



U.S. Citizenship
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Services

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FILE:

[REDACTED]
EAC-03-256-50184

Office: VERMONT SERVICE CENTER

Date: NOV 10 2005

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a veterinary hospital firm. It seeks to employ the beneficiary permanently in the United States as a veterinary assistant. 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.

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 March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$10.82 per hour, which amounts to \$22,505.60 annually. On the Form ETA 750B, signed by the beneficiary on March 16, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1998 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on September 8, 2003. On the petition, the petitioner left blank the items for the date on which the petitioner was established, its current number of employees, its gross annual income, and its net annual income. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated December 9, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and additional evidence relevant to the beneficiary's experience. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on March 5, 2004.

In a decision dated June 16, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on appeal that during 2001 the petitioner's tax return showed a loss because of unusual business expenditures that year. Counsel also states that evidence submitted on appeal shows that during 2001 the beneficiary was paid at the rate of the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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, on the Form ETA 750B, signed by the beneficiary on March 16, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1998 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2002 and 2003. The beneficiary's Form W-2's show compensation received from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	no W-2 submitted	\$22,505.60	no W-2 information
2002	\$29,491.68	\$22,505.60	no increase needed
2003	\$22,429.80	\$22,505.60	\$75.80

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2003. The record before the director closed on March 5, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that

date, the petitioner's federal tax return for 2003 was not yet due, but a copy of that return has been submitted on appeal.

In the RFE, which was dated December 9, 2003, the director specifically requested copies of the petitioner's federal tax returns for 2001 and 2002, with all schedules and attachments. Nonetheless, the petitioner failed to submit a copy of its federal tax return for 2002. Federal tax returns are one of the alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the proffered wage.

Although the copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002 submitted in evidence states that the beneficiary was paid \$29,491.68 that year, the absence of a copy of the petitioner's federal tax return for 2002 prevents any analysis as to whether the wage payments stated on the Form W-2 for 2002 are consistent with the petitioner's federal tax return for 2002.

The record contains no explanation for the failure of the petitioner to submit a copy of its federal tax return for 2002, a document which was specifically requested by the director in the RFE. The copy of the beneficiary's Form W-2 for 2002 is not one of the alternative forms of evidence specified in the regulation at 8 C.F.R. § 204.5(g)(2), which requires copies of either annual reports, federal tax returns, or audited financial statements. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

For the year 2001, the petitioner has submitted a copy of its federal tax return, but has submitted no copy of a Form W-2 of the beneficiary. The record also contains no explanation for the failure of the petitioner to submit a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2001. In the RFE the director had stated, "If the beneficiary was employed by you in 2001 and 2002, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business." (RFE, December 9, 2003, at 2). The petitioner submitted no copy of a Form W-2 of the beneficiary for 2001 in its response to the RFE, nor has a copy of a Form W-2 of the beneficiary for 2001 been submitted on appeal.

On appeal the petitioner has submitted for the first time a document entitled "Find Report" listing payments to the beneficiary for the period from March 6, 2001 through December 25, 2001. The Find Report does not identify the organization making the payments. The Find Report shows 44 weekly payments to the beneficiary in amounts ranging from a low of \$324.82 for the payment on December 25, 2001 to a high of \$633.83 for the payment on July 18, 2001. The total for the 44 payments is \$18,347.64, and the average payment is \$416.99.

As noted above, the priority date in the instant petition is March 21, 2001. The Find Report shows 41 weekly payments after that date, for a total of \$17,208.75 and an average weekly payment during that period of \$419.73. The proffered wage is \$10.82 per hour, which is equivalent to a weekly wage of \$432.80. The beneficiary's average weekly payment from March 21, 2001 through December 31, 2001 was \$13.07 less than the weekly proffered wage.

Although the Find Report submitted on appeal indicates wage payments to the beneficiary at a rate nearly equal to the proffered wage during the last nine months of 2001, that report is not a form of evidence which can be considered to be equivalent to a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2001, which was the document requested by the director. The record contains a letter dated July 7, 2004 from the president and sole shareholder of the petitioner. The letter is newly submitted on appeal. In that letter, the president states that the petitioner paid the beneficiary \$18,347.64 for the partial year 2001. However, the

president offers no explanation for the absence from the record of a Form W-2 Wage and Tax Statement of the beneficiary for 2001.

As noted above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As another means of determining the petitioner's ability to pay the proffered wage, CIS will 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.

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. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$5,948.00	\$22,505.60*	-\$28,453.60
2002	not submitted	none**	no information
2003	\$0.00	\$75.80***	-\$75.80

* The full proffered wage, since the record contains no copy of a Form W-2 for 2001 establishing the amount of any wage payments made by the petitioner to the beneficiary that year.

** The beneficiary's Form W-2 for 2002 states compensation at a level higher than the proffered wage, but the record lacks corroboration, since no federal tax return for 2002 was submitted.

*** Crediting the petitioner with the \$22,429.80 actually paid to the beneficiary in 2003, as shown on the beneficiary's Form W-2 for 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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 current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	-\$94,801.00	-\$72,426.00	\$22,505.60*
2002	not submitted	not submitted	none**
2003	-\$160,814.00	-\$103,405.00	\$75.80***

* The full proffered wage, since the record contains no copy of a Form W-2 for 2001 establishing the amount of any wage payments made by the petitioner to the beneficiary in that year.

** The beneficiary's Form W-2 for 2002 states compensation at a level higher than the proffered wage, but the record lacks corroboration, since no federal tax return for 2002 was submitted.

*** Crediting the petitioner with the \$22,429.80 actually paid to the beneficiary in 2003, as shown on the beneficiary's Form W-2 for 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

In his letter dated July 7, 2004, the petitioner's president states that the petitioner's net loss for the year 2001 was the result of purchases of new equipment and leasing of surgical equipment in September of 2001. Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. Temporary losses resulting from unusual business expenses would be among the factor's which CIS could consider in such an analysis. In the instant petition, however, the petitioner has failed to submit sufficient evidence for an evaluation of the totality of the circumstances affecting the petitioner. No tax returns or other financial documents were submitted for any year prior to 2001. Moreover, no copy of the petitioner's federal tax return for 2002 was submitted, a document which was specifically requested by the director. Therefore the petitioner has failed to establish that the year 2001 was an unusually unprofitable year for the petitioner.

Any analysis based on the totality of the circumstances must be based on evidence in one of the alternative forms required by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements. For the year 2002, the petitioner has submitted no evidence in one of those three required forms. Rather, the petitioner has submitted only a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002. The regulation does not permit the substitution of other forms of evidence for one of the three required forms.

The petitioner's tax return for 2001 shows an expense deduction for compensation of officers in the amount of \$163,144.00 and an expense deduction for salaries and wages in the amount of \$500,571.00. Those figures appear to be consistent with the petitioner's statement on appeal that it has twenty three employees. Nonetheless,

the petitioner has not submitted a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2001, despite a specific request for that document in the RFE, nor has the petitioner submitted any explanation for the absence of the beneficiary's Form W-2 for 2001.

Although the figures on some of the documents submitted in evidence appear to show the petitioner's financial condition to be strong, not all of the documents required by regulation have been submitted, and not all of the documents requested in the RFE have been submitted. It is reasonable to infer that the documents which the petitioner has failed to submit may contain information adverse to the petitioner. The record lacks evidence required by the regulation at C.F.R. § 204.5(g)(2), namely a copy of an annual report, a copy of federal tax return or a copy of an audited financial report for 2002, and lacks evidence specifically requested in the RFE, namely a copy of the petitioner's federal tax return for 2002 and a copy of the beneficiary's Form W-2 for 2001. The record therefore lacks a sufficient evidentiary basis for a finding that the totality of circumstances establishes the petitioner's ability to pay the proffered wage during the relevant period.

For the foregoing reasons, the evidence 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.

In his decision, the director correctly stated the petitioner's net income in 2001 and correctly calculated the petitioner's year-end net current assets for that year. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in that year. For 2002 and 2003 the director based his analysis only on the beneficiary's Form W-2 Wage and Tax Statements, without mentioning the absence of a copy of the petitioner's federal tax return for 2002. As discussed above, however, the regulation at 8 C.F.R. § 204.5(g)(2) requires evidence in one of three specified types, namely copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted no evidence pertaining to 2002 in one of those three alternative required forms. The director's analysis was therefore incomplete. Nonetheless, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail 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.