

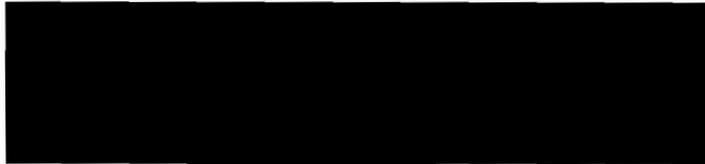
identifying information deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B5



FILE:

LIN 05 149 51454

Office: NEBRASKA SERVICE CENTER

Date: JUL 17 2006

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



JUL 17 2006

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.

Mari Johnson

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 (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is an aerospace engineering consulting firm. It seeks to employ the beneficiary permanently in the United States as an assistant project manager/physicist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the 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 denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 January 24, 2002. The proffered wage as stated on the Form ETA 750 is \$68,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 2001.

On the petition, the petitioner claimed to have an establishment date in 1996, a gross annual income of \$2.8 million and 23 employees. The petitioner did not list its net annual income. In support of the petition, the petitioner submitted its Form 1065 U.S. Returns of Partnership Income for 2002 and 2003. These returns reflect the following information:

	2002	2003
Net income	\$151,389	(\$121,269)
Current Assets	\$777,370	\$710,510
Current Liabilities	\$498,164	\$386,987

Net current assets \$279,156 \$323,523

The petitioner also submitted Forms W-2 issued by Gevity HR, LP to the beneficiary in 2002, 2003 and 2004 reflecting wages of \$69,088.21, \$73,255.77 and \$73,842.48 respectively. The petitioner also submitted the beneficiary's pay report for 2004 reflecting total compensation of \$84,166.27 including benefits and total earnings of \$73,224.57. The report was prepared by Gevity but lists the beneficiary's employer as the petitioner, who is credited as contributing the full \$73,224.57.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 29, 2005, the director requested additional evidence pertinent to that ability. Specifically, the director requested evidence of the relationship between Gevity and the petitioner, concluding that the petitioner had not paid the beneficiary's wages in previous years and showed a net loss in 2003. The director requested the petitioner's 2004 tax return.

In response, counsel explained that Gevity is a professional employment organization (PEO), a "co-employer" to whom the petitioner outsources human resource functions, including company payroll, Form I-9 compliance and benefit plans. The petitioner submitted a welcome letter from Gevity to client employees indicating that it provides human resource services to employers. Gevity is responsible for issuing paychecks, providing consultation to the employer, negotiating health and retirement benefits and managing paperwork. The client employer remains responsible for compensating its employees, managing day-to-day work, delivering rewards and incentives, running the business and making business decisions, providing training and development opportunities and performance appraisals. The letter further asserts that the employee will receive paychecks from Gevity but the client employer is obligated to pay Gevity for the full amount of the wages.

On August 19, 2005, the director issued another request for additional evidence. In this request, the director noted that the welcome letter was not a contract between the petitioner and Gevity and requested the contract as well as evidence of the petitioner's transfer of funds to Gevity for payroll purposes. The petitioner submitted a contract between the petitioner and Staff Leasing, LP, noting that Staff Leasing has changed its name to Gevity. The petitioner submitted a filing with the State of Delaware whereby Staff Leasing, LP changed its name to Gevity HR, LP. The petitioner also submitted evidence relating to the petitioner's payments to Gevity for payroll purposes.

As noted by the director, the contract provides that:

[Staff Leasing] reserves a right of direction and control over Co-employees and retains authority to hire, terminate its employment of, and discipline and reassign, Co-Employees. Notwithstanding the foregoing reserved and retained rights, Staff assigns to Client the actual control over (i) the day-to-day job duties of Co-Employees, and (ii) the portion of all job sites at which and from which Co-Employees work.

Later, however, the contract says that the client also has the right to hire, accept or cancel the assignment of, and to terminate its employment of any Co-Employee. The petitioner also has the right and obligation “to supervise, direct and control the Co-Employees in order to conduct its business.”

Significantly, Staff Leasing “assumes responsibility for the payment of wages to Co-Employees without regard to payments by Client to Staff although in doing so Staff does not waive or limit any claim to be reimbursed by Client for such payments, and assumes full responsibility for the payment of payroll taxes and collection of taxes from payroll on Co-Employees.” Moreover, Paragraph 12(A) mandates that the petitioner “will pay Staff the gross remuneration of Co-Employees.”

Records Custodian for Gevity, asserts that the petitioner has deposited “all payroll taxes process through Gevity’s payroll system.” Accompanying this letter are Gevity’s “Billing and Receipt History” statements for the beneficiary as an employee of the petitioner. In addition, the petitioner submitted its own bank statements showing large transfers to Gevity.

The director determined that petitioner’s net income in 2002 and net current assets in 2003 were sufficient to establish an ability to pay in those years, but noted that the petitioner had failed to submit a tax return for 2004. The director acknowledged that the petitioner could establish an ability to pay the proffered wage by having paid at least that wage directly to the beneficiary, but concluded that the “co-employer” relationship precluded a finding that the petitioner was responsible for paying the beneficiary’s wages.

On appeal, counsel asserts that the petitioner has employed the beneficiary at no less than the proffered wage since prior to the priority date. Thus, counsel asserts, the petitioner has established its ability to do so. Counsel further asserts that case law supports a conclusion that the worksite employer is the employer. Counsel opines that the director’s decision effectively precludes small business that use PEO’s to sponsor non-citizen employees. Counsel concludes:

In the present case, there does not seem to be any dispute that the Petitioner has the actual funds to pay the Beneficiary. There is no dispute that the Petitioner used said funds to pay the Beneficiary for services rendered as an employee. Common sense dictates that the Petitioning company has earned the funds necessary to pay the Beneficiary, and indeed pays here, and whether it employs a third part to actually write the checks should be irrelevant.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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.

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 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 the Service should have considered income before expenses were paid rather than net income.

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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.¹ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a partnership'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.

In 2002, the petitioner shows a net income of \$151,389, more than the proffered wage. In 2003, the petitioner shows net current assets of \$323,523, also more than the proffered wage. Thus, the remaining issue is the petitioner's ability to pay the proffered wage in 2004.

¹ 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 director does not appear to be questioning whether the petitioner is a qualifying employer with a bona fide intention of employing the beneficiary. Rather, the sole basis of the director's decision is the petitioner's ability to pay the proffered wage. If the petitioner is actually paying those wages, directly or otherwise, it is unclear how it lacks the ability to do so.

In the second request for evidence, the director specifically requested evidence that the petitioner transferred sufficient funds to Gevity to cover the beneficiary's paycheck. The director then inexplicably rejects this evidence because the petitioner had not paid the beneficiary directly. If the director had no intention of considering indirect payments to the beneficiary, it is unclear why he requested this evidence in the first place.

We find that the petitioner has provided sufficient evidence tracing the wage payments made to the beneficiary back to the petitioner. As those wages were higher than the proffered wage in 2002, 2003 and 2004, we are satisfied that the petitioner does have the ability to pay the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 and subsequently. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.