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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
EAC 03 014 54243

Office: VERMONT SERVICE CENTER

Date: AUG 16 2005

IN RE:

Petitioner: [REDACTED]
Beneficiary: [REDACTED]

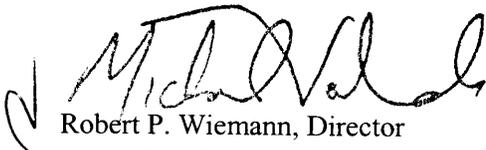
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a medical facility. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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.

On appeal, counsel submits a statement

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.

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$20.90 per hour, which equals \$43,472 per year.

On the petition, the petitioner stated that it was established during 2000 and that it employs "10+" workers. The petition states that the petitioner's gross annual income is \$1 million. The petitioner left blank the space where it was required to state its net annual income. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Brooklyn, New York.

On the Form ETA 750B, signed by the beneficiary on February 28, 2001, the beneficiary did not claim to have worked for the petitioner. The beneficiary, who was required to list all employment during the previous three years on that form, stated that she was last employed during December 1996 in the Ukraine.

In support of the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner is a corporation and that it reports taxes pursuant to the calendar year.

The 2000 return shows that during that year the petitioner declared a loss of \$79 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$221 and no current liabilities, which yields net current assets of \$221.

The 2001 return shows that during that year the petitioner declared a loss of \$3,771 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 10, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$92,357. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$46,514 and no current liabilities, which yields net current assets of \$45,514.

In a letter dated December 15, 2003, counsel characterized the 2001, 2002, and 2003 tax returns as showing consistent growth and states that the petitioner expects further growth and urged that the petition be approved.

The Acting 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 February 20, 2004, denied the petition.

On appeal, counsel again characterizes the petitioner's tax returns as showing consistent growth. Counsel further argues that the petition should be approved because the beneficiary has been working and paying her taxes. This office notes that the statement that the beneficiary has been working and paying her taxes is not supported by any evidence in the record and, except if the petitioner demonstrates that it has been paying her wages, is irrelevant to the approvability of this petition.

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 did not establish that it employed and paid the beneficiary.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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.

The proffered wage is \$43,472 per year. The priority date is March 6, 2001.

During 2000 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income. At the end of that year, the petitioner had net current assets of \$221. That amount is insufficient to pay the proffered wage. The petitioner submitted no credible evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income. At the end of that year, the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no other credible evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$92,357. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002 out of its profits.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 not met that burden.

ORDER: The appeal is dismissed.