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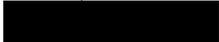


U.S. Citizenship
and Immigration
Services

B6



FILE:



EAC 02 247 51022

Office: VERMONT SERVICE CENTER

Date: SEP 30 2005

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an architecture firm. It seeks to employ the beneficiary permanently in the United States as an architect. 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 has the ability to pay the proffered wage, and that Citizenship and Immigration Services (CIS) failed to consider that the petitioner was already paying a salary to the beneficiary. Counsel submits further documentation.

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 27, 1998. The proffered wage as stated on the Form ETA 750 is an annual salary of \$72,800. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June of 1996.

On the petition, the petitioner claimed to have been established in 1996. Although the petitioner marked the sections for current number of employees and gross annual income, the petitioner's responses are illegible. In support of the petition, the petitioner submitted two pages of its 2001 Form 1120S corporate income tax return. The petitioner also submitted two letters of work verification from the beneficiary's former employers in New

York City. The petitioner also submitted evidence with regard to the beneficiary's academic credentials as well as INS Form I-797A that establishes the previous approval of the beneficiary's H-1B nonimmigrant visa in 2002.

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, August 27, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide evidence that the beneficiary had the requisite five years of work experience. The director also stated that the petitioner's Form 1120S for 2001 indicated a \$3,674 net loss. The director requested that the petitioner submit its federal income tax returns for 1998 to 2002, with all schedules and attachments. The director stated that the petitioner alternatively could submit annual reports for 1998 to 2002, accompanied by audited or reviewed financial statements. Finally the director stated that if the petitioner had employed the beneficiary in 1998 to 2002, the petitioner should submit copies of the beneficiary's Form W-2 Wage and Tax Statements.

In response, the petitioner submitted two other letters of work verification to further document the beneficiary's previous work experience as an architect prior to the priority date of 1998. The petitioner also submitted the petitioner's financial statements compiled by [REDACTED] C.P.A., for the years 1998 to 2002. Each financial statement consists of a balance sheet, an income statement and a statement of changes in retained earnings. Mr. [REDACTED] also submitted the following statement: "A review is assessing [sic] the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. It is considerably less in scope th[a]n an audit and, [sic] accordingly I do not express an opinion or any other form of assurance on them."

On March 19, 2004, in his denial of the petition, the director described the petitioner's financial statements submitted to the record as reviewed financial statements. The director examined the petitioner's net income as identified on the income statement page, and the petitioner's net current assets noted on the balance sheet in all five years, and stated that the petitioner's net incomes and net current assets were both less than the proffered salary for all five years.

On appeal, counsel states the petitioner has sufficient funds to pay the proffered wage. Counsel states that CIS failed to consider the fact that the petitioner was already paying a salary to the beneficiary. Counsel further states that the petitioner's accountant's statement and the guarantees provided by the petitioner's clients indicate the availability of funds to pay the proffered wage. Counsel submits a letter dated March 31, 2004 from Frank Wolter, the petitioner's accountant. Mr. [REDACTED] states that the petitioner, along with the entire construction industry in New York City was affected by the September 11, 2001 events. The accountant states that the petitioner is recovering from the economic slump brought about by terrorist acts and that presently the petitioner shows \$73,591 in current receivables along with back log work in progress and contracts on the books in excess of half a million dollars. Mr. [REDACTED] then states that as a result of these contracts the firm will be adding personnel in the near future, and that the beneficiary is a key employee as he is its leading architect and business generator. According to the accountant, the beneficiary's efforts have brought in new clients, and certain clients require that the beneficiary be directly responsible for their projects and his personal attention is part of the contractual requirements with the firms and a condition for hiring the petitioner. The accountant then states that these clients are willing to guarantee the beneficiary's salary as part of their contracts with the

firm. The accountant also states that the wage and salaries reported on the firm's tax return includes the beneficiary's salary, and that the petitioner cannot be expected under generally accepted accounting standards to both expense his salary and have those same funds be available as part of its profits. The accountant states that the existing salary appears as an expense item on the petitioner's income statement which when added to its profits and depreciation shows sufficient funds to pay the proffered wage.

The petitioner also submits a letter from [REDACTED] Managing Director, [REDACTED] New York City. This letter states that Florencia Properties has hired the petitioner based upon the specialized skills and expertise of the beneficiary and as part of its contractual obligation with the petitioner, it is willing to guarantee that the petitioner has sufficient funds to maintain the beneficiary's salary at \$72,800 a year. The petitioner also submitted a letter from [REDACTED] President, [REDACTED] and [REDACTED] President, [REDACTED] Inc., Brooklyn, New York. Both of these letters state that the letter writers have hired the petitioner based upon the specialized skills and expertise of the beneficiary, and that as part of the businesses' contractual obligations, the businesses were willing to guarantee that the petitioner has sufficient funds to maintain the beneficiary's proffered salary. The petitioner also submitted an unaudited income statement for the year ending December 31, 2004 as well as a five page compiled unaudited financial statement for 2003 that includes a balance sheet, an income statement, a statement of changes in retained earnings, and a final page that lists notes to the financial statements. The one page income statement for the year 2004 indicates a net income of \$210,368, while the 2003 compiled statement indicates a net income of \$62,426.

The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. In his denial of the petition, the director referred to these documents. On appeal, counsel submits additional unaudited financial statements. However, the unaudited financial statements that counsel submitted in response to the director's request for further evidence and on appeal 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.

In addition, the letters submitted by the petitioner on appeal from three of the petitioner's clients dated April 2004 are also not viewed as persuasive evidence that the petitioner has the ability to pay the proffered wage as of the 1998 priority date and to the present. The assertions of the petitioner's clients that they were willing to guarantee that the petitioner has sufficient funds to pay the proffered wage have no relevance in the present proceedings. The petitioner, not its clients, has to establish that it has sufficient funds to pay the proffered wage. The petitioner's clients have no liability whatsoever for the payment of the beneficiary's salary. Furthermore, the petitioner provided no copies of any contracts between itself and clients. Any contracts between the petitioner and its clients for the period of 1998 to 2002 that explicitly state such a guarantee on the part of the petitioner or its clients would provide much more probative weight to this issue. No such documentation is found in the record.

On appeal, the petitioner's accountant refers to the use of the petitioner's depreciation figures in providing additional funds to establish the petitioner's ability to pay the proffered wage. However, the AAO does not consider depreciation figures in its examination of the petitioner's financial resources. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng Chang* at 537.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. Although counsel states on appeal that the petitioner is paying a salary to the beneficiary, the petitioner provided no further substantiation of this assertion, such as W-2 forms or paychecks. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel also states that the petitioner's financial statements refer to the salaries paid to the petitioner's employees. As stated previously, the unaudited financial statements submitted by the petitioner are given no weight in these proceedings. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 and onward.

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. As noted previously, the petitioner only provided two pages of its 2001 federal income tax return in the initial petition, and did not submit any other income tax returns for the period of time in question. Therefore, only the petitioner's 2001 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: -\$3,674. This figure fails to establish the ability of the petitioner to pay the proffered wage in 2001.

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 include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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. As stated previously, the petitioner has submitted no other federal income tax returns besides two pages of its 2001 tax return. These two pages of the 2001 tax return did not include Schedule L. In addition, the unaudited financial statements submitted to the record for the years 1998 to 2002 are not viewed as persuasive evidence in these proceedings. Therefore the AAO cannot examine the petitioner's net current assets as of the 1998 priority date to the present.

Without more persuasive evidence, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing to the present day.

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.

¹ 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.