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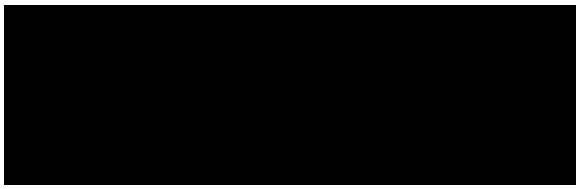
U.S. Citizenship and Immigration Services



FILE: LIN 02 236 52468 Office: NEBRASKA SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Director
Administrative Appeals Office

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

The petitioner is a franchise group. It seeks to employ the beneficiary permanently in the United States as a data base design analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel submits a brief and additional documentation.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted on June 18, 2001. The proffered salary as stated on the labor certification is $45,000 per year.

With the petition, counsel submitted copies of Forms 941, Employer's Quarterly Federal Tax Return, for the four quarters of 2001, the front page of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, and a copy of Form UI-3/40, Illinois Employer's Contribution and Wage Report, for the quarter ending June 30, 2002. The latter document reflects wages paid to the beneficiary of $22,500 as of June 30, 2002 while the tax return reflects an ordinary income of -$5,776. These documents were considered insufficient by the director, and, on October 29, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of June 18, 2001 to be in the form of audited profit/loss statements, bank account records, and/or personnel records such as the

beneficiary's Form W-2, Wage and Tax Statement(s), or paycheck stubs/receipts, and the corporate tax return for 2001, if available.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation and a copy of the beneficiary's 2002 W-2, Wage and Tax Statement, which reflected wages paid to the beneficiary in 2002 of $45,000.

The petitioner's 2001 tax return shows that the petitioner declared $3,514 as its ordinary income. The corresponding Schedule L indicates that at the end of that year the petitioner had current assets of $10,892 and current liabilities of $146,684, which yields net current assets of -$135,792.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on March 31, 2003, denied the petition.

On appeal, counsel states:

> The Nebraska Service Center made factual errors in denying the I-140 petition on grounds that Petitioner failed to demonstrate the financial ability to pay the offered wage and instead based its decision on a misunderstanding of accounting principles used in the preparation of Petitioner's tax returns. The Service Center also acted improperly by stating that the beneficiary's W-2 form without supplemental evidence was insufficient evidence that Petitioner had in fact paid the offered wage. Rather, the W-2 form was prima facie evidence that Petitioner had the financial ability to pay the offered wage. As additional evidence of financial ability to pay the offered wage, Petitioner is herby submitting supplemental documentation.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2001, merely that the petitioner paid wages.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 2001 tax return reflects an ordinary income of $3,514 and net current assets of -$135,792. The petitioner could not pay the proffered wage of $45,000 per year out of either the ordinary income or the net current assets.

On appeal, counsel also states:

> The decision did not acknowledge the fact that Petitioner listed over $384,000 in cost of labor on the 2001 tax return and did not take into consideration the fact that tax documentation for 2002 was unavailable during the time in which Petitioner was given to respond to the request for evidence. . . .
>
> As additional evidence of Petitioner's ability to pay the offered wage, attached are corporate bank statements showing the company's quarterly bank balances from June 2001 through December 2001, Exhibit 6. These statements are offered to supplement the 2001 corporate tax return to show that Petitioner had enough cash to pay the offered salary. In addition, Petitioner submits the Employer's Contribution and Wage Report filed with the Illinois Department of Employment Security for the quarter ending March 31, 2003 showing show much it paid each named employee for the quarter. Exhibit 7. This document shows that the beneficiary continues to be paid at a rate equal to the salary offer.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not

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[1] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

It is noted that, if the petitioner continued to pay the beneficiary at the rate shown on the Illinois Employer's Contribution and Wage Report for 2003, the beneficiary would have earned $45,000 or the proffered wage for that year.

While the copy of the beneficiary's 2002 Form W-2 is sufficient evidence of the petitioner's ability to pay the wage in 2002, the fact that the petitioner had $384,000 in cost of labor in 2001 is not sufficient evidence of the petitioner's ability to pay the wage in 2001. There is no evidence that any of the $384,000 was paid to the beneficiary and the petitioner has not supplied a 2001 Form W-2 for the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

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.