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U.S. Citizenship
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Services

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FILE:

[Redacted]
EAC 03 264 51963

Office: VERMONT SERVICE CENTER

Date:

AUG 23 2005

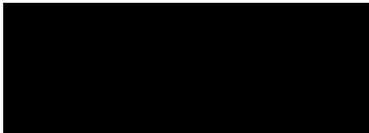
IN RE:

Petitioner:
Beneficiary:



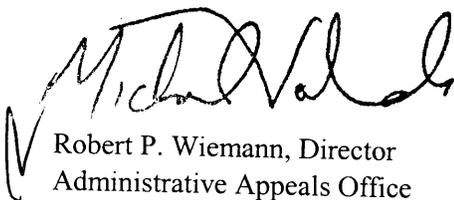
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a rehabilitation provider. It seeks to employ the beneficiary permanently in the United States as a physical therapist. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The Acting 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)(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, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. See 8 CFR § 204.5(d). Here, the petition was filed with CIS on September 22, 2003. The proffered wage as stated on the Form ETA 750 is \$1,000 per week, which equals \$52,000 per year.

On the petition, the petitioner did not state the when it was established in the space provided on the form for that purpose. The petitioner also failed to state the number of workers it employs, its gross annual income, and its net annual income.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 2003. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Trenton, New Jersey.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage. Therefore, on December 8, 2003, the Vermont Service Center requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's response is dated January 2, 2004 and was received on January 5, 2004. With that response, counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner is a corporation and reports taxes pursuant to the calendar year. During 2002 the petitioner declared a loss of \$30,525 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The Acting 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 March 10, 2004, denied the petition.

The appeal in this matter was received on April 9, 2004. On appeal, counsel submits a copy of the petitioner's 2003 Form 1120 U.S. Corporation Income Tax Return and a copy of the 2003 Form W-2 Wage and Tax Statement showing wages the petitioner paid to the beneficiary during that year. The tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$41,208 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The W-2 form shows that the petitioner paid the beneficiary \$40,850 during 2003.¹

Counsel argues that the evidence submitted shows that during 2003 the petitioner had the ability to pay the proffered wage, and urges that CIS should therefore approve the petition, notwithstanding that the petitioner failed to demonstrate the ability to pay the proffered wage during 2002.

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner demonstrate the ability to pay the proffered wage at all times since the priority date. The priority date in this matter, however, is September 22, 2003. Evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner established that it employed and paid the beneficiary \$40,850 during 2003.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

¹ Counsel also submitted a W-2 form showing wages paid to the beneficiary by another company during the same year. That form has no relevance to the petitioner's ability to pay the proffered wage or to any other issue in this matter, and will not be further considered.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$52,000 per year. The priority date is September 22, 2003. Having demonstrated that it paid the petitioner \$40,850 during 2003 the petitioner is obliged to show that it was able to pay the remaining \$11,150 during that same year. During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$41,208. That amount is sufficient to pay the balance of the proffered wage during 2003. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The Request for Evidence in this matter was issued on December 8, 2003. The response was received on January 5, 2004. The appeal was submitted on April 9, 2004. On all of those dates the 2004 calendar year, pursuant to which the petitioner would report taxes, was unfinished. The petitioner's 2004 taxes were therefore unavailable. The petitioner was not obliged to submit 2004 tax information.

The petitioner demonstrated its ability to pay the proffered wage during the only salient year. 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 these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.