

Identifying case related to:
Previous case; Administrative
Process of appeal; primary
reference case



U.S. Citizenship
and Immigration
Services

B6



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005
WAC 05 177 55750

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software company in the hearing sciences field. It seeks to employ the beneficiary permanently in the United States as a product development director. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

On appeal, counsel submits a brief and additional evidence.

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 the granting of 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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 24, 2001. The proffered wage as stated on the Form ETA 750 is \$140,000 a year.

In the petition, the petitioner claims to have been established in 1991, to have 21 employees, and a net annual income of -\$6,054,639. With the petition, the petitioner submitted IRS Form 1120 for the year 2001, a W-2 form for the beneficiary for the year 2001, and a IRS Form 7004, asking for an extension until September 2003 to file the petitioner's 2002 federal income tax return.¹ The petitioner's Form 1120 indicated that the petitioner had net income of -\$6,054,639. The beneficiary's W-2 Form indicated that the petitioner paid him \$142,202.70 in 2001. The petitioner also submitted a letter dated May 2003 from ██████████ M.D., the petitioner's chairman and chief operating officer. Dr. ██████████ stated that the petitioner is in the forefront of developing hearing device products for the hearing impaired, and had received funding of over 15 million dollars from Tyco Ventures, Texas Instruments, Essex Woodlands Healthcare Fund, and a number of independent investors. Dr. ██████████ added that the petitioner would be launching its first product the following month.

¹ In the I-485 petition for the beneficiary also submitted by the petitioner, the beneficiary submitted his W-2 Form for 2002, which reflects that the petitioner paid him \$104,658.06 in 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 13, 2003, the director requested additional evidence pertinent to that ability. The director requested that the petitioner provide copies of annual reports, originals of signed federal tax returns, with all accompanying schedules, statements and attachments, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and continuing. The director specifically requested the petitioner's federal income tax returns for the years 2002 and 2003, if available. The director also requested that the petitioner clarify the proffered wage, noting the beneficiary was paid \$104,658.06 in 2002. The director also requested the beneficiary's W-2 Form for 2003.

In response, counsel submitted a second letter dated March 2, 2004, from Dr. [REDACTED] to explain the funding structure of the company. Dr. [REDACTED] stated that the petitioner had received funding of over \$16.9 million and that the petitioner anticipated its first product introduction at the end of 2004. Dr. [REDACTED] further stated the petitioner was in the process of raising its next round of financing and expected to close on nine million dollars in April 2004. Attached to the letter from Dr. [REDACTED] was a statement by [REDACTED] Acting Corporate Financial Officer. Mr. [REDACTED] stated that the petitioner had interim funding provided by major venture investors in the sum of \$4.3 million dollars. Mr. [REDACTED] stated that Essex Woodlands Health Venture alone had provided interim financing of \$1.9 million dollars, and submitted a copy of a Comerica Bank wire transfer to the petitioner in the amount of \$250,000 from Essex Woodlands Health Ventures. The wire transfer is dated January 23, 2004. Counsel also submits another computer printout that appears to be an earlier wire transfer to the petitioner dated September 13, 2001. The wire transfer is from an entity identified as [REDACTED]. The petitioner also submitted a Form 1120 for the year 2002 that indicated the petitioner had a net income of -\$4,660,084, with wages paid of \$1,843,671, and officer compensation of \$306,615.

With regard to the difference in wages paid to the beneficiary, the petitioner submitted a letter signed by both Dr. [REDACTED] and the beneficiary dated March 3, 2004. The letter stated that because of a tight budget, the petitioner's employees made a voluntary decision to defer part of their compensation until the company obtained the final round of funding preceding product introduction into the market. The letter further noted that as a result of the voluntary deferment plan, the beneficiary received just over \$61,000 in 2003, and that the beneficiary would receive full reimbursement for the deferred wages, and his wages will be restored to the \$140,000 level following the voluntary deferment. The submitted W-2 Form for the beneficiary indicated that he received \$61,041.20 in wages in 2003.

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 22, 2004, denied the petition. The director stated that based on the beneficiary's W-2 Form for 2001, the petitioner had paid the beneficiary more than the proffered wage in 2001, and thus had established that it had the ability to pay the proffered wage as of the 2001 priority date. The director then noted that the beneficiary earned \$104,658.06 in 2002 and \$61,041.20 in 2003, wages that were less than the proffered wage. The director also examined the petitioner's income tax return for 2002, and determined that the petitioner's net income of -\$4,660,084 and the petitioner's total current assets of \$293,484 and total liabilities of \$1,530,563 were not sufficient to establish the petitioner's ability to pay the proffered wage in 2002. The director stated that since the petitioner's Form 1120 for 2003 was not in the record, he could not determine whether the petitioner had sufficient funds in 2003 to pay the difference between the beneficiary's actual wages and the proffered wage.

The director noted Dr. [REDACTED] letter with regard to voluntary deferment of salary, and stated that the petitioner was not required to have paid the proffered wage from the priority date onward, but only had to establish it had the ability to pay the proffered wage. The director also stated that the beneficiary's willingness to defer compensation was in no way related to the actual ability of the petitioner to pay the proffered wage during the period of time in question.

On appeal, new counsel refers to a Citizenship and Immigration Services (CIS) memorandum by [REDACTED] Associate Director for Operations.² Counsel refers to the part of the Yates memo that states adjudicators should make a positive determination of the petitioner's ability to pay when the record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage. Counsel also refers to another section of the memo that states, in certain instances, petitioners may submit additional evidence to the record, such as bank account records, when establishing a petitioner's ability to pay the proffered wage.

Counsel then states that the petitioner paid less than the proffered wage to the beneficiary in 2002; however, the cash available in the petitioner's checking account through both 2002 and 2003 were sufficient to make up the difference between the wage proffered and the actual wage in those years. Counsel submits copies of the petitioner's bank account records for 2002 and 2003. Counsel states that the petitioner's average checking account balance during 2002 was in excess of \$170,000, while its average balance during 2003 was in excess of \$90,000. Counsel also submits a copy of the beneficiary's pay stub dated July 15, 2004, that indicates the beneficiary earned \$5,833.33 for a two week period of work. The pay stub also indicated that the beneficiary's gross pay as of that date was \$49,457.53. Counsel submits the pay stub as evidence that the petitioner had resumed paying the full wage shown on the approved ETA 750.

On appeal, counsel submits the petitioner's checking account monthly statements for 2002 and 2003. Counsel's reliance on the average monthly balances in the petitioner's bank 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, as discussed in the Yates memo, 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. In fact, the monthly bank checking account balances for the two year period reflect the nature of the petitioner's venture capital structure with very high monthly balances in 2002 that are considerably lower in the latter part of 2002, and in 2003, substantially more modest monthly balances that fluctuate. For example, the balance in the petitioner's bank account as of December 31, 2002 was \$17,765.28, the monthly balance for January 31, 2002 was \$74,190.91, and the monthly balance for February 28, 2003 was \$825.08. The 2003 monthly checking account balances also perhaps reflect why the petitioner instituted a program of voluntary deferment of salaries in 2003. As such the bank statements do not demonstrate additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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

² Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

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. As stated previously, the petitioner submitted W-2 Forms for the beneficiary for the years 2001 through 2003. The W-2 Form established that the petitioner paid the beneficiary more than the proffered wage in 2001. Thus, the petitioner established that as of the 2001 priority date, it had the ability to pay the proffered wage.

However, based on the W-2 Forms for the years 2002, and 2003, the petitioner paid the beneficiary \$104,858.06 in 2002, or \$35,141.94 less than the proffered wage, and \$61,041.20 in 2003, \$78,958.80 less than the proffered wage. Thus, the petitioner did not pay the beneficiary the proffered wage in 2002 or 2003. With regard to 2004, the evidence submitted by the petitioner only establishes the wages paid to the beneficiary for the first two weeks of July. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 and onward.

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. 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). 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 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 the Service, now CIS, should have considered income before expenses were paid rather than net income. As previously stated, the record does not contain the petitioner's 2003 federal income tax return. Thus the AAO will only examine the petitioner's net income for 2002 as reflected in its Form 1120 for 2002. The petitioner's net income in 2002 was -\$4,660,084. This figure is not sufficient to pay the difference between the beneficiary's actual wages and the proffered wage in 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. In addition, 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

³ According 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.

are shown on lines 16 through 18. If a corporation's end-of-year 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 tax returns reflect the following information for 2002:

	2002
Taxable income ⁴	\$ -4,660,084
Current Assets	\$ 293,484
Current Liabilities	\$ 1,530,563
Net current assets	\$ -1,237,079

The petitioner has demonstrated that it paid the proffered wage to the beneficiary during 2001. In 2002, as previously illustrated, the petitioner shows a taxable income of -\$4,660,084, and negative net current assets of -\$1,237,079, and has not, therefore, demonstrated the ability to pay the proffered wage. Although counsel asserted that the petitioner's monthly bank balances in 2002 and 2003 establish the petitioner's ability to pay the proffered wage, as previously stated, these statements are not viewed as probative evidence. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2002 and continuing to the present time. Therefore, although the petitioner has shown its ability to pay the proffered wage as of the priority date, it has not shown the ability to pay the proffered wage from 2002 to the present time.

In addition, although the petitioner emphasizes the nature of the petitioner's funding structure as a venture capital company, this factor is not given as much probative weight in these proceedings as other factors such as company longevity, number of employees, or the pattern of an unprofitable year between other profitable years, when evaluating whether the petitioner has the ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). These latter factors are not found in the instant petition. As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

⁴ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.