

Administrative Review based on  
prevention of terrorism  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

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*RB6*

APR 29 2005

FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC-04-069-50620

IN RE:

Petitioner:

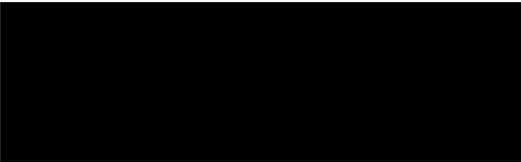


Beneficiary:

PETITION:

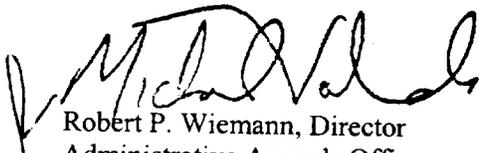
Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 immigrant visa petition was denied by the director of the Vermont Service Center, and, it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consultant and building heating\ventilation\cooling (i.e. HVAC) contractor company. It seeks to permanently employ the beneficiary in the United States as a network and system engineer according to the petitioner's alien labor certification at a prevailing wage of \$72,539.15 per year. As required by statute, a Form ETA 750, entitled Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The priority date of the Alien Employment Certification was December 16, 1998. That is the date the Application for Alien Employment Certification was accepted for processing.

On November 24, 2004, the director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing of Form ETA 750, which was November. The petitioner, by its counsel, appealed the director's decision to the AAO.

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. The petitioner is petitioning for the permanent employment of a skilled worker.

The applicable regulation at Title 8, Code of Federal Regulations, Part 204.5(g)(2) states in pertinent part the following:

*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 annual reports, federal tax returns, or audited financial reports.

On appeal, petitioner's counsel submits a legal brief and evidentiary exhibits as follows: 35 partial copies of purchase orders mostly executed in 2004 that are contracts for petitioner's services; copies of the petitioner's federal corporate tax returns (Form 1120) for 1998, 1999, 2000, 2001 and 2002; the beneficiary's W-2 wage statement for the year 2003 in the amount of \$8050.00; and, nine (9) monthly payroll checks payable to the beneficiary each in the amount of \$4301.00 (indicating a \$51,612.00 per year salary rate) commencing on 12/01/2003.

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 CFR § 204.5(d). In this case, the Form ETA 750 was accepted for processing on December 16, 1998. The proffered wage as stated on the Form ETA 750 is \$72,539.15 per year.

On the Form ETA 750B, signed by the beneficiary, the beneficiary stated he worked for the petitioner since February 2002 although counsel's legal brief in support of petitioner's appeal states that petitioner

“... formally hired the beneficiary in December 2003....” According to Form ETA 750B, the beneficiary was a computer science student in the United States from September 1996 through the date the beneficiary signed the Form ETA 750B on December 10, 1998.

In determining the petitioner's ability to pay the proffered wage during a given period, the U. S. Citizenship and Immigration Services (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.

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). In *K.C.P. Food Co., Inc. v. Sava*, the court held 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 on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

Reviewing the petitioner's federal tax returns Form 1120, the petitioner stated its taxable income as \$8,202.00 in 1998, a negative -\$1,583.00 in 1999, a negative -\$815.00 in 2000, \$16,130.00 in 2001, and \$16,940.00 in 2002. Petitioner employed the beneficiary during 2002 according to Form ETA 750 Part B in evidence. Although requested by the director, evidence of the beneficiary's wages for 2002 was not submitted. This is important since the wage paid to beneficiary by petitioner may be added to the petitioner's 2002 taxable income to determine petitioner's ability to pay the proffered wage.

Although petitioner has submitted beneficiary's 2003 Form W-2 Wage and Tax Statement, it did not submit petitioner's tax return for 2003. Had the petitioner provided the information, a calculation could have been made to determine if petitioner had the ability to pay the proffered wage in year 2003. Therefore, the petitioner has not come forward with evidence to meet its burden of proof to demonstrate it did have the ability to pay the proffered wage in years 2002 and 2003 through the addition of its taxable income and wages paid to beneficiary for those years.

Petitioner did not demonstrate it employed the beneficiary at a salary equal to or greater than the proffered wage stated in Form ETA 750 from the date it was accepted for processing by the U. S. Department of Labor. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has tax income to pay the proffered wage.

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.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the five Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets exceeded its current liabilities by \$58,306.00 in 1998, by \$53,758.00 in 1999, by \$7,963.00 in 2000, by \$46,551 in 2001, and by \$61,719.00 in 2002. Therefore for the period 1998 through 2002, 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Additionally, petitioner's counsel submitted 35 partial copies of petitioner's purchase orders dated mostly in 2004. Counsel, in his brief, related the job performance of beneficiary to an increased business performance. Counsel directly attributed beneficiary's hiring to an increase in income in petitioner's business "... continuing from December 2003 to present and in the future..." The beneficiary's qualification or occupation performance is not an issue in the director's decision or in this appeal.

The regulation at Title 8, Code of Federal Regulations, Part 204.5(g)(2) cited more fully above states in part:

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 annual reports, federal tax returns, or audited financial reports.

No detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits from December 2003 to present. For the first time in the appeal, petitioner is attempting to raise an issue relating to beneficiary's performance but petitioner has not supplied federal tax returns after 2002 or audited financial reports to prove that petitioner has had an increase in income after 2002.

This hypothesis cannot be concluded to outweigh the evidence presented in the five corporate tax returns as submitted by petitioner that by any test demonstrated that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.