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U.S. Citizenship and Immigration Services

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MAY 09 2007

FILE: SRC 02 236 52420 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Texas Service Center, denied the third preference immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel and transportation company. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed. Although it makes no specific allegation of error in law or fact it is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 23, 2001. The proffered wage as stated on the Form ETA 750 is $49,000 per year.

The Form I-140 petition in this matter was submitted on August 1, 2002. On the petition, the petitioner stated that it was established during 1998 and that it employs "2+" workers. The petition states that the petitioner's gross annual income is $250,000 and that its net annual income is "$50,000+".[1] On the Form ETA 750, Part

[1] The portions of the tax returns subsequently submitted and described below show that the petitioner's gross receipts were less than $250,000 during each of the salient years and that its taxable income before net operating loss deductions and special deductions, rather than exceeding $50,000 per year, never exceeded $12,162.

B, signed by the beneficiary on September 12, 2001, the beneficiary claimed to have worked for the petitioner since March 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Miami, Florida.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.

In the instant case the record contains the first pages of the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The first pages of the petitioner's tax returns show that the petitioner is a corporation, that it incorporated on May 1, 1998, and that it reports taxes pursuant to the calendar year. The first pages do not indicate whether the petitioner reports taxes pursuant to cash or accrual convention accounting.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of $338. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's 2001 end-of-year net current assets.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of $8,145. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's 2002 end-of-year net current assets.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of $12,162. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's 2003 end-of-year net current assets.

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of $10,024. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's 2004 end-of-year net current assets.

The director denied the petition on September 11, 2004. On appeal, the petitioner submitted a letter, dated May 15, 2005, signed by the beneficiary, that asserted that the salary and wage expense shown on each of its tax returns includes $47,000 per year paid to the beneficiary. The petitioner provided no additional evidence to support that assertion.

On June 7, 2004 the service center issued a request for evidence asking that the petitioner provide additional evidence of its continuing ability to pay the proffered wage beginning on the priority date including its 2001, 2002, and 2003 tax returns. In his response to that request the petitioner did not provide its tax returns, but stated that they were lost.

On appeal the petitioner did not provide complete copies of those tax returns, but provided the first page of each return. The petitioner did not explain why it was then able to provide those portions of those documents.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not typically accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988).

Because the petitioner claimed that it was initially unable to locate the tax returns, however, this office will consider the portions of the tax returns submitted. This office, however, finds that the unqualified request for copies of the petitioner's tax returns was a request for **complete** copies of those returns, and does not consider the submission of the first page of each of the salient returns to be responsive to that request.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

In the instant case the petitioner did not submit W-2 forms or any other documentary evidence specifically demonstrating that it paid wages to the beneficiary during the salient years. The May 15, 2005 letter from the petitioning company, signed by the beneficiary, did state, however, that the total salary and wage expense shown on each of the petitioner's tax returns from 2001 through 2004 includes $47,000 paid to the beneficiary during each of those years. The beneficiary stated, on the Form ETA 750B, that he began working for the petitioner during March of 2001. This office questions the assertion that the petitioner paid the petitioner paid the beneficiary a full year's salary during 2001 when he allegedly began working for the petitioner during March of that year. Under these circumstances, in the absence of documents such as the beneficiary's W-2 forms for 2001 – 2004, this office finds that the petitioner has not established that it employed and paid the beneficiary at any time since the priority date.[2]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant*

[2] A letter dated August 14, 2004 states, "I . . . have copies of my W-2's and previous returns. If these are sufficient, please let me know and I will send them to you." Who composed that letter, and whose W-2 forms were being offered, is unclear. In any event, the petitioner is obliged to submit evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, rather than merely to offer to submit evidence if it is sufficient. If the petitioner has additional evidence that demonstrates its continuing ability to pay the proffered wage beginning on the priority date, this evidence may be submitted on motion.

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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[3] shown on lines 16(d) through 18(d). 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.

The proffered wage is $49,000 per year. The priority date is October 23, 2001.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of $338. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no data from which its 2001 end-of-year net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

[3] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of $8,145. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no data from which its 2002 end-of-year net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of $12,162. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no data from which its 2003 end-of-year net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on August 1, 2002. On that date the petitioner's 2004 tax return was unavailable. On June 7, 2004 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2004 tax return was still unavailable. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2004 and later years.

Although it was not required to show the ability to pay the proffered wage during 2004, the petitioner submitted the first page of its 2004 tax return. That return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of $10,024. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no data from which its 2004 end-of-year net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds available to it during 2004 with which it could have paid the proffered wage.

If the petitioner had been obliged to demonstrate its ability to pay the proffered wage during 2004 the first page of its 2004 tax return would have been insufficient to sustain the petitioner's burden of proof. As was noted above, however, the petitioner was not obliged to demonstrate its ability to pay the proffered wage during 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

In the June 7, 2004 request for evidence the service center requested copies of the petitioner's 2001, 2002, and 2003 tax returns. In its response to that request the petitioner did not provide its tax returns, stating that they were unavailable. On appeal the petitioner provided the first pages of those three tax returns, as well as the first page of its 2004 return, but did not explain the failure to provide the balance of those returns. Assuming that the petitioner had recovered those returns in their entirety, rather than merely the first page of each return, then the submission was insufficiently responsive to the request.

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 petition could have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.