



U.S. Citizenship
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Services

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FEB 03 2005

FILE: [REDACTED]
WAC 03 049 51537

Office: CALIFORNIA SERVICE CENTER Date:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a used car dealership. It seeks to employ the beneficiary permanently in the United States as a sales manager for a used car dealership. 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 resubmits evidence of wages paid to the beneficiary, along with new evidence with regard to wages paid to both the beneficiary and the beneficiary's wife.

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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.17 per hour, which amounts to \$35,713 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 2000 to the present.

On the petition, the petitioner claimed to have been established on 1998, to have a gross annual income of \$20 million, and to currently employ 60 workers. The petitioner submitted no evidence in support of its petition. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date or that the beneficiary had the requisite two years of work experience, on February 24, 2003, the director requested additional evidence pertinent. In

accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In particular, the director requested the petitioner's 2001 and 2002 federal tax returns, with all accompanying schedules, attachments, and tables. The director also requested evidence to establish that the beneficiary possessed two years of work experience, such as letters from previous employers on letterhead, showing the name, title, address and telephone number of the person verifying employment information. The director requested that the verification state the beneficiary's title, duties, and dates of employment and the number of hours worked per week. The director noted that the ETA-750B indicated that the petitioner had employed the beneficiary from November 2000 to the present. The director requested IRS computer printouts of the beneficiary's W-2 forms for 2001 and 2002.

In response, the petitioner submitted W-2 forms for the beneficiary for the years 1996, 1997, 1998, and 2000. The petitioner also submitted a letter from [REDACTED], Payroll Administrator, Desert Nissan, dated March 10, 2003 that confirmed the beneficiary's employment as a sales consultant from April 18, 2000 to November 9, 2000. A letter from [REDACTED] Human Resources, stated that [REDACTED] Integrity Chrysler employed the beneficiary as a salesman on an accrued pay commission basis from February 17, 1997 to February 5, 1999. The petitioner submitted no federal income tax returns. Counsel asked for an additional 90 days to submit information on the petitioner's ability to pay the proffered wage.

It is noted that the petitioner submitted no federal income tax returns, although the director requested such documents in his request for further evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant petition, the lack of response to the director's request should have been considered grounds for dismissal of the petition.

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 April 29, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's 2001 federal tax return had been submitted; and that the federal tax returns for 1998 through 2000 and for the tax year 2002 would be submitted later. Counsel asks for an additional 90 days to submit further evidence. However, counsel does not specifically address the reasons stated for denial or provide any additional evidence. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. Thus, the appeal is viewed as improperly filed, and the instant petition is summarily dismissed.

Even if the appeal were accepted as properly filed, the petitioner has still not demonstrated the ability to pay the proffered wage. On December 8, 2003, counsel resubmits the beneficiary's W-2 form for 2000 from Jack Biegger Nissan, Inc., Las Vegas, Nevada. This document shows a gross pay of \$10,403 for 2000. Counsel also resubmits the beneficiary's W-2 form for 2000 from the petitioner, that shows total wages of \$10,393.41. A new W-2 form for 2000 from Ugly Duckling Car Sales and Finance Corporation, Phoenix, Arizona, shows

the beneficiary's additional non-employee compensation of \$600. For the year 2001, counsel submits a W-2 form from Thrifty Car Sales, Las Vegas, Nevada for the beneficiary that shows non employee compensation of \$592.75. The petitioner submits a new W-2 form for the year 2001 for the beneficiary for wages of \$25,570.34. Finally, counsel submits a partially xeroxed copy of the beneficiary's W-2 form for the year 2002 which indicates wages of \$22,543.47. Counsel also submits W-2 forms for various years for the beneficiary's wife, which are not viewed as relevant to this proceeding.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 establish that it employed the beneficiary in 2000, 2001, and 2002. Since the priority date upon which the petitioner's ability to pay the proffered wage is April 30, 2001, the W-2 forms for 2000 submitted by the petitioner are not relevant to this proceeding. Based on the W-2 forms for 2001, and 2002, the petitioner paid the beneficiary the following commissions or salary during those years: \$25,570 in 2001, and \$22,543 in 2002. Neither salary is equal to the petitioner's proffered annual wage of \$35,713. Therefore, the record does not establish that the petitioner employed and paid the beneficiary the full proffered wage from the priority date to the present. Thus, the petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its employment of 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 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 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 the Service should have considered income before expenses were paid rather than net income.

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. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. With regard to the instant petition, as stated previously, the petitioner submitted no federal income tax returns. Therefore the analysis of the petitioner's net income or net current assets cannot be utilized to determine whether the petitioner has the ability to pay the proffered wage.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary as of the priority date and onward. In addition, it has not submitted sufficient documentation to establish its corporate business tax structure, and to allow any further examination of its net income, or current net assets. Accordingly, the petitioner failed to submit sufficient evidence to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 and subsequently during 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 with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As discussed previously, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.

¹ 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.