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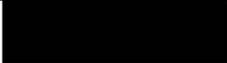
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

OCT 10 2008

SRC 07 101 51263

IN RE:

Petitioner:

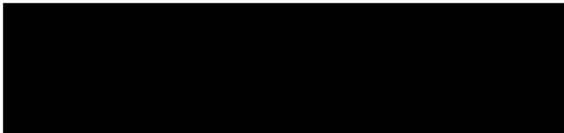
Beneficiary:



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:



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 preference visa petition was denied by the Director, Texas 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 a telecommunications firm. It seeks to employ the beneficiary permanently in the United States as a team leader/software engineering 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. For the reasons discussed below, we withdraw the director's adverse findings.

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 either 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 ETA Form 9089 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 ETA Form 9089 was accepted for processing on October 27, 2006. The proffered wage as stated on the ETA Form 9089 is \$107,037 annually (\$4,116.81 biweekly). On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 2005.

On the petition, the petitioner claimed to have an establishment date in 2001, a gross annual income of \$2,700,000, a "confidential" net income and 50 employees. In support of the petition, the petitioner submitted its 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return, the beneficiary's 2006 Form W-2 Wage and Tax Statement reflecting wages of \$103,275, and the beneficiary's pay stubs for December 2006 reflecting that the beneficiary was being paid \$4,166.67 biweekly.

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 February 20, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R.

§ 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted a draft audited financial statement covering 2004, 2005 and 2006 and pay stubs reflecting that the beneficiary was currently being paid \$4,583 biweekly. The pay stubs also reflect a year to date bonus of \$10,775. The petitioner's 2005 tax return and financial statement reflect large net losses and current assets exceeding current liabilities in all years.

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 May 21, 2007, denied the petition. The director's decision stated that the beneficiary was paid \$100,957.32 in 2006. A careful reading of the beneficiary's Form W-2, however, reveals that while the beneficiary's *taxable* income was \$100,957.32, his actual income, adding back in a transportation reduction and a cafeteria 125 reduction, was \$103,275, the amount reflected on both the beneficiary's Form W-2 Earnings Summary and his December 31, 2007 pay stub. Nevertheless, we acknowledge that \$103,275 is also less than the proffered wage.

On appeal, counsel and the petitioner assert that the beneficiary received a cash bonus for 2006 which was paid in April 2007 of \$10,775. Counsel asserts that the director should have considered the petitioner's venture capital and other evidence in addition to tax returns and financial statements. The petitioner submits the petitioner's bank statements for October, November and December 2006.

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. In the instant case, the petitioner began paying the beneficiary at least the proffered wage in December 2006. For all of 2006, the petitioner paid the beneficiary \$103,275, only \$3,762 less than the proffered wage for the full year.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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 be 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 corporation'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 16(d) through 18(d). 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.

As noted by the director, the petitioner began paying the proffered wage in 2007 (actually at least as of December 2006) and need only demonstrate an ability to pay the difference between the proffered wage and wages paid in 2006. As further noted by the director, the petitioner shows a net loss and current liabilities that exceed current assets in 2004 through 2006.

As stated above, the priority date in this matter is October 27, 2006. Significantly, the petitioner began paying the proffered wage no later than December 2006. We will not 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. In this matter, however, we cannot ignore that the priority date occurred just over a month before the record shows the petitioner paying the beneficiary the full proffered wage.

We are not persuaded by counsel's assertion that the director should have considered the petitioner's venture capital. Any capital received would be reflected in the petitioner's assets, which the director took into account in calculating the petitioner's net current assets. We cannot consider assets without balancing them against liabilities. Moreover, while the bonus paid in April 2007 may have

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

been in recognition of services performed in 2006, it remains that the bonus was not paid in 2006 and cannot be considered evidence of the petitioner's ability to pay additional funds in that year.

Often, bank balances are not useful evidence. 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 tend to show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage as funds available to pay the proffered wage in one month would not be available in following months. Third, we will not presume that the funds reported in bank statements reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L. Nevertheless, as stated above, the petitioner paid the beneficiary all but \$3,762 of the proffered wage in 2006 and began paying the proffered wage less than two months after the priority date. The petitioner's bank statements reflect balances of \$702,027.33 as of October 31, 2006, \$267,539 as of November 30, 2006 and \$277,831 as of December 29, 2006. We are persuaded that the petitioner could have paid the \$3,762 in 2006.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2006 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.