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MAR 17 2005



FILE: SRC-03-103-53936 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

The petitioner is a commercial masonry contractor firm. It seeks to employ the beneficiary permanently in the United States as a mason. 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 petitioner's evidence showed its ability to pay substantial amounts in total compensation to its employees and that the evidence established the petitioner's ability to pay the proffered wage.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.80 per hour, which amounts to \$41,184.00 annually. On the Form ETA 750B, signed by the beneficiary on April 6, 2001, the beneficiary claimed to have worked for the petitioner from June 2000 through the date of the Form ETA 750B.

On the petition, the petitioner claimed to have been established in 1973, to have a gross annual income of \$1.5 million, and to currently have 54 employees. The item for the petitioner's net annual income was left blank on the petition.

In support of the petition, the petitioner submitted a letter dated November 18, 2002 from the petitioner's president confirming a continuing job offer to the beneficiary; a copy of a certificate from a masonry company in Romania stating the beneficiary's prior employment with that company as a mason from October 15, 1997 until May 30, 2000, with certified English translation; copies of the beneficiary's Form W-2

Wage and Tax Statements showing compensation received from the petitioner for 2001 and 2002; and a copy of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2001.

In a request for evidence (RFE) dated July 14, 2003 the director requested additional evidence on the issue of the petitioner's ability to pay the proffered wage.

In response, counsel submitted a letter dated October 14, 2003 and the following evidence: copies of monthly statements issued by SunTrust Bank, Richmond, Virginia, for a business checking account of the petitioner for the months of March and April 2001; and additional copies of the beneficiary's Form W-2 Wage and Tax Statements showing compensation received from the petitioner for 2001 and 2002.

In a decision dated November 4, 2003 the director found that the petitioner's evidence failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and accordingly denied the petition.

On appeal, counsel submits a written statement in support of the I-290B notice of appeal and the following evidence: copies of monthly statements issued by SunTrust Bank, Richmond, Virginia, for a business checking account of the petitioner for the months of April, May, June and July 2001; and copies of monthly statements issued by First Union Bank, of Virginia, with its address not stated, for a commercial checking account of the petitioner for the months of July through November 2001, January through December 2002, and January through July 2003.

Counsel states on appeal that the petitioner has not yet filed its tax returns for 2001 and 2002 and asserts that the petitioner's bank statements and its Form W-3 showing the total it paid to its employees in 2001 contain information similar to the information on the petitioner's tax returns, and that the documents submitted establish the petitioner's ability to pay the proffered wage during the relevant period.

On the I-290B, signed by counsel on December 1, 2003, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. However, no further documents have been received by the AAO to date.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the Form W-2 Wage and Tax Statements in the record show that the petitioner paid employee compensation to the beneficiary of \$21,567.00 in 2001 and \$22,377.50 in 2002. Each of those amounts is less than the proffered wage of \$41,184.00. The amounts needed to raise the beneficiary's actual compensation to the proffered wage are \$19,617.00 in 2001 and \$18,806.50 in 2002. Therefore the beneficiary's Form W-2 Wage and Tax Statements fail to establish the petitioner's ability to pay the proffered wage during 2001 and 2002.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Form 1120, U.S. Corporation Income Tax Return, 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. In the instant petition, however, the petitioner submitted no tax returns in evidence. Nor did the petitioner submit copies of annual reports or audited financial reports, which are alternative forms of acceptable evidence allowed by the regulation at 8 C.F.R. § 204.5(g)(2), quoted above. The evidence in the record, therefore, provided no basis on which to calculate the petitioner's net income or its net current assets during the relevant period.

The record before the director contained copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

In the instant case, the record before the director contained copies of two statements issued by SunTrust Bank, Richmond, Virginia, for a business checking account of the petitioner for the months of March and April 2001. The ending balances are \$37,484.17 on the March 2001 statement and \$87,560.00 on the April 2001 statement. Each of those amounts is higher than the amount of \$19,617.00 which would be need to raise the beneficiary's salary to the proffered wage in 2001. But since only two bank statements were submitted in evidence, those statements are insufficient to establish the petitioner's continuing ability to pay the proffered wage. Moreover, no evidence on the petitioner's liabilities was submitted, so the record lacks a basis to determine whether the funds in the petitioner's bank were available to pay the beneficiary the proffered wage.

The evidence submitted prior to the director's decision included a copy of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2001. That form shows that the petitioner submitted a total of 87 Form W-2

Wage and Tax Statements for 2001, showing payment of total employee compensation of \$1,173,877.15. Counsel asserts in his statement in support of the I-290B notice of appeal that the total employee compensation shown on its Form W-3 for 2001 is large enough establish the petitioner's ability to pay the proffered wage during 2001. The Form W-3 provides some support for counsel's assertions. Based on total employee compensation of \$1,173,877.15, the additional \$19,617.00 which would be needed to raise the beneficiary's compensation to the proffered wage in 2001 would be a small percentage of its total employee compensation, only 1.7% of that total. Nonetheless, the record lacks evidence on whether the petitioner's employee compensation was growing or declining throughout the relevant period and evidence on any liabilities which may have constrained its ability to raise the compensation of the beneficiary to the proffered wage. Finally, no Form W-3 for 2002 was submitted, so that no evaluation can be made of employee compensation payments in that year.

The evidence submitted prior to the director's decision therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

CIS electronic records show that the petitioner has filed eighteen other I-140 petitions since January 2003, and that seven of those petitions have been approved. In order to carry its burden of proof in the instant petition, the petitioner would have to show its ability to pay the proffered wages to each of the beneficiaries of its recently-approved petitions and of its pending petitions as well as the proffered wage of the beneficiary in the instant petition. Evidence would be needed to show the proffered wage and current employment status of each beneficiary of the petitioner's approved and pending petitions. The record in the instant petition, however, contains no evidence about the beneficiaries of the petitioner's other approved and pending petitions.

In his decision, the director correctly found that the petitioner had failed to submit financial evidence in the form of either tax returns, annual reports, or audited financial statements, as required by the regulation at 8 C.F.R. § 204.5(g)(2). The director also correctly found that the beneficiary's Form W-2 Wage and Tax Statements showed compensation from the petitioner of less than the proffered wage, and that they were therefore insufficient to establish the petitioner's ability to pay the proffered wage. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director. The director noted that the petitioner had filed other petitions, but the director did not rely on that fact in reaching his decision.

On appeal, counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE

issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764.

Nonetheless, even if that evidence were properly before the AAO, it would fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

The evidence on appeal consists of copies of monthly statements issued by SunTrust Bank, Richmond, Virginia, for a business checking account of the petitioner for the months of April, May, June and July 2001; copies of monthly statements issued by First Union Bank, of Virginia, with its address not stated, for a commercial checking account of the petitioner for the months of July through November 2001, January through December 2002, and January through July 2003.

On the petitioner's bank statements, including both the statements submitted prior to the director's decision and those submitted for the first time on appeal, the ending balances are as follows:

2001: SunTrust Bank: \$37,484.17 for March; \$87,560.00 for April; \$949.73 for May; \$309,358.03 for June; and \$68,768.37 for July; and First Union Bank: \$4,950.06 for July; \$9,210.35 for August; \$29,181.42 for September; \$33,257.65 for October; and \$7,588.58 for November; with no statement submitted for December;

2002: First Union Bank: \$3,270.52 for January; -\$487.15 for February; \$6,543.94 for March; \$11,270.94 for April; \$32,877.60 for May; \$626.98 for June; \$12,475.89 for July; -\$4,204.18 for August; \$54,245.14 for September; \$1,701.45 for October; \$13,771.98 for November; and \$15,240.54 for December; and

2003: First Union Bank: \$9,434.87 for January; \$66.16 for February; \$3,987.68 for March; \$31,254.45 for April; \$112,885.36 for May; \$157.07 for June; and \$2,176.31 for July.

The petitioner's bank statements submitted on appeal, together with the statements submitted previously, cover nearly the entire period relevant to the instant petition. Nonetheless, the statements submitted on appeal have the same evidentiary limitations as are discussed above concerning the bank statements submitted previously. Moreover, although the bank statement records on appeal are more complete than those submitted previously, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage.

For the foregoing reasons, the petitioner's evidence submitted on appeal is insufficient to overcome the decision of the director.

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.