



U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 107 51349 Office: VERMONT SERVICE CENTER Date: APR 04 2006

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

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

The petitioner is a cleaning service. It seeks to employ the beneficiary permanently in the United States as a supervisor of janitorial services. 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 does have the ability to pay the proffered wage and submits additional evidence.

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, 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which amounts to \$24,960 annually. The beneficiary indicated on the Form ETA 750 that the petitioner had employed her since March 2001.¹

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 2000, 2001 and 2002. These tax returns indicated the petitioner had taxable income before net operating loss deduction and special deductions of \$1,935 in 2000, taxable income before net operating loss deductions and special deductions of \$1,070 in 2001, and taxable income before net operating loss deduction and special deductions of \$1,366 in 2002. The petitioner also submitted the beneficiary's Forms 1040 EZ, Income Tax Return for Singles and Joint Filers With No Dependents for tax years 2000 and 2001, and Form 1040A, U.S. Individual Income Tax Return, for tax year 2002. These documents indicated that the beneficiary earned \$7,741 in 2000

¹ The ETA Form 750 also indicated that the beneficiary had worked for the petitioner previously from 1996 to 2000 as a supervisor of janitorial services.

from other employers, and that she earned \$14,542 in 2001 from the petitioner and other employers, and \$16,330 in 2002. With regard to the 2001 and 2002 W-2 forms, these documents indicate that the petitioner paid the beneficiary \$9,712 in 2001, and \$14,520 in 2002.

On September 16, 2004, the director denied the petition. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2001 priority date. The director stated that the beneficiary's W-2 form indicated the petitioner paid the beneficiary \$9,712, which was \$15,248 less than the proffered wage of \$25,960. The director also noted that the petitioner had taxable income after deduction expenses of \$1,070 that was less than the difference between the beneficiary's actual wages and the proffered wage. However, the director stated that the Schedule L contained in the petitioner's 2001 tax return showed net current assets of \$15,432 which did establish the petitioner's ability to pay the difference between the beneficiary's actual wages in 2001 of \$9,712 and the proffered wage of \$24,960 at the time of filing.

With regard to tax year 2002, the director stated that the petitioner paid the beneficiary \$14,520, which was \$10,440 less than the proffered wage. The director then noted that the petitioner's 2002 tax return showed taxable income before net operating loss deduction and special deductions of \$1,036, which was not sufficient to pay the difference between the beneficiary's actual wages in 2002 and the proffered wage. The director also stated that the Schedule L contained in the petitioner's 2002 tax return indicated no net current assets that were available to pay the difference between the beneficiary's actual wages and the proffered wage. The director then determined that although the petitioner had established its ability to pay the proffered wage as of the 2001 priority date, it had not demonstrated its ability to pay the proffered wage after the priority year.

The director referenced the Yates memo dated May 4, 2004² and stated that it established that under certain circumstances, a petition could be denied without benefit of a request for additional evidence. The director stated that one such circumstance is when the record of proceedings is complete with respect to all the required initial evidence as specified in the regulations. The director noted that the instant petition contained a complete record, and that the documents submitted by the petitioner did not establish the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the beneficiary has been paid each and every year based on the starting salary stipulated in the I-140 petition. Counsel submits the petitioner's 2003 tax return and stated that it reflects sufficient income and the petitioner's ability to pay the proffered wage at the time of filing. This documents indicates that the petitioner had taxable income before net operating loss deduction and special deductions of \$1,283, and net current assets of \$1,283.³

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 employed and paid the beneficiary during

² Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

³ The analysis of the petitioner's Schedule L for all relevant tax years will be discussed further in these proceedings.

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. The W-2 documents submitted to the record by the petitioner indicate that the petitioner paid the beneficiary \$9,712 in 2001, and \$14,520 in 2002, less than the proffered wage of \$24,960. The petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner is structured as a corporation. In its examination of IRS Form 1120, CIS considers the petitioner's taxable income the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return. With regard to tax years 2001, 2002, and 2003, the petitioner's taxable income is \$1,070, \$1,366, and \$1,283. These figures are not sufficient to pay the difference between the beneficiary's actual wages and the proffered wage in either year.

Nevertheless, 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. In addition, 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.⁴ 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. The tax returns reflect the following information for the following years:

⁴ 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.

	2001	2002	2003
Taxable income ⁵	\$ 1,070	\$ 1,366	\$ 1,283
Current Assets	\$ 15,431	\$ 0	\$ 3,397
Current Liabilities	\$ 0	\$ 0	\$ 2,114
Net current assets	\$ 15,431	\$ 0	\$ 1,283

As previously discussed by the director, the petitioner has demonstrated that it has the ability to pay the proffered wage in 2001. In 2001, the petitioner shows a taxable income of \$1,070 and net current assets of \$15,431, and has, therefore, demonstrated the ability to pay the difference between the beneficiary's wages of \$9,712 and the proffered wage of \$24,960. In 2002, the petitioner shows a taxable income of \$1,366, and net current assets of \$0, and has, therefore, not demonstrated the ability to pay the difference between the beneficiary's actual wages and the proffered wage, in 2002.

With regard to tax year 2003, the petitioner has not established that it paid wages to the beneficiary in 2003. Therefore the petitioner has to establish that it has the ability to pay the entire proffered wage of \$24,960 during 2003. As previously illustrated, the petitioner has taxable income of \$1,283, and net current assets of \$1,283. Thus, in 2003, the petitioner did not have the ability to pay the proffered wage from either its taxable income or net current assets.

It is noted that the petitioner did establish that it had the ability to pay the proffered wage as of the 2001 priority date; however, the petitioner has to also establish that it has the continuing ability to pay the proffered wage, from the time the priority date was established to when the beneficiary obtains legal permanent residency. The petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Furthermore the petitioner did not establish any additional sources of funds with which to pay the difference between the beneficiary's actual wages in 2002 and the proffered wage, or the proffered wage in 2003.

Therefore, the director's decision shall stand, and the petition shall be denied.

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.

⁵ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.