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U.S. Citizenship and Immigration Services

[redacted]

MAR 08 2005

FILE: SRC 02 038 51950 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company that owns and manages hotels. It seeks to employ the beneficiary permanently in the United States as a hotel manager. 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)(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 March 19, 2001. The proffered wage as stated on the Form ETA 750 is $16.30 per hour, which amounts to $33,900 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1997.

On the petition, the petitioner claimed to have been established on 1985, to have a gross annual income of $169,317.24, and to currently employ 161 workers. In support of the petition, the petitioner submitted a Form G-28; an approved labor certification application; the petitioner's 2000 Form 1120S tax return; the petitioner's offer of employment; and, the beneficiary's diploma and college transcripts showing the beneficiary's qualifications.

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, on April 5, 2002, the director requested additional evidence (RFE) pertinent to that ability. The director also requested the petitioner's 2001 federal income tax return. The RFE also requested a W-2 for the beneficiary, confirmation of the beneficiary's status as an employee or a subcontractor and other information to explain why in the 2000 1120S return, it reported having 161 employees while only paying $927 in wages for the year.

In response, counsel on June 25, 2002, submitted the petitioner's June 20, 2002 written clarification disclaiming the petition's assertion of having 161 workers and instead asserting that the hotels "lease" the employees and also pay their salaries; the petitioner's unaudited profit and loss statement for 2001; bank statements for the petitioner as of December 2001 and January 2002 showing average balances in excess of the beneficiary's annual salary; a request to extend the filing deadline for the petitioner's 2001 tax return; an accountant's sworn statement on the petitioner's ability to pay; a bank letter regarding the average balance of two accounts held by the petitioner.

In more detail, the petitioner's response stated:

- In a June 20, 2002 clarification letter that described its former practice of assigning employees to hotels – so-called "employee-leasing," – as "customary", with the payment of salary and other labor costs left to the individual hotels. The letter states that to save on such costs, the petitioner stopped further employee leasing in July 2000. The letter was framed as describing an overall practice and made no reference to its relationship with the beneficiary.

- The petitioner's profit and loss statement for 2001, unaudited, had reported total revenue of $138,867.61, total expenses of $106,805.49, for a net income of $32,062.12.

- The petitioner's two bank statements reported a) an average daily balance of $91,431.61 during the period December 6, 2001, to January 6, 2002; and b) an average collected balance of $8,992 for all of December 2001.

- In a June 12, 2002 letter, that the petitioner had maintained "an average balance of four figures" in the one account and "an average balance of six figures" in another.

- In the June 25, 2001 sworn statement of petitioner's accountant, that based upon the petitioner's bank statements for December 2001 through January 2002 and its profit-and-loss statement for 2001, that the petitioner could afford to pay the proffered wage at any time from the priority date forward to the date of the sworn statement.

The director determined, from the petitioner's June 20, 2002 letter, that the petitioner did not intend to employ the beneficiary and thus could not file a petition for the beneficiary. Thus, the petitioner had failed to establish its ability to pay the beneficiary the proffered wage. And, on August 16, 2002, he denied the petition.

On appeal, filed September 30, 2002, counsel asserts that:

- The director erred by inferring from the petitioner's June 20, 2002 letter that it did not and would not employ the beneficiary;
- By maintaining an average monthly balance above the proffered monthly wage, the petitioner established its ability to pay;
- The accountant's statement establishes ability to pay.

In a September 6, 2002 letter submitted with counsel's motions, the petitioner addressed questions by a June 20, 2002 letter in an attempt to reconcile its earlier claim of 161 workers and reporting a total wage payment of $927. In that letter the petitioner disavowed having employees but rather it leases its employees to individual hotels that then paid the workers' salaries. However, the petitioner clarified that the beneficiary would work directly for the petitioner. With the letter is a partial listing of the petitioner's "hotel properties"

that includes the Comfort Inn Gateway Motel of New Port Richey, Florida, where the beneficiary has been general manager since November 1997.[1]

While counsel may be correct in asserting that the petitioner's June 20, 2002 "clarification" letter did not imply that the petitioner no longer intended to employ the beneficiary, the letters do not resolve the confusion regarding the size of the petitioner's workforce is or whether the beneficiary is part of that workforce.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Further, *Ho*, states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel's submission of the petitioner's profit and loss statement on the issue of ability to pay is not an audited financial statement. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Since, however, the profit and loss statement is the only information in the record covering the period of time surrounding the priority date, the AAO will give the statement due consideration.

Counsel's reliance on the average balances in the petitioner's bank accounts is also 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 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect 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, 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 not establish that it employed and paid the beneficiary the full proffered wage in 2001. Thus, even if the petitioner did employ the beneficiary from 1997 at one of its hotels, which is in no way clear, the record does not make clear amount of wages the beneficiary has been earning at his present job in Florida.

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[1] The letter leaves unclear whether the beneficiary's general manager wages from the petitioner's Port Richey motel can be credited toward the petitioner's ability to pay.

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 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.[2] 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 2000 Form 1120S tax return shows:

Net income	$ 93,950
Current Assets	$483,388
Current Liabilities	$ 0
Net current assets	$483,388

The petitioner's unaudited profit/loss statement for 2001 shows:

Total Income	$138,867.61
Total Expenses	$105,805.49
Net Income	$ 32,062.12

[2] 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.

The petitioner's tax returns during the year in question, 2001, however, were not provided because the petitioner did not submit its 1120S tax return for 2001. As such, the director's failure to consider the petitioner's income or net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2000, the petitioner shows a net income of $93,950, and net current assets of $483,388. The unaudited financial report for 2001 in the form of a profit and loss statement for the year 2001 shows a net income of $32,062.12 after expenses. Therefore, even if the figures on the report were accepted, the report is insufficient to establish the petitioner's ability to pay during 2001. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently. Therefore, this office cannot determine that the director erred in making a determination that the petitioner had failed to establish its 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.