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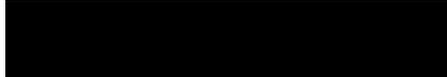
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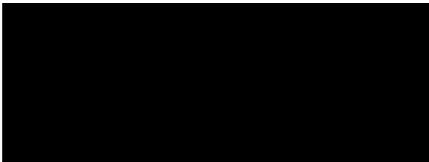
Petitioner:



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:



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 movement and dramatic arts instruction studio. It seeks to employ the beneficiary permanently in the United States as a character movement and drama instructor. 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 states that the director ignored the fact that the beneficiary worked part-time for the petitioner when the director examined the petitioner's ability to pay the proffered wage. Counsel also states that the director did not give sufficient weight to the proposed reorganization of the petitioner's personnel.

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 March 30, 1998. The proffered wage as stated on the Form ETA 750 is \$26.60 per hour, with a 35-hour weekly work schedule that amounts to \$48,412 annually. Based on the Form ETA 750, the beneficiary worked 20 hours a week for the petitioner and another 20 hours a week for [REDACTED] from September 1994.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 1998, with as well as quarterly state wage reports for quarters in 2001 and 2002. The petitioner also submitted an educational equivalency report from Education International, Wellesley, Massachusetts. This report stated that the beneficiary's baccalaureate degree in education from the University of Alberta, Canada, was evidence that the beneficiary had achieved the equivalent of a U.S. degree in education. The petitioner also submitted a letter from [REDACTED] Administrator/General Manager of the Rutgers University, Department of Theater Arts. This letter stated that the beneficiary had taught at the Rutgers Theater Arts Department from September 1994 to June 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 4, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 1999, 2000, and 2001 federal income tax returns as well as the beneficiary's 1998, 1999, 2000, 2001, and 2002 W-2 Wage and Tax Statements. The director also requested a copy of the petitioner's annual report for 2001, with audited or reviewed financial statements. Finally the director asked the petitioner to identify the nature of the business, gross and net annual income, the date the business was established and the number of employees. The director also requested information as to whether the position was a newly created position.

In response the petitioner stated that it was a dramatic arts instruction business with a gross annual income of \$145,999. The petitioner stated that it was established in 1982, and with the beneficiary, it has three part-time employees. The petitioner stated that the beneficiary would become a full-time employee and the part time instructors would become commissioned agents or independent contractors. The petitioner further stated that a fulltime employee who received a labor certification and immigrant visa as a skilled worker previously filled the position. According to the petitioner, this employee left the petitioner's employ seven years previously and since that time, the petitioner has relied on part time professional instructors. The petitioner stated that the beneficiary would be working as a fulltime employee, in contrast to his H-1B part time employment. The petitioner also submitted a statement from [REDACTED] the petitioner's managing director. This letter stated that the beneficiary has been working part time with the petitioner. And for this reason, the quarterly earnings reflected a salary below the annual full time rate of \$48,412. The managing director also stated that in 2001, the petitioner paid \$63,178 in salaries to part time employees, including the beneficiary. The petitioner's director stated that the beneficiary's full time employment would eliminate the need for the part time instructors, who would then work on commission basis or be paid directly by students. The managing director then stated that the differential between the beneficiary's actual wages of \$33,923.29 and the proffered wage of \$48,412, namely, \$14,412, would be paid by the approximately \$30,000 available in the existing salary allotment (the difference between the beneficiary's wages paid and the petitioner's total wages paid). The director also stated that she expected the petitioner's gross revenues to increase and to add additional resources for other part time workers.

The petitioner's accountant submitted a statement in which he examined the petitioner's taxable loss of \$36,233 in 2001. The accountant stated that this loss included \$6,188 in depreciation. The accountant called the depreciation a non-cash outlay, and that the actual cash loss in 2001 was \$30,045. The accountant further stated that the petitioner had earning and profits from previous years that enable it to continue running operations despite a drop in gross and net revenue. The accountant stated that it appeared the petitioner would be profitable in the tax year of 2002. He added that the replacement of the part time staff by the beneficiary working fulltime for the petitioner would reduce costs to be paid thus leaving additional resources to pay the beneficiary's full salary. The accountant submitted an additional statement dated November 25, 2002, that stated that the petitioner, despite the deficit on its most recent tax return, was able to meet all its financial obligations, including payroll, and still operates as a viable company.

The petitioner submitted its federal tax returns for 1998, 1999, 2000, and 2001. It also submitted the beneficiary's W-2 Forms from 1999 to 2002. These documents reflected the following part-time employment wages: \$14,305 in 1999; \$21,442 in 2000; \$37,948 in 2001; and \$28,267.75 in 2002.

On July 9, 2003, the director sent the petitioner a request for further evidence that is identical to the initial request for further evidence sent to the petitioner on March 4, 2003. The petitioner resubmitted materials submitted in response to the initial request.

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 January 7, 2004, denied the petition. The director examined the petitioner's federal income tax returns and the beneficiary's W-2 Forms and determined that they did not establish the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the director failed to consider the part-time H-1B employment of the beneficiary. Counsel also asserts that the director ignored the evidence submitted with regard to the petitioner's personnel reorganization that would allow the petitioner to pay the proffered wage.

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. On Form ETA 750, the beneficiary stated under oath that he worked 20 hours a week for the petitioner as of 1994. The Form ETA 750 also indicated the proffered wage was based on an hourly salary of \$26.60 and that the beneficiary would work for the petitioner for 35 hours a week. At the stated hourly rate, the beneficiary's wage for a 20-hour workweek is \$532, while the beneficiary's wage for a 35-hour workweek is \$931. The annual salary for a 20-hour workweek at the stated hourly rate would be \$27,664, while the annual salary for a 35-hour workweek would be \$48,412.

In its response to the director's request for further evidence, the petitioner submitted the beneficiary's W-2 forms from 1999 to 2002. As stated previously, the beneficiary's annual salaries based on his W-2 Forms for his 20 hours a week employment are as follows: \$14,305 in 1999; \$21,442 in 2000; \$37,948 in 2001; and \$28,267.75 in 2002. Based on the employment documentation submitted by the petitioner and the stated hourly rate outlined in the Form ETA 750, the petitioner has shown that it had the ability to pay the beneficiary the proffered wage for part-time employment in 2001 and 2002. However, it did not demonstrate that it had the ability to pay the beneficiary the proffered wage for full-time employment as of the priority date and onward.

In addition, the priority date identified on the Form ETA 750 is March 30, 1998. The petitioner has to establish that it paid the beneficiary the proffered wage since this priority date and to the present time. The petitioner did not submit any evidentiary documentation for the beneficiary's wages in 1998. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 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 stated previously, although the petitioner demonstrated that it paid wages to the beneficiary in 1999, 2000, 2001, and 2002, the petitioner has not established that it paid the beneficiary the proffered wage on a fulltime basis for these years.

Based on the petitioner's federal income tax returns, the petitioner had the following net income from 1998 to 2001: in 1998, \$0; in 1999, -\$8,647; in 2000, \$1,410; and in 2001, -\$33,057. None of these figures is sufficient to pay either the entire proffered wage, or the difference between the beneficiary's actual wages and the proffered wage. With regard to the petitioner's net income in 1998, the petitioner has provided no evidence of any wages paid to the beneficiary. Therefore the petitioner would have to demonstrate that it had sufficient net income to pay the entire proffered wage of \$48,412. In 1999, the beneficiary was paid \$14,305; however, the petitioner had negative net income of \$8,647. The petitioner would not have been able to pay the difference between the beneficiary's actual wages of \$14,305 and the proffered wage of \$48,412.

In 2000, the petitioner's net income of \$1,410 would also be insufficient to pay the difference between the beneficiary's actual wages of \$21,442 and the proffered wage of \$48,412, or \$26,970. In 2001, the petitioner's negative net income of \$33,057 would also be insufficient to pay the difference between the petitioner's actual wages of \$37,948 and the proffered wage of \$48,412, or \$10,464. With regard to the tax year 2002, the petitioner did not submit its federal income tax return. Therefore the record does not reflect the petitioner's net income for 2002, and whether the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages of \$28,267.75 and the proffered wage of \$48,412, or \$20,144.25. Therefore the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and onward based on its net income.

Furthermore, the petitioner's accountant in the response sent to the director's request for further evidence, discussed the depreciation figure of \$6,188 contained in the petitioner's 2001 tax return and used it to lower the petitioner's taxable loss of \$36,233. With regard to the accountant's discussion of depreciation, the AAO does not examine depreciation figures in its review of the petitioner's net income. In *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) the court noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

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.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. The petitioner's tax returns reflect the following information for the following years:

	1998	1999	2000	2001
Taxable income ²	\$ 0	\$ -8,647	\$ 1,410	\$ -33,057
Current Assets	\$ 844	\$ 8,780	\$ 24,467	\$ 0
Current Liabilities	\$ 13,668	\$ 31,557	\$ 82,532	\$ 42,868
Net current assets	\$ -12,824	\$ -22,777	\$ -58,065	\$ -70,182

The petitioner has not demonstrated that it paid any wages to the beneficiary as of the priority date of March 30, 1998. In 1998, as previously illustrated, the petitioner shows a taxable income of \$0, and negative net current assets of \$12,824, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner did not provide any documentation with regard to additional financial resources, and the petitioner's comments with regard to its proposed reorganization of its part-time personnel are not applicable to the petitioner's financial resources in 1998. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1998.

The petitioner demonstrated that it paid \$14,305 to the beneficiary during 1999. In 1999, the petitioner shows a taxable income of -\$8,657 and net current assets of -\$22,777. Thus, the petitioner did not have the ability to pay the difference between the actual wage paid and the proffered wage during 1999. With regard to 2000, the petitioner demonstrated that it paid \$21,442 to the beneficiary. However, in 2000, the petitioner showed taxable income of \$1,410 and net current assets of -\$58,065. Therefore, the petitioner cannot establish that it had the ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2000. Similarly in

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.

² 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.

2001, the petitioner demonstrated that it paid the beneficiary \$37,948 in wages. However, the petitioner showed taxable income of -\$33,057 and net current assets of -\$70,182. Therefore the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$10,464. Since the petitioner did not submit its federal income tax return for 2002, the AAO cannot analyze the petitioner's net current assets for 2002. Therefore, the petitioner has not established that it had the ability to pay the proffered wage based on the petitioner's net current assets or net income. Accordingly the petitioner has not established that it can pay the proffered wage as of the priority date to the present.

Counsel also urges the consideration of the beneficiary's proposed full-time employment as an indication that the petitioner's income will increase. However, the assertions of the petitioner do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaighena*, 19 I&N Dec. 534 (BIA 1988). Furthermore, the petitioner's assertion that the beneficiary's fulltime employment will be paid by the elimination of part time employees and the reorganization of its personnel is not persuasive. The record does not contains any evidence as to which part time workers would be let go and what the duties of these employees are, and whether their duties are similar to the duties of the beneficiaries. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.