC-02-141-50341) on behalf of the beneficiary on March 18, 2002 based on the same labor certification and the petition was denied by the Vermont Service Center on January 9, 2003 because the director determined that the petitioner failed to establish its ability to pay the proffered wage.

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$21.43 per hour (\$44,574.40 per year). On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$2 million, and to currently employ 32 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 appeal². On appeal counsel submits bank statements for the petitioner's checking account covering the months from May 2001 to December 2001 and the petitioner's corporate tax return for fiscal year 2003. Other relevant evidence in the record includes the petitioner's corporate tax returns for fiscal years 2000 and 2002, and Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner's bank statements show average balances enough to pay the proffered wage on a monthly basis and that the petitioner's depreciation combined with net income is in excess of the proffered wage.

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 submit any documentary evidence to show that it employed and paid the beneficiary in the relevant years from the priority date of April 24, 2001 to the present. The petitioner's 941 form shows that the petitioner paid its employees. However, in general, wages already paid to others including the owners of the petitioner 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. The petitioner has not established that it paid the beneficiary the proffered wage from the priority date in 2001 onwards. The petitioner is obligated to

² 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).

demonstrate that it could pay the full proffered wage in 2001 through the present with its net income or its net current assets.

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 contrary to the petitioner's assertions. 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. Counsel claims that the petitioner's depreciation should be added back to net income and its net income combined with depreciation yielded an amount that was in excess of the proffered wage. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. Contrary to counsel's argument, the court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that CIS 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 petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for fiscal years 2000, 2002 and 2003. The record also contains the petitioner's corporate income tax return for fiscal year 2001 submitted with the previous petition (EAC-02-141-50341). According to the tax returns, the petitioner is structured as a C corporation and its fiscal year runs from May 1 to April 30. The priority date in the instant case is April 24, 2001, and thus the petitioner's tax return for its fiscal year of 2000 (covering from May 1, 2000 to April 30, 2001) is the tax return for the year of the priority date. The petitioner's tax returns for its fiscal years 2000 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$44,574.40 per year from the priority date:

In the fiscal year 2000 (5/1/00-4/30/01), the Form 1120 stated a net income³ of \$(51,458).

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

- In the fiscal year 2001 (5/1/01-4/30/02), the Form 1120 stated a net income of \$58,220.
- In the fiscal year 2002 (5/1/02-4/30/03), the Form 1120 stated a net income of \$32,944.
- In the fiscal year 2003 (5/1/03-4/30/04), the Form 1120 stated a net income of \$17,376.

Therefore, while the petitioner's net income in the fiscal year 2001 was sufficient to pay the beneficiary the proffered wage, for the fiscal years 2000, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$44,574.40.

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.⁴ 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 its fiscal year 2000 were \$(141,204).⁵
- The petitioner's net current assets during its fiscal year 2002 were \$(32,277).⁶
- The petitioner's net current assets during its fiscal year 2003 were \$671.

Therefore, for the fiscal years 2000, 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 continuing ability to pay the beneficiary the proffered wage as of the priority date to the present except for the fiscal year 2001 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submits bank statements for the petitioner's business checking

⁴According 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.

⁵ The director erroneously stated that the petitioner's net current assets were \$(151,589) in fiscal year 2000. However, this error does not affect the ultimate outcome of the appeal.

⁶ The director erroneously stated that the petitioner's net current assets were \$(53,216) in fiscal year 2002. However, this error does not affect the ultimate outcome of the appeal.

account covering the months from May 2001 to December 2001 and asserts that the petitioner's bank statements show average balances enough to pay the proffered wage on a monthly basis. Counsel's reliance on the balance in the petitioner's checking 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.

Counsel'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 from the day the Form ETA 750 was accepted for processing by the Department of Labor to the present except for 2001.

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 not been met.

ORDER: The appeal is dismissed.