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Date: DEC 16 2005

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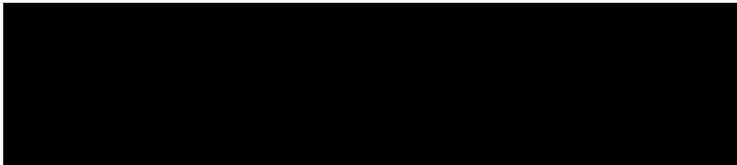
Petitioner:



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.

A handwritten signature in black ink, appearing to read "Michael Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as a database design analyst. 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 granting 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 12, 2002. The proffered wage as stated on the Form ETA 750 is \$78,000 per year.

On the petition, the petitioner stated that it was established during 1999 and that it employs two workers. The petition states that the petitioner's gross annual income is \$496,395. The petitioner did not state its net annual income in the space provided for that purpose. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 2000.

In support of the petition, counsel submitted a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on January 1, 2000, and that it reports taxes pursuant to the calendar year and accrual accounting. The return also shows that the petitioner reported ordinary income of \$3,323 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$99,554 and current liabilities of \$46,531, which yields net current assets of \$53,023.

Counsel also provided a letter, dated July 14, 2003, from the petitioner's manager, citing the amount of the petitioner's gross receipts as an index of its ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on November 13, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested Form W-2 Wage and Tax Statements showing the amounts it paid the beneficiary during each of the salient years and, if the petitioner continued to employ the beneficiary, a copy of his most recent pay stub.

In response, counsel submitted (1) a 2003 W-2 form showing that the petitioner paid the beneficiary \$48,000 during that year, (2) monthly statements pertinent to the petitioner's investment and bank accounts, (3) a transcript of a November 16, 1994 teleconference between the then Director of the Vermont Service Center and representatives of an immigration attorneys' association, (4) the petitioner's 2003 W-3 transmittal, showing that the petitioner paid total wages of \$132,593.33 during that year, and (5) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the last quarter of 2002 and all four quarters of 2003, showing that the petitioner paid total wages of \$36,600, \$25,440, \$28,080, \$19,840, and \$59,233.33 during those quarters, respectively.

In the November 16, 1994 transcript the Director, Vermont Service Center, stated that a sufficiently favorable ratio of current assets to current liabilities would lead the Service Center to the assumption that the petitioner is able to pay a proffered wage.

In a letter dated February 2, 2004 counsel argued that the petitioner's 2002 gross receipts, its total wage expense during that year, the ratio of its current assets to its current liabilities as shown on its balance sheet, and its bank statements show its continuing ability to pay the proffered wage beginning on the priority date. Counsel did not explain why the requested pay stub and the 2002 W-2 form showing wages the petitioner paid to the beneficiary during that year was not provided.

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 March 7, 2004, denied the petition. That decision stated that the petitioner's balance sheet¹ appears to indicate that the petitioner included uncollectible receivables in its net current assets.

On appeal, counsel submits (1) copies of several recent pay stubs purporting to show wages the petitioner paid to the beneficiary, (2) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (3) a letter, dated May 28, 2004, from the petitioner's accountant stated that the petitioner's current assets, as shown on its Schedule L balance sheet, did not include any uncollectible receivables, and (4) copies of other documents previously submitted.

¹ By "balance sheets," the director referred to the balance sheets shown on the petitioner's Schedule L. In subsequent references to balance sheets counsel and the petitioner's accountant are also referring to the petitioner's Schedule L.

The petitioner's 2003 tax return shows that during that year the petitioner declared a loss of \$5,322 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$184,022 and current liabilities of \$10,061, which yields net current assets of \$173,961.

In a brief, counsel states that the decision of denial was the result of a misreading of the petitioner's tax return. Counsel notes that, according to the letter from the accountant, none of the funds listed as the petitioner's current assets are bad debts. Counsel further asserts that petitioners gross receipts, its bank and investment account statements and the ratio between its current assets and its current liabilities demonstrate its ability to pay the proffered wage.

As to 2002, counsel asserted that, because the priority date is November 12, 2002 the petitioner is obliged to show the ability to pay only the prorated portion of the proffered wage that would have been due for 1 ½ months of employment.

Initially, this office notes that counsel and the accountant are correct that the amount the petitioner claimed as its current assets does not appear to include any uncollectible receivables. How that misinterpretation transpired is unclear.

This office is not convinced, however, by counsel's argument that the petitioner's current ratio, the ratio of its current assets to its current liabilities, shows the petitioner's ability to pay the proffered wage. Notwithstanding the opinion of the Director, Vermont Service Center,² the current ratio is a measure of the petitioner's ability to cover its existing debts with its existing liquidity. It is not a measure of the ability to absorb additional expenses. Unlike the petitioner's current ratio, its net current assets, that is, the difference between the petitioner's current assets and its current liabilities is an index of the ability to absorb additional expenses, such as additional wages.

The November 13, 2003 Request for Evidence requested that the petitioner provide a copy of a recent pay stubs showing the wages it was then paying to the beneficiary. Counsel did not include any pay stubs with the petitioner's response. Now, on appeal, counsel has submitted pay stubs purporting to show wage payments by the petitioner to the beneficiary.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office need not and does not comment on the sufficiency of the check stubs offered on appeal.

Counsel's reliance on the investment and bank account statements in this case is misplaced. First, those statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, those

² This office is not bound by the opinion of the Director, Vermont Service Center.

statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.³ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel requests that CIS prorate the proffered wage during 2002 for the portion of the year that occurred after the priority date. This office will not, however, consider 12 months of income towards an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel urges that because the petitioner's total annual wage expense exceeds the proffered wage the petitioner has shown the ability to pay the proffered wage. Counsel also asserts that the petitioner's gross receipts are an index of that ability.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁴ or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

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 the beneficiary during 2003 and paid him \$48,000.

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁴ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁵ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of 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 a given 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). 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 \$78,000 per year. The priority date is November 12, 2002.

During 2002 the petitioner declared ordinary income of \$3,323. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$53,023. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary wages of \$48,000. The petitioner is obliged to show the ability to pay the \$30,000 balance of the proffered wage. During 2003 the petitioner declared a loss of \$5,322. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, however, the petitioner had net current assets of \$173,961. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that basis.

The record raises an additional issue that was not addressed in the decision of denial. In the November 13, 2003 Request for Evidence the Service Center requested that the petitioner provide the W-2 forms showing wages the petitioner paid to the beneficiary during "all applicable years." Because the priority date is

November 12, 2002, "all applicable years" includes 2002. Counsel has not submitted that requested W-2 form and has given no reason for that omission. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should also have been denied on this ground.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 not met that burden.

ORDER: The appeal is dismissed.