



U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-04-158-51226

Office: VERMONT SERVICE CENTER

Date: OCT 07 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 building management firm. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$19.51 per hour, which amounts to \$40,580.80 annually. On the Form ETA 750B, signed by the beneficiary on March 25, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on April 28, 2004. On the petition, the petitioner claimed to have been established on July 17, 1996 and to currently have ten employees. The items on the petition for the petitioner's gross annual income and for its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 23, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 November 10, 2004.

In a decision dated February 2, 2005, 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 a statement in the I-290B notice of appeal and in an addendum to the I-290B, and submits no additional evidence. The petitioner also submits duplicate copies of portions of audited financial statements which had been submitted previously for the record. The petitioner also submits a copy of a memorandum dated May 4, 2004 to CIS Service Center Directors and to other CIS officials from William R. Yates, Associate Director of Operations, CIS. That document is not an evidentiary document, but is submitted by the petitioner as legal authority in support of the petition.

Counsel states on appeal that although the petitioner's net income in each of the relevant years is insufficient to establish the petitioner's ability to pay the proffered wage, the petitioner's net current assets in each of the years at issue were sufficient to establish the petitioner's ability to pay the proffered wage.

Since no new evidence is submitted on appeal, the AAO will evaluate the director's decision based on the evidence submitted prior to the director's decision.

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 Sonogawa*, 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 25, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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.

In the instant case, however, the petitioner has submitted no copies of any of its federal tax returns. Rather, the petitioner has submitted copies of audited financial statements for the years ending December 31, 2000 and December 31, 2001.

Audited financial statements are one of the three alternative types of required evidence to establish the petitioner's ability to pay the proffered wage, as specified in the regulation at 8 C.F.R. § 204.5(g)(2). The record before the director closed on November 10, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, financial information should have been available for the years 2002 and 2003. However, no financial information was submitted for those years. It is noted that the auditor's report accompanying the petitioner's financial statements in the record is dated February 8, 2002, for the year ending on December 31, 2001. That date was only about nine weeks after the close of the period covered by that report. Therefore, it is reasonable to expect that audited financial information for 2002 and 2003 should have been available to the petitioner by November 10, 2004, a date more than ten months after the end of the year 2003.

The RFE dated August 23, 2004 states in pertinent part as follows:

Please submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$40,580.80 per year as of April 12, 2001, the date of filing and continuing to the present.

If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

If this information is unavailable, please submit the 2001 and 2003 U.S. federal income tax returns(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

As an alternative, you may submit annual reports for the year 2001, and 2003, which are accompanied by, audited or reviewed financial statements.

If such evidence is shown to be unavailable, other documentation relating to the employer's ability to pay the beneficiary the proffered salary as of the date of filing, will be considered.

(RFE, August 23, 2004, at 1-2).

No explanation appears in the record for the failure of the petitioner to submit financial information for the years 2002 and 2003. 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).

The financial statements in the record state the following amounts for net income as shown in the table below.

Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	-\$173,702.00	not applicable	not applicable
2001	-\$185,381.00	\$40,580.80*	-\$225,961.80
2002	not submitted	\$40,580.80*	no information
2003	not submitted	\$40,580.80*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above figures fail to establish the petitioner's ability to pay the proffered wage in 2001, 2002 or 2003.

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 company'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 its Form 1120S tax return, Schedule L, lines 1 through 6. Its current liabilities are shown on Schedule L, 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.

In the instant case, the petitioner has submitted no copies of tax returns, but has submitted audited financial statements, as allowed by the regulation at 8 C.F.R. § 204.5(g)(2). In the notice of appeal, counsel states that on the petitioner's financial statements the figures for current assets are found in the line items for "Cash and Cash Equivalents," and the figures for current liabilities are found in the line items for "Accrued Expenses." Counsel states that the figures in the assets line items for "Tenant Security Deposits" are exactly matched by the figures in the liabilities line items for "Security Deposits Payable" and suggests that the figures for security deposits therefore need not be included in any calculations of the petitioner's net current assets. Counsel also states that the financial statements present separately the figures for each of the two properties owned by the petitioner and suggests that the separate figures should be combined when calculating the petitioner's net current assets.

A review of the financial statements in the record indicates that counsel's explanations of the statements are accurate. The items for "Cash and Cash Equivalents," state the figures which would appear on a Form 1120, Schedule L, lines 1 through 6, and the items for "Accrued Expenses" state the figures which would appear on a Form 1120, Schedule L, lines 16 through 18. Counsel suggestions for calculating the petitioner's net current assets do appear to indicate the accurate approach to such calculations.

Calculations based on the audited financial statements submitted for the record 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	
2000	not submitted	\$62,811.00	not applicable
2001	\$62,811.00*	\$56,463.00	\$40,580.80***
2002	\$56,463.00**	not submitted	\$40,580.80***
2003	not submitted	not submitted	\$40,580.80***

* The figure for the end of 2000, which is equivalent to the beginning of 2001.

** The figure for the end of 2001, which is equivalent to the beginning of 2002.

*** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above figures show that at the end of 2000, which is equivalent to the beginning of 2001, the petitioner had net current assets of \$62,811.00, a figure which was greater than the proffered wage of \$40,580.80. The above figures also show that at the end of 2001, which is equivalent to the beginning of 2002, the petitioner had net current assets of \$56,463.00, which was also greater than the proffered wage of \$40,580.80. Those figures are therefore sufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002. Nonetheless, no financial statements were submitted for the years 2002 and 2003. As note above, the RFE dated August 23, 2004 specifically requested evidence pertaining to 2003. The petitioner's submissions in response to the RFE were received by the director on November 10, 2004, but included no evidence relevant to 2003.

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage in the year 2003.

In his decision, the director incorrectly stated that the petitioner's financial statements show net income for the years 2001 and 2002, whereas in fact the financial statements show net income for the years 2000 and 2001. The director further erred by combining the 2000 and 2001 figures for one property and stating the result to be the petitioner's net income for 2001, and by combining the 2000 and 2001 figures for the second property and stating the result to be the petitioner's net income for 2002. The director also failed to make any calculation of the petitioner's net current assets.

Although the director's calculations were incorrect and incomplete, for the reasons discussed above, the director's decision to deny the petition was correct, because the evidence in the record before the director failed to establish the petitioner's ability to pay the proffered wage in the year 2003. As noted above, 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).

The assertions of counsel 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.