



U.S. Citizenship
and Immigration
Services

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FILE:

WAC 02 049 52582

Office: CALIFORNIA SERVICE CENTER

Date: JAN 02 2008

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, California Service Center, revoked approval of the visa petition in this matter, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a home health agency. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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 that the job offer had not been open to U.S. workers as was alleged in obtaining DOL approval of the Form ETA 750. The director revoked approval of the visa 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.

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 April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$24.94 per hour, which equals \$51,875.20 per year.

The Form I-140 petition in this matter was submitted on November 23, 2001. On the petition, the petitioner stated that it was established during 1995 and that it employs 50 workers. The petition states that the petitioner's gross annual income is \$949,871. The space reserved for the petitioner to report its net accrual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on March 23, 2001, the

beneficiary claimed to have worked for the petitioner since January 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Northridge, 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.¹

In the instant case the record contains (1) a portion of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, (2) the petitioner's 2001, 2002 and 2003 Form 1120, U.S. Corporation Income Tax Return, (3) copies of the beneficiary's 2001, 2002, 2003, and 2004 Form W-2 Wage and Tax Statements,² (4) photocopies of paycheck stubs from 2004 and 2005, and (5) the petitioner's California Form DE-6 Wage Reports for the third and fourth quarters of 2004. 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.

As to the issue of whether the proffered position was open to U.S. workers, a Notice of Intent to Revoke issued on July 8, 2005 states that at a January 31, 2005 interview the beneficiary stated that he learned about the proffered position from his mother, whom the petitioner previously employed. The Notice of Intent to Revoke also states that the proffered position is a new position, rather than a pre-existing vacated position. From this evidence the director drew the conclusion that the proffered position was not open to U.S. workers.

The petitioner's tax returns show that it is a corporation, that it incorporated on August 4, 1995, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2000 the petitioner declared a loss of \$3,232 as its taxable income before net operating loss deductions and special deductions. Because the corresponding 2000 Schedule L was not included with the portion of the tax return submitted this office is unable to compute the petitioner's end-of-year net current assets. This office notes, however, that because the priority date of the visa petition is April 20, 2001 evidence pertinent to the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$27,855. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$9,521. At the end of that year the petitioner's current liabilities exceeded its current assets.

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).

² Additional portions of the beneficiary's tax returns were submitted, but have no relevance to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$102,383. At the end of that year the petitioner had current assets of \$184,430 and current liabilities of \$144,467, which yields net current assets of \$39,963.

The pay stubs provided show that the petitioner issued paychecks to the beneficiary bimonthly and cover the pay periods ending December 15, 2004, December 31, 2004, and January 15, 2005. The gross pay per pay period varied from \$1,590 to \$1,616.50. The December 15, 2004 stub shows year-to-date gross earnings of \$38,332.53. The December 31, 2004 pay stub shows year-to-date pay of \$1,590, which was also the beneficiary's pay for that pay period, indicating that the beneficiary's gross pay for that period was charged to 2005. The January 15, 2005 pay stub shows gross pay for the preceding pay period of \$1,603.25 and year-to-date gross pay of \$3,193.25.

The beneficiary's 2001, 2002, 2003, and 2004 W-2 forms from the petitioner show that the petitioner paid the beneficiary wages of \$47,451.65, \$53,673.07, \$27,715.39, and \$38,332.53 during those years, respectively.

The California wage reports for the second, third, and fourth quarters of 2004 show that the petitioner employed 30, 21 and 35 workers during those quarters, respectively. The petitioner paid total wages of \$303,593.15, \$260,393.01, \$360,414.22 during those quarters, respectively. Those wage reports show that the petitioner paid the beneficiary \$10,338.75 during the last quarter of 2004, but do not show that it paid him any wages during the previous two quarters.

The director found that the evidence did not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date³ and showed that the petitioner had violated DOL regulations in recruiting the beneficiary without first seeking to employ a U.S. worker. The petitioner revoked approval of the visa petition on October 18, 2005.

In a response to a notice of intent to revoke counsel stated, "The priority date of April 20, 2001 means the Petitioner must show the ability to pay \$32,920,20 for 2001." Although counsel did not show any calculations, he appears to be indicating that the amount of the proffered wage that the petitioner must show the ability to pay during that year must be prorated to reflect that a portion of the year had transpired on the priority date. The petitioner performed other calculations pertinent to the petitioner's ability to pay the proffered wage during various years and concluded that it had demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

³ In discussing the W-2 forms submitted the director stated,

The petitioner did not specify the difference on the salaries submitted from 2002 – 2004. Therefore, the W-2's are insufficient to establish the ability to pay the beneficiary wages because of the inconsistencies in the fluctuation of the yearly salaries."

Although this office does not entirely follow the director's reasoning it appears that the director declined to consider the amounts shown on the W-2 forms because they varied from year to year. This office will, nevertheless, consider the amounts shown on those W-2 forms.

On appeal, counsel asserted, "The Petitioner's ability to pay the pro-offered [sic] wage has already been established." Counsel submitted no additional evidence or argument pertinent to the proffered wage.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the 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), the petitioner has not submitted such evidence.

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 established that it paid the beneficiary \$47,451.65, \$53,673.07, \$27,715.39, and \$38,332.53 during 2001, 2002, 2003, and 2004, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years.

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 \$51,875.20 per year. The priority date is April 20, 2001.

The petitioner paid the beneficiary \$47,451.65 during 2001 and is obliged to show the ability to pay the \$4,423.55 balance of the proffered wage. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$27,855. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$53,673.07 during 2002. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$27,715.39 during 2003 and must show the ability to pay the \$24,159.81 balance of the proffered wage during that year. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$102,383. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner demonstrated that it paid the beneficiary \$38,332.53 during 2004 and would ordinarily be obliged to show the ability to pay the balance of the proffered wage. The petition in this matter, however, was submitted on November 23, 2001. On that date the petitioner's 2004 tax return was unavailable. Although the July 8, 2005 Notice of Intent to Revoke issued in this matter allowed the petitioner to submit additional evidence pertinent to its financial condition, that notice did not rely on the petitioner's ability to

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

pay the proffered wage during 2004. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2004 and later years. The petitioner demonstrated the ability to pay the proffered wage during each of the salient years and has overcome that basis for revoking approval of the instant visa petition.

The remaining basis for revoking approval of the approved visa petition is the finding that the position was not open to U.S. workers as required by 20 C.F.R. § 656.20(c)(8). In making that finding the director relied upon a statement by the beneficiary that his mother informed him that the position was open, that the beneficiary's mother previously worked for the petitioner, and that the proffered position is a new position. This office finds that the evidence relied upon by the director in revoking approval of the instant petition on that ground does not support the finding that the proffered position was not open to U.S. workers. The petitioner has overcome this additional basis for revocation.

The petitioner has overcome both bases the director relied upon in revoking approval of the petition and no other bases appear in the record. 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.