



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: NOV 03 2005

WAC 03 036 53549

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:



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 employment based immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an international business management firm. It seeks to employ the beneficiary permanently in the United States as a business affairs manager. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date and denied the petition.

On appeal, current counsel submits additional evidence and asserts that the petitioner has established its 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 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 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 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 July 27, 2001. The proffered wage as stated on the Form ETA 750 is \$92,575.65 per year. The ETA 750B, signed by the beneficiary on June 25, 2001, does not indicate that she has ever worked for the petitioner.

On Part 5 of the visa petition, filed November 12, 2002, the petitioner claims that it was established in 1996, currently employs five workers, and has a gross annual income of over \$500,000.

The petitioner initially submitted copies of its Form 1065, U.S. Return of Partnership Income for 1999, 2000 and 2001. They indicate that the petitioner uses a standard calendar year to file its taxes. They show that the petitioner is structured as a general partnership. The 2001 tax return identifies the three general partners as [REDACTED] and [REDACTED].

In 1999, the partnership reported gross income of \$560,465, salaries and wages of \$165,715, guaranteed payment to partners of \$61,874, and ordinary income of \$34,807.¹

In 2000, the partnership declared \$453,983 in gross income, salaries and wages of approximately \$182,068, guaranteed payment to partners of \$52,831, and ordinary income of -\$2,159.

In 2001, the year the priority date of the petition was established, the partnership reflects that the petitioner reported gross receipts as \$579,345, gross income of \$580,185 including additional other income of \$840, salaries and wages of \$198,452, guaranteed payment to partners of \$81,001, and ordinary income of \$43,191.

The Schedule L balance sheet included in the petitioner's 2001 return shows that the petitioner had -\$15,175 in current assets and \$61,438 in current liabilities, resulting in -\$76,613 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of liquidity during a given period and as an alternative method to evaluate a petitioner's continuing ability to pay a certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² If a petitioner's year-end 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.

A letter, dated October 18, 2002, from [REDACTED] also accompanied these documents. He states that he is the chief financial officer for the petitioner and vouches for the petitioner's viability. He adds that the petitioner generates more than \$250,000 in net income and more than one million dollars in gross revenue worldwide and is well able to afford payment of the proffered salary to the beneficiary.¹

The director cumulatively requested additional evidence on four different dates. The first request was issued on February 4, 2003. The director misstated the priority date and did not correctly describe the beneficiary's employment history, but did request additional evidence from the petitioner in support of its ability to pay the \$92,575.65 proposed wage offer. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence must consist of either annual reports, federal tax returns, or audited financial statements. The director specifically requested copies of the petitioner's state quarterly wage reports for the most recent three quarters.

¹ For purposes of this review, ordinary income will be treated as net income.

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 response included duplicate copies of its 1999-2001 partnership returns, as well as copies of its state quarterly wage reports for 2002. The wage reports show that the petitioner employed six workers during the first quarter, eight workers during the next two quarters, and five workers as of the last quarter of 2002. The reports do not include the beneficiary's name as a listed employee.

The director again requested additional evidence on May 8, 2003. He specifically requested that the petitioner provide its relevant financial data covering the 2002 tax year. Former counsel responded by submitting a copy of an Internal Revenue Service (IRS) application for extension of time to file the petitioner's 2002 partnership return, a copy of an IRS Form 8804, Annual Return for Partnership Withholding Tax, and a letter, dated June 13, 2003, from [REDACTED] indicating that the relevant IRS tax return for 2002 had not yet been filed but that the petitioner had gross income of \$1,152,803 for that tax year.

The director's third request for evidence is dated July 14, 2003. Besides requesting evidence in support of the beneficiary's qualifying work experience and copies of the petitioner's current business license(s), the director also requested the petitioner to submit copies of the beneficiary's individual tax returns and Wage and Tax Statements (W-2s). The director assumed that the petitioner had employed the beneficiary since 1996. On the ETA 750B, the beneficiary designated "Business Affairs Entertainment" as her employer from August 1996 to the present. While the preference petition states that the certified job is not a new position, the record also fails to demonstrate that the petitioner was the same employer as "Business Affairs Entertainment" or that the petitioner has ever employed the beneficiary, as mentioned above.

Although the petitioner responded to the July 2003 by submitting the requested documents, the director issued a final request for additional evidence on September 2, 2003. He again requested that the petitioner provide either federal tax returns (with appropriate signatures), annual reports, or audited financial statements for 2001 and 2002. The petitioner's response included a signed copy of its 2001 and 2002 partnership returns.

The 2002 return reflects that the petitioner reported \$523,018 in gross receipts and \$1,152,803 in gross income as indicated by [REDACTED] June 2003 letter. Statement 1 attached to the return indicates that additional other income of \$629,785 was received from the petitioner's United Kingdom (UK) partnership. Deductions from the UK partnership are also reflected on statement 2 of the petitioner's Form 1065. The petitioner also reported salaries and wages of \$254,775, guaranteed payment to partners of \$300,000, and \$41,756 in ordinary income.

Schedule L of the petitioner's return shows that it had -\$2,450 in current assets and \$99,275 in current liabilities, yielding -\$101,725 in net current assets.

Based on the evidence that was submitted to the record, the director determined that the petitioner had failed to demonstrate a continuing ability to pay the proffered wage. The director denied the petition on February 6, 2004, concluding that neither the petitioner's net income, nor its net current assets was sufficient to cover the proffered wage in either 2001 or 2002.

On appeal, counsel offers several arguments in support of the petitioner's ability to pay the proffered wage. Two of these contentions are persuasive in establishing the petitioner's ability to pay the proffered wage of \$92,575.65 per year. Both are advocated in two letters submitted on appeal by counsel. One letter, dated April 1, 2004 is from

Ph.D., an associate professor of accounting at UCLA's graduate school of management. The other letter, dated April 1, 2004, is from , a certified public accountant.

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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. This case does not indicate that the petitioner employed the beneficiary.

As mentioned above, CIS also reviews net income and net current assets as reflected on either an audited financial statement or a federal income tax return. 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 not sufficient. 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.

Here, as noted above, the petitioner in this matter is a general partnership, not a corporation as described in *K.C.P. Food Co., Inc. v. Sava*, *supra*. As a general proposition, because general partners have joint and several liability for the partnership debts and have personal assets at risk from partnership creditors, similar to a sole proprietorship, in reviewing a partnership's ability to pay the proffered wage, CIS will also consider general partners' individual assets and other sources of income available to pay the proffered wage.

With reference to the petitioner's ability to pay the certified wage offer, both Dr. Benartzi and assert that it is appropriate to consider the combined resources of the petitioner and its UK office as they operate as one entity. Dr. Benartzi states that all partnership profits should be included to accurately determine the petitioner's ability to pay the proffered wage. He further asserts "it would be inconceivable in the business world to exclude a foreign office's income in evaluating any international partnership." also confirms that as only the Los Angeles' office net income was reported on the 2001 return, CIS only examined part of the petitioner's available resources. Counsel adopts this assertion on appeal and provides copies of the UK partnership tax returns for 2001 and 2002. This contention is convincing because as mentioned above, the record shows that the general partnership's income from the UK office was included in the petitioner's 2002 tax return. The UK partnership tax return provided on appeal indicates that the partnership reported a net profit of £82,078.47 in 2001, which results in additional funds of approximately \$166,000 available to the petitioner to pay the proffered salary in 2001. The petitioner established its ability to pay the proffered salary of \$92,575.65 for this year.

Both Dr. Benartzi and further contend that it is appropriate to add back the amounts reflected as guaranteed payment to partners in both 2001 and 2002. It is maintained that because the partnership is not a

separate taxable entity, but a *pass-through* entity in which the individual partners declare their proportionate profits or losses on their individual tax returns, then such monies belong to the partners individually no matter whether they are distributed or not. [REDACTED] adds:

Please note further that the term 'guaranteed payment' is misleading. The reason for this name is not because partners **must** receive these payments, but because they are often guaranteed by partnership agreement. After reviewing the partnership agreement, it is apparent that there is no clause that requires a fixed 'guaranteed' payment to any partner. They are just entitled to any net partnership income after all expenses have been paid. (Original emphasis.)

On appeal, counsel has provided a copy of an "Amended and Restated General Partnership Agreement," entered into on May 1, 2000. (Counsel's Exhibit 19) It does not contain any evidence of an agreed fixed amount to be distributed as a guaranteed payment to a partner. As mentioned above and as evidenced by the partnership returns submitted to the record, the amounts reflected as guaranteed payments to partners substantially varied from a low of \$52,831 reported in 2000, to a high of \$300,000 reported in 2002. With reference to this petitioner and the evidence submitted to the record, the guaranteed payment to partners of \$300,000 in 2002 represented a distribution of profits to the partners and would be an available source out of which the proffered wage could have been paid in 2002. Thus, the petitioner established its ability to pay the proffered wage during this year.

It is further noted that on appeal, counsel did submit an affidavit from one of the general partners, [REDACTED] who provides a copy of his March 30, 2004 bank statement, his personal financial statement as of March 31, 2004, and copies of two facsimile transmissions showing that he transferred twenty-five thousand pounds to his brother and sister-in-law in January 2002 and twenty thousand pounds in June 2002. Mr. [REDACTED] describes these transfers as available to be repaid in full or in part on demand, but no evidence of the terms of this agreement is offered to the record. Although independently, this does not sufficiently document available additional individual assets necessary to demonstrate the general partnership's ability to pay the proffered wage in 2002, it does represent credible supplementary evidence suggestive of some of this partner's personal holdings available to be applied to the petitioner's ability to pay the proffered wage. As the petitioner's ability to pay the proffered wage has been already established as noted above, further discussion of this and other evidence is not required.

Based on the evidence contained in the record, as well as the evidence and argument submitted on appeal, the AAO concludes that the petitioner has demonstrated its continuing financial ability to pay the proffered wage as of the July 27, 2001, priority date of the petition.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.