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U.S. Citizenship
and Immigration
Services

B6.

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FILE: EAC 04 118 50803 Office: VERMONT SERVICE CENTER Date: JUN 12 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
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 specialty residential and office cleaner. It seeks to employ the beneficiary permanently in the United States as a cleaner specialist. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 4, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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, 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. 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 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 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour or \$22,880.00 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on

¹ 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*

appeal includes counsel's brief. Other relevant evidence in the record includes the petitioner's 2001 through 2003 Forms 1120S, U.S. Income Tax Return for an S Corporation. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 tax returns reflect an ordinary income or net income of -\$8,826, \$3,646, and -\$10,247, respectively. The petitioner's 2001 through 2003 tax returns also reflect net current assets of \$11,507, \$2,799, and \$2,417, respectively.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$22,880 based on its assets and the fact that the beneficiary was employed and paid wages by the petitioner since 2001. Counsel cites an unpublished decision, *O'Connor v. Attorney General*, 1987 WL 18243 (D. Mass. Sept. 29, 1987)² in support of his statement.

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 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 April 27, 2001, the beneficiary did not include the petitioner as a past or present employer. However, a letter from the petitioner indicates it has employed the beneficiary since April 30, 2001. Therefore, the petitioner has established that it employed the beneficiary in 2001 through 2003. It should be noted that the petitioner has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in 2001 through 2003.

As an alternative 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, 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.

of Soriano, 19 I&N Dec. 764 (BIA 1988).

² It should be noted that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions (whether precedent decisions or other decisions) are not similarly binding. In addition, precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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. 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.³ 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 petitioner's net current assets in 2001 through 2003 were \$11,507, \$2,799, and \$2,417, respectively. The petitioner could not have paid the proffered wage of \$22,880 in 2001 through 2003 from its net current assets.

Counsel contends that the petitioner has established its ability to pay the proffered wage based on its assets. Counsel is mistaken. Counsel is basing his contention on total assets and current liabilities. As stated above, CIS will only consider the petitioner's net current assets which are current assets minus current liabilities. It is not appropriate to include all assets and only current liabilities.

Counsel states:

Taking petitioner's labor costs (Form 1120S, Schedule A, line 3) and Schedule L amounts, it is clear that petitioner had the ability to pay the proffered annual wage of \$22,880 to beneficiary. As stated above, the record reflects that beneficiary was employed by petitioner since 2001, which means that [CIS] should have made allowance in its decision for this fact as well as the fact that petitioner's assets during the relevant time exceeded the proffered wage even without taking into account beneficiary's employment for wages with petitioner during the relevant time period.

³ 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.

As stated above, CIS will only consider the petitioner's net current assets when determining the petitioner's ability to pay the proffered wage of \$22,880, and not all of the petitioner's assets. In addition, CIS will consider wages issued by the petitioner to the beneficiary. However, the petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$22,880 and the actual wages paid to the beneficiary. CIS will not assume or try to guess the amount the beneficiary earned. In order to confirm the wages paid to the beneficiary, the petitioner must submit the beneficiary's Forms W-2, Wage and Tax Statements, Forms 1099-MISC, Miscellaneous Income, cancelled payroll checks, payroll records, etc.

Counsel asserts that CIS failed to take into account other factors such as the growth of the petitioner's business, the fact that it has spent around \$130,000 in wages (including the beneficiary), and the petitioner's reasonable expectations for continued growth. Again, the AAO is not in agreement with counsel. The petitioner's 2001 through 2003 tax returns actually show a decrease in gross receipts over the pertinent years. In fact, the petitioner's gross receipts fell \$71,719 from 2001 (\$291,262) to 2003 (\$219,543). In addition, the mere fact that the petitioner paid wages, no matter the amount, does not equate to its ability to pay the proffered wage, nor does it establish that the petitioner actually paid the proffered wage to the beneficiary. Furthermore, the petitioner has provided no evidence of its expected growth (projected financial growth, statements, etc.).

The petitioner's 2001 tax return reflects an ordinary income or net income of -\$8,826 and net current assets of \$11,507. The petitioner could not have paid the proffered wage of \$22,880 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of \$3,646 and net current assets of \$2,799. The petitioner could not have paid the proffered wage of \$22,880 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of -\$10,247 and net current assets of \$2,417. The petitioner could not have paid the proffered wage of \$22,880 from either its net income or its net current assets in 2003.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was appropriate based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.