



U.S. Citizenship
and Immigration
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAY 31 2007

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.

A handwritten signature in black ink, appearing to read "Rob Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting corporation. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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 the petitioner has not shown that it had sufficient income to pay all the wages of all its pending employment based petitions. 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated September 16, 2005, an 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, and also, in addition, whether or not the petitioner has filed other immigrant petitions for alien workers (Form I-140), as well as other employment based petitions that are currently pending.¹

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 granting 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ According to the director, the petitioner has filed 13 I-140 petitions since January 1, 2003, and 39 I-129 H-1B petitions since January 1, 2003.

Here, the Form ETA 750 was accepted on October 13, 2003. The proffered wage as stated on the Form ETA 750 is \$65,000.00 per year.

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 appeal.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated August 14, 2004; an explanatory letter dated July 13, 2005; Form 941 statements; U.S. Internal Revenue Service Form 1120 tax returns for 2003 and 2004; amendments to U.S. Internal Revenue Service Form 1120 tax returns for 2003; an explanatory statement from the petitioner's accountant dated July 7, 2005; the petitioner's employee and wage information for the first quarter of 2005; an internally generated ability to pay calculations "spread sheet" for six named beneficiaries; a W-2 Wage and Tax Statement for the year 2004 from the petitioner to the beneficiary in the amount of \$52,588.00 together with the beneficiary's and spouse personal federal tax return; a pay statement from the petitioner to the beneficiary for the period May 23, 2005 to June 5, 2004, stating year to date earnings of \$33,000.00; W-2 Wage and Tax Statements for the years 2003 and, 2004; and, a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. In the petition, the petitioner claimed to have been established in 1998 and at the time the petition was prepared to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on October 9, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the tax returns submitted in this matter "did not reflect the accounting policies chosen by the petitioner," and therefore, the tax returns were amended and include the "hybrid" method of accounting that includes cash and accrual basis.

Counsel asserts that the petitioner has the ability to pay the proffered wage for the 13 I-140 petitions filed since January 1, 2003, and 39 I-129 H-1B petitions because some beneficiaries leave the petitioner. (Counsel also elucidates concerning the petitioner's experience with employees on H-1B visa.)

Counsel states that the beneficiary's current earnings are equal to \$78,000.00 annually, which is evidence of the petitioner's ability to pay the proffered wage.

As a preface to the following discussion, the petitioner's tax returns were prepared pursuant to the cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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 of Soriano*, 19 I&N Dec. 764 (BIA 1988).

to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS. The petitioner seeks to introduce amended tax returns utilizing a new accounting method.

The IRS requires the submission of Form 3115 on behalf of each applicant seeking consent to change an accounting method. Specifically, the publicly available instructions for the Form 3115 state that a corporate taxpayer should file a "Form 3115" to request a change in accounting method, including the accounting treatment of *any* item." (Emphasis added.) The instructions further require a form for "each unrelated item or submethod." The record lacks evidence that the petitioner filed this form.

This office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seek to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. The petitioner initially reported income when it was received, consistent with cash convention, but has amended the tax returns to include income earned during a fiscal year but not received during that year, which would be consistent with the accrual method. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change year-to-year distribution of the petitioner's current assets, but the petitioner has not satisfactorily demonstrated why changing from the cash to accrual method would make available revenue that would otherwise not have appeared in any year.

Our position is consistent with the business reference available at <www.referenceforbusiness.com> which provides that while switching accounting methods generally results in adjustments to taxable income (not demonstrated in this matter) "changing accounting methods does not permanently change the business' long-term taxable income, but only changes the way that income is recognized over time." The petitioner has presented markedly different statements of its current assets for the same tax year with no supporting documentation to explain why the amended version is more credible than the first tax return originally file with the IRS. 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)). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore for the reasons above stated we cannot accept the amended tax returns submitted as independent, objective evidence of the petitioner's ability to pay the proffered wage without accompanying audited financial statements.

Accompanying the appeal, counsel submits an explanatory statement from the petitioner's accountant; an internally generated ability to pay calculations spread sheet for six named beneficiaries; and, one pay statement from the petitioner to the beneficiary dated October 7, 2005, stating gross wages of \$3,000.00, and, year-to-date earnings of \$56,700.00.

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 CFR § 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 (BIA 1967).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date. Submitted into evidence were the following: a W-2 Wage and Tax Statement for the year 2004 from the petitioner to the beneficiary in the amount of \$52,588.00 together with the beneficiary's and spouse personal federal tax return; a quarterly return reflecting wages paid to the beneficiary of \$15,000 in the first quarter of 2005; a pay statement from the petitioner to the beneficiary for the period May 23, 2005 to June 5, 2004, stating year to date earnings of \$33,000.00 and October 7, 2005 pay statement reflecting year to date wages of \$56,700.

Counsel has stated that the beneficiary's current earnings equal to \$78,000.00 annually is evidence of the petitioner's ability to pay the proffered wage. However, there is no evidence that the petitioner paid the beneficiary the proffered wage for any year examined prior to October 7, 2005.

The petitioner has not demonstrated that it paid the beneficiary any wages in 2003. Thus, the petitioner must demonstrate an ability to pay the full \$65,000 in that year.³ Based on the above, the petitioner must demonstrate an ability to pay the difference between the proffered wage, \$65,000, and the wages paid in 2004, \$52,588. That difference equals \$12,412.

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).

³ Counsel has asserted that the petitioner need only demonstrate an ability to pay the prorated proffered wage from the priority date on October 13, 2003. This would be a valid assertion if counsel were providing evidence of wages paid or net income for just that period. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel asserts that the income stated in the petitioner's tax returns is evidence of the petitioner's ability to pay the proffered wage as discussed above. Reliance on the petitioner's gross sales and profits is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in the aggregate in excess of the proffered wage is insufficient.

The initial and amended tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120 stated net income of \$8,117.00.
- In 2004, the Form 1120 stated net income of \$8,678.00.

Thus, the petitioner did not have net income sufficient to pay the proffered wage for the year 2003 or the difference between the proffered wage and wages paid in 2004.

Further, examining additional factors, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of 2003 through an examination of wages paid to the beneficiary, its net income, or, the additional wage expense of beneficiaries for which the petitioner has filed I-140 petitions. In an internally prepared document, based on the proffered wages and wages paid to six beneficiaries, the petitioner calculated that the aggregate proffered wages amount to \$382,000.00. The difference between the aggregate proffered wages and the wages paid to all of the six beneficiaries is calculated to be \$81,071 in 2003 and \$133,937 in 2004. The petitioner's net income in those years clearly does not cover these amounts.

If the net income the petitioner demonstrates it had available during the 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets at the end of 2003 are listed as \$13,127 on the original tax return. The record only contains the petitioner's amended tax return for 2004.

For the reasons discussed above, we will not consider the amended returns. Therefore for 2003 and 2004 the petitioner did not have sufficient net current assets to pay the proffered wage of \$65,000 in 2003. Without the original 2004 tax return, the petitioner cannot establish its ability to pay the difference between wages paid and the proffered wage, \$12,412, in 2004. This conclusion is especially true when taking into consideration the additional wage expense of the beneficiaries now pending for which the petitioner has filed I-140 petitions, claimed to be \$81,071 in 2003 and \$133,937 in 2004.

The CIS electronic database records show that the petitioner filed I-140 petitions on behalf of other beneficiaries at about the same time as the instant petition was filed. It is necessary for the petitioner to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. According to an exhibit submitted by the petitioner, the total additional amount required to pay the wages offered to six other beneficiaries is \$382,000.00. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.