



U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 06 2005

EAC 03 051 54143

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:

SELF-REPRESENTED

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, 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 janitorial service. It seeks to employ the beneficiary permanently in the United States as a supervisor. 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, the petitioner submits a statement and additional evidence.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$7.11 per hour, which equals \$14,788.80 per year.

On the petition, the petitioner stated that it was established during November of 1985 and that it employs 30 workers. The petition states that the petitioner's gross annual income is \$800,000. The space provided in which the petitioner was to have stated its net income was left blank. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since August 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Alexandria, Virginia.

In support of the petition, the petitioner submitted its 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes pursuant to the calendar year and that during 2001 it reported a loss of \$7,069 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.

Subsequently the petitioner submitted copies of three pay stubs showing wages it paid to [REDACTED] presumably the beneficiary, during October 2000, December 2000, and January 2001. Those pay stubs show that the beneficiary was paid \$7 per hour during 2000 and \$7.25 per hour during 2001. Only one of those pay stubs shows wages paid during 2000. That pay stub, for the pay period ending October 20, 2000, shows year-to-date earnings of \$2,683.96. The most recent pay stub for 2001 is for the pay period ending January 3, 2001 and shows a year-to-date total of \$1,005. That amount includes wage payments for employment beginning on December 18, 2000.

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 February 28, 2003, requested additional evidence pertinent to that ability. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2000 and 2001, it provide W-2 forms showing wages it paid to the beneficiary during those years.

In response, the petitioner also submitted statements of deposits and filings produced by a tax service pertinent to all four quarters of 2002 and an annual statement compiling the figures from the quarterly statements. Those statements show that during 2002 the petitioner paid total wages of \$561,842.61.

The petitioner also submitted a 2002 Form W-2 Wage and Tax Statement showing that it paid the beneficiary \$344.38 during that year. Although the Service Center had specifically requested them, the petitioner did not provide 2000 and 2001 W-2 forms showing wages it paid to the beneficiary, which would have demonstrated the total wages it paid to the beneficiary during those years.

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 December 1, 2003, denied the petition.

On appeal the petitioner submits its 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$19,298. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$42,365 and current liabilities of \$41,670, which yields net current assets of \$695.

The petitioner also submitted a payroll detail report purporting to show that it paid the beneficiary 2003 year-to-date total wages of \$12,827.62 through December 19, 2003.

In a cover letter dated December 29, 2003, submitted on appeal, the petitioner's owner states that the beneficiary is the petitioner's full-time employee and contributes to the petitioner's profitability.

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 \$1,005 by January 3, 2001, but did not establish that it paid her any additional wages during the balance of 2001. The petitioner established that it employed the beneficiary during 2002 and 2003 and paid her at least \$344.38 and \$12,827.62 during those

years, respectively.¹ Having established that it paid the beneficiary those amounts during those years, it is obliged to show the ability to pay the balance of the proffered wage during those same years.

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, 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 \$14,788.80 per year. The priority date is April 27, 2001.

Having demonstrated that it paid the beneficiary wages of \$1,005 during 2001,² the petitioner is obliged to show the ability to pay the \$13,783.80 balance of the proffered wage. During 2001, however, the petitioner

¹ The petitioner also established that it paid the beneficiary at least \$2,683.96 during 2000. Because the priority date of the petition is April 27, 2001, however, financial information pertinent to 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² The petitioner had paid the beneficiary that amount by January 3, 2001 and likely paid the beneficiary some additional wages during the remainder of that calendar year. Because the petitioner failed to provide the requested 2001 W-2 form, however, the record contains no reliable evidence of any additional wages paid to the beneficiary during that year, and the additional wages the petitioner may have paid to the beneficiary cannot be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits during that year. The petitioner finished the year with negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage during 2001 out of its net current assets. The petitioner has not demonstrated that any other funds were available to it during 2001 with which it might have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that it paid the beneficiary wages of \$344.38 during 2002, the petitioner is obliged to show the ability to pay the \$14,444.42 balance of the proffered wage. During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$19,298. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner did not submit copies of annual reports, federal tax returns, or audited financial statements pertinent to 2003. The appeal in this matter, however, was submitted on December 31, 2003. On that date the petitioner's 2003 tax return was unlikely to be available. The petitioner may not have had 2003 annual reports or audited financial statements available to it on that date either. Under these circumstances, the petitioner is excused from providing evidence pertinent to 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.