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U.S. Citizenship
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Services

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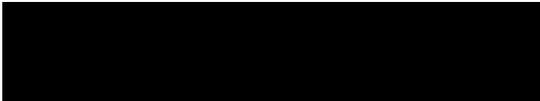
Office: VERMONT SERVICE CENTER

Date: JUL 24 2006

EAC 03 244 52865

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:

SELF-REPRESENTED

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, Chief
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 dental office. It seeks to employ the beneficiary permanently in the United States as a secretary. 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 submitted documentation with regard to its ability to pay the proffered wage. The director denied the petition accordingly.

On appeal, the petitioner states that it does have the ability to pay the proffered wage. The petitioner submits copies of two bank statements, and also requests an oral hearing.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 14, 2001. The proffered wage as stated on the Form ETA 750 is \$15.35 an hour, or \$31,928 annually.¹

On the petition, the petitioner indicated it was established in 1995, has 6 employees, a gross annual income of \$539,844, and a net annual income of -\$13,221. The petitioner retained the services [REDACTED] Certified Paralegal, Immigration & Pro. Services, Inc, Falls Church, Virginia.² [REDACTED] submitted the instant

¹ The I-140 petition also identified a weekly salary of \$614.

² Although [REDACTED] submitted a Form G-28 that stated she was an accredited representative of the National Federation of Paralegals Associations, Inc, and as such is recognized by the Board, her name is not found in the list of accredited representatives to the Board of Immigration Appeals. For purposes of these proceedings, the petitioner is considered self-represented.

I-140 petition, and stated that the original labor certification was submitted along with the work experience letter of the substitute beneficiary. The original ETA 750 identified the original beneficiary [REDACTED]. The record is devoid of any work experience letter of the current beneficiary, [REDACTED] or any ETA 750, Part B, signed by the current beneficiary. The petitioner did submit a copy of the current beneficiary's diploma from the Evangelical University of El Salvador as a doctor in dental surgery.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 13, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 and 2002 federal income tax returns, with all schedules and attachments. In addition, the director requested a copy of the beneficiary's Forms W-2 if the petitioner had employed her. The director also stated that alternatively the petitioner could also submit its annual reports for 2001 and 2002, or a statement from a financial officer of the company that established its ability to pay the proffered wage.³ The director also noted that additional evidence such as accredited profit/loss statements, bank account records, or personnel records may be considered but only as supplementary evidence to establish a petitioner's ability to pay the proffered wage. With regard to the beneficiary's qualifications, the director requested an advisory evaluation of the beneficiary's formal education.

In response, the petitioner submitted a Form 1120 corporate tax return for the petitioner for the year 2001, an affidavit from [REDACTED] identified in the letter as the petitioner's president and owner, a one page document that examined the petitioner's income statement for the period January 1, 2001 to June 30, 2001, a letter from [REDACTED] the petitioner, and a credential evaluation report for the beneficiary's educational studies.

The petitioner's 2001 Form 1120 indicated the petitioner had net income of \$6,282, and did not indicate any figures on Schedule L of its federal tax return with which to calculate the petitioner's net current assets.⁴ In his affidavit, [REDACTED] the petitioner's president, stated that he owned the petitioner, and that he was submitting a loan approval letter from M&T Bank that qualified him for a home equity line of credit for \$50,000 which was readily available to use for business expansion.⁵ [REDACTED] also stated that the petitioner's financial statement as of June 30, 2001, showed gross revenues of \$237,058 and a net profit of \$34,871. [REDACTED] also noted that the petitioner's federal tax return for 2001 also showed a potential income of \$478,058 and a net profit of \$6,282.⁶ [REDACTED] stated that based on these figures, the petitioner had the ability to pay the proffered wage of \$31,928.

The one page petitioner's income statement for the first six months of 2001 submitted to the record, states on the bottom of the page that the document was prepared and audited [REDACTED] CPA; however, no statement by the accountant accompanies the document. The credential evaluation report submitted by the

³ This method of establishing a petitioner's ability to pay a proffered wage applied to petitioners with 100 or more employees. This method is not applicable to the instant petitioner that has six employees.

⁴ The calculation of the petitioner's net current assets, and its use in determining the petitioner's ability to pay the proffered wage will be discussed further in these proceedings.

⁵ The M& T Bank letter is dated May 4, 2004, and states that the petitioner's owner's application for a home equity line of credit in the amount of \$50,000 had been approved.

⁶ [REDACTED] identification of these two figures varies from how the AAO identifies these figures. The figure \$478,058 on the petitioner's tax return indicates the petitioner's gross profit, and the figure \$6,282 identifies the petitioner's net income.

petitioner is written by [REDACTED] Inc., Bowling Green Station, New York. In the report, the evaluator states that the beneficiary's educational credential of Doctor of Dental Surgery was the equivalent of five years of professional studies in the United States. The report also noted that Doctor in Dental Surgery was the first professional degree in dentistry in El Salvador.

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 priority date, and, on June 25, 2004, denied the petition. The director stated that the petitioner's income statement for January 1, 2001 to June 30, 2001 did not reflect the petitioner's ability to pay the proffered annual salary at the end of 2001, and that although the statement indicated it was audited, no letter from the accountant was provided confirming such an audit. The director then determined that the petitioner's six-month income statement was of limited evidentiary weight. Furthermore the director determined that the petitioner's home equity loan had been approved in May of 2004, and thus any funds from the loan would not have been available to pay the proffered wage in 2001, the year in which the priority date was established. The director then determined that the petitioner had not provided sufficient evidence to establish that it had the ability to pay the proffered wage as of the 2001 priority and continuing.

On appeal, the petitioner submits a copy of its bank statement from SunTrust for the petitioner's checking account for the month of June 2001. This bank statement indicated an ending balance of \$32,100.43. The petitioner also submits a copy of a monthly statement for June 2001 from Burke and Herbert Bank and Trust Company. This document indicates an ending balance of \$17,970. The petitioner also states that if these financial documents are not sufficient to establish the petitioner's ability to pay the proffered wage, he requests an oral hearing so as to have the opportunity of retaining legal counsel to defend the petitioner's position.

With regard to oral hearings, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. The petitioner merely states that it would like to have the opportunity to have an attorney defend its position. The issue of legal representation is not a unique factor or an issue of law to be resolved. The petitioner is free to obtain legal counsel prior to the submission of any petition and during any stage of these proceedings. Furthermore, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The petitioner on appeal submits two monthly statements for two banks for June 2001. The petitioner's reliance on the balances in its bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement for June 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return.

With regard to utilizing the petitioner's home equity line of credit as an additional source of funds with which to pay the proffered salary, as the director correctly noted in her decision, this line of credit was approved in May 2004, more than a year after the petitioner filed the I-140 petition and almost three years after the petitioner filed the Form ETA 750. Thus the loan cannot be used to establish the petitioner's ability to pay the proffered wage as of the 2001 priority date or 2003 filing date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Furthermore, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing. *See Katigbak*. Moreover, the petitioner's existent loan would be reflected in the balance sheet provided in the petitioner's 2004 or audited financial statement and would be fully considered in the evaluation of the corporation's net current assets in that tax year, if this tax return were submitted to the record. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In addition, the petitioner submitted an income statement for the first six months of tax year 2001. As the director correctly noted, although the document states "Prepared and audited by Scott Covino, CPA," [REDACTED] has submitted no further explanation of the claimed audit and its preparation. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 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. As stated previously, there is no ETA Form 750, Part B, that details the current beneficiary's work experience. In her I-485 petition, the beneficiary submitted a W-2 form that she earned \$12,335.42 in 2002 while employed by the petitioner. This sum is not sufficient to pay the proffered wage in 2002. Furthermore, the petitioner has to establish it is capable of paying the proffered wage as of the 2001 priority date, as well as tax year 2002. A petitioner must establish the elements for the approval of the petition at the time

of filing. A petition may not be approved if the petitioner was not eligible at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore 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. The petitioner's net income is the sum, identified on line 28, taxable income before net operating loss deduction and special deductions, IRS Form 11020, U.S. Corporation Income tax Return. While the director requested the petitioner's 2001 and 2002 federal income tax returns, the petitioner only submitted its 2001 federal income tax returns. Therefore the AAO will only examine this document as to the petitioner's net income. Based on the petitioner's 2001 tax return, the petitioner had taxable income before net operating loss deduction and special deductions of \$6,282. This net income is not sufficient to establish the petitioner's ability to pay the proffered wage of \$31,928.

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.⁷ 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. Upon review of the petitioner's 2001 tax return, Schedule L, lines 1 through 6, and lines 16 through 18 are blank. Therefore the petitioner's current assets, current liabilities and net current assets cannot be calculated. Therefore

⁷ 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 has not demonstrated its ability to pay the proffered wage through either its net income or net current assets.

As stated previously, the petitioner's home equity line of credit is not considered as a source of additional funds with which to pay the proffered wage. Although the petitioner in its response to the director's request for further evidence produced a document for the first six months of 2001 that indicated a net income of \$34,871 as of June 30, 2001, as stated previously, the petitioner has not demonstrated that this statement is audited, and is given no evidentiary weight. Therefore, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

Beyond the decision of the director, the petitioner did not establish that the beneficiary was qualified for the proffered position. First, as previously stated, the Form ETA 750 submitted with the petition contained no Part B filled in and signed by the current beneficiary that lists her credentials and work experience. Furthermore, it is noted that the proffered position on the Form ETA 750 is for a secretary with a bachelor's degree in business administration. The petitioner submitted an educational equivalency report that establishes the current beneficiary has no baccalaureate degree in business administration, but rather a five-year university degree with a diploma for Doctor in Dental Surgery. Thus, the educational credentials do not match the credentials outlined in Form ETA 750. Therefore the beneficiary is not qualified to perform the duties of the proffered position.

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.