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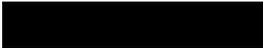


**U.S. Citizenship
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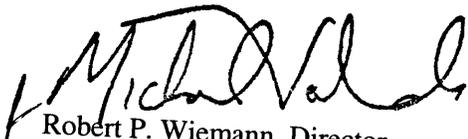
IN RE: Petitioner: 
Beneficiary: 

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The petitioner had submitted a previous I-140 petition for the beneficiary, which the director denied, and the AAO subsequently dismissed. The appeal will be dismissed.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 the granting of 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.

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 the granting of 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, 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 May 1, 2000. The proffered wage as stated on the Form ETA 750 is \$350 a week, which amounts to \$18,200 annually.

On the petition, the petitioner stated it was established in 1997, had seven employees and a gross annual income of \$155,873. With the petition, counsel submitted a cover letter, IRS Forms 1120, federal corporate income tax returns for 2000 and 2001, as well as W-2 forms for the petitioner's employees for 2000 and 2001. Counsel stated that the beneficiary would be replacing [REDACTED], an employee who recently had her second child and would not be working with the company any longer. The petitioner stated that this employee earned \$17,371 in 2001 and did not work the last months of the year. Counsel also submitted the Motion to Reopen or Reconsider submitted by the petitioner on April 2, 2002 in support of the previous I-140 submitted by the petitioner on behalf of the beneficiary. In addition, with regard to contract services, the petitioner submitted an explanation of Line 26,

other deductions, on its 2000 tax return, that indicated it had paid \$10,152 for contract services. It also submitted the same explanation of Line 26, other deductions, for its 2001 tax return that indicated it paid \$8,322 for contract services. In the documentation accompanying the motion, the petitioner submitted Forms 1099-MISC for five workers that it identified as subcontractors. The petitioner also submitted W-2 forms for the tax year 2000 for four employees. For the year 2000, the petitioner submitted twelve W-2 forms for its employees.

On May 23, 2003, the director denied the petition, without issuing a request for further evidence. In her decision, the director stated that in 2000, the petitioner had taxable income of \$9,838, depreciation of \$2,616, wages paid of \$27,780, and compensation to officers of \$23,534. Based on these figures, the director determined that the petitioner had not established that it had the ability to pay the proffered wage of \$18,200 as of the priority date of May 1, 2000.

On appeal, counsel states that the officer failed to request additional information and summarily dismissed the case without even a notice of intent to deny. Counsel asserts that if the officer had requested further information, it would have pointed out that in the IRS 1040 Form, there was an item of \$10,152 in contract labor, which is available to pay the salary.¹ Counsel asserts that the previous AAO decision which the petitioner submitted to the record also supports this conclusion. Counsel states that the director failed to include the amount paid for contract labor that can be allocated to the beneficiary's wage. Counsel identifies the amount of contract labor in 2000 as \$10,152, and states that the sum was paid to beauticians and cosmetologists subcontracted temporarily to satisfy the need for additional skilled help, on a temporary basis. Counsel states that the petitioner's business operations increased dramatically in 2001, with over \$100,000 paid in wages, tips and other compensation in that year. Counsel submits W-3 Transmittal of wage and tax statements for 2001 in support of her assertion. Counsel asserts that the petitioner has hired part-time and seasonal cosmetologists to handle its excess work. Counsel states that this is why the petitioner is pursuing a labor certification for a permanent cosmetologist position.

Although the director did not examine the issue of subcontractors and whether the money used to pay them could be used to show ability to pay the proffered wage, the AAO will examine this issue. In the instant petition, counsel is correct in her assertion that such funds can be used to establish the ability to pay the proffered wage. Counsel is also correct that the AAO in its previous dismissal of the petition, upheld this principle. Nevertheless, as the AAO stated in its previous dismissal: In 2001, "this amount [of contracted labor] can be considered if documentation has been submitted which establishes that the contractors perform the same job that the beneficiary will perform and that they have been subsequently terminated. If the contractor performed other duties, then the beneficiary could not have replaced them." With regard to the documentation submitted to establish that the subcontractors were performing the same job and that they were terminated, the petitioner's evidence is not persuasive. For example, two of the employees, [REDACTED] and [REDACTED] who were compensated by the petitioner by means of Form 1099-MISC in 2000, were subsequently paid as employees, as evidenced by their 2001 W-2 forms. These employees were not terminated, but rather employed on a more permanent status. In addition, [REDACTED] who worked for the petitioner in 2000 is listed in the petitioner's present employee roster as a masseuse, not as a cosmetologist. Therefore, the petitioner has not established that [REDACTED] was working as a cosmetologist in 2000, and thus, performed similar duties as the beneficiary. With regard to the other three

¹ Contrary to counsel's assertion, the petitioner submitted IRS Form 1120, corporate income tax return, not Form 1040, for both 2000 and 2001.

individuals compensated in 2000 by way of Form 1099-MISCs, the petitioner in its cover letter appeared to state that these three individuals, [REDACTED], [REDACTED], and [REDACTED] worked as cosmetologists. However, there is no further documentation in the record to substantiate this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). There are also no Form 1099-MISC in the record for [REDACTED] or [REDACTED] both identified by the petitioner as cosmetologists who worked for the petitioner for short periods of time, apparently in 2000. Although the petitioner in its 2001 tax return stated that it paid contract workers during the year, it submitted no Form 1099-MISCs or other pay documentation to more substantively establish this assertion.

With regard to the petitioner's assertion that the beneficiary would be replacing another employee, this is also another way of establishing the petitioner's ability to pay the proffered wage. However, as with contracted labor, the petitioner has to provide documentation to further substantiate this assertion. However, there is no documentation in the record beyond the petitioner's assertion that the beneficiary would replace Mr. [REDACTED]. Without more persuasive evidence, the petitioner has not adequately established that it will be substituting the beneficiary for a former employee.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. The petitioner did not state that it employed and paid the beneficiary the full proffered wage in 2000 and onward.

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 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, now CIS, should have considered income before expenses were paid rather than net income.

With regard to the petitioner's net income in 2000 and 2001, the director only commented on the petitioner's net income in 2000, a period of time that included the priority date. While this is correct, the AAO will examine the petitioner's net income in both 2000 and 2001. As stated previously, the petitioner's net income in 2000 was \$9,839, and in 2001, the petitioner's net income is \$0. Neither sum is sufficient to pay the proffered wage of \$18,200. Therefore the petitioner cannot establish its ability to pay the proffered wage based on its net income.

Nevertheless, counsel is correct that 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. In addition, 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.² 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. The tax returns reflect the following information for the following years:

	2000	2001
Taxable income ³	\$ 9,839	\$ 0
Current Assets	\$ 3,880	\$ 343
Current Liabilities	\$ 4,794	\$ 6,682
Net current assets	\$ -914	\$ -6,339

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, as previously illustrated, the petitioner shows a taxable income of \$9,839, and negative net current assets of \$914, and has not, therefore, demonstrated the ability to pay the proffered wage. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a taxable income of \$0 and net current assets of -\$6,339. Thus, the petitioner has not demonstrated the ability to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

In examining the totality of the circumstances with regard to whether the petitioner has the ability to pay the proffered wage, it is noted that the petitioner in 2001 added additional employees that appear to work on both a full-time and part-time basis and the petitioner also increased its payroll. While these factors may not have increased the overall profitability of the petitioner's operations, it is evidence of substantially increased business

² 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.

³ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

activity. Counsel's assertion with regard to the employment of one full-time person in lieu of numerous part-time employees also appears reasonable.

In addition, it should be noted that the AAO in its previous decision erroneously identified the wages paid by the petitioner in 2000 to its subcontractors. The AAO identified the wages of the subcontractors as \$5,217.⁴ Although the petitioner identified subcontracting costs at \$10,152, based on the Forms 1044-MISC submitted by the petitioner, the subcontracting costs in 2000 were \$9,464.17. This sum, when combined with the petitioner's net income for 2000 of \$9,839, would be sufficient to cover the beneficiary's proffered wage of \$18,200.⁵ Nevertheless, as illustrated previously, the petitioner's documentation of its subcontractors raises more questions with regard to the jobs and temporary nature of the work performed by subcontracted workers than it provides answers. Therefore, without more persuasive evidence, the examination of such wages does not establish the petitioner's ability to pay the proffered wage in 2000. In addition, it should be noted that although the petitioner stated that it had paid \$8,322 in 2001 to compensate non-employees, the petitioner did not submit any Forms 1099-MISC to further substantiate this assertion. In addition, the combination of the petitioner's non-employee compensation of \$8,322 with the petitioner's negative net income in 2001 or net current assets of -\$6,339 would not be sufficient to pay the proffered wage during 2001.

As stated previously, the documentation of the replacement of a former employee by the beneficiary can be a valid means of establishing that the petitioner has sufficient financial resources to pay the proffered wage. It is noted that, if [REDACTED] the full-time employee that the beneficiary would replace, did not work the entire year, her yearly salary would be equal, if not higher, than the proffered wage. However, as stated previously, the petitioner's mere assertion that such a replacement possibility exists in 2001 is not sufficient evidence to establish the petitioner's ability to pay the proffered wage. In addition, the petitioner submitted a Form W-2 for [REDACTED] that established that she earned \$17,371 in 2001. Thus, this money would not have been available to pay the beneficiary's proffered wage in 2001. Although [REDACTED]'s salary could be used to pay a similar salary in 2002 after her departure, it does not establish that the petitioner had sufficient funds to pay the beneficiary the proffered wage in 2001.

Without more persuasive evidence, the petitioner has not established that in 2000, its wages paid to subcontracted employees could establish the petitioner's ability to pay the proffered wage in 2000, or that its replacement of a full time employee with the beneficiary could establish the petitioner's ability to pay the proffered wage in 2001. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

⁴ It is not clear how the AAO arrived at this figure for subcontracted work in tax year 2000 in its previous dismissal.

⁵ The combination of the petitioner's 2000 non-employee compensation of \$9,464.17 and the petitioner's net income of \$9,838 equals \$19,303.17.