



U.S. Citizenship
and Immigration
Services

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BC

FILE: [REDACTED]
EAC 03 058 54429

Office: VERMONT SERVICE CENTER

Date: DEC 21 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: SELF-REPRESENTED

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 dismissed.

The petitioner is a producer and exporter of fiber optic splicing products. It seeks to employ the beneficiary permanently in the United States as a production supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor 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.

The record contains a Form G-28, Notice of Entry of Appearance in which the petitioner consents to be represented by counsel. In a letter submitted on appeal the petitioner's marketing director indicates that the petitioner has replaced that attorney. The petitioner no longer recognizes that attorney as its attorney of record. The petitioner has not, however, submitted a Form G-28 consenting to be represented by the new attorney. All representations will be considered, but this decision will be furnished only to the petitioner.

On appeal, the petitioner submits a brief.

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 January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$40,788.80 per year.

On the petition, which was submitted on November 21, 2002, petitioner stated that it was established during 1989 and that it employs 15 workers. The petition states that the petitioner's gross annual income is \$1,000,000 and that its net annual income is \$480,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Belle Meade, New Jersey.

In support of the petition, counsel submitted monthly statements pertinent to the petitioner's bank account and the petitioner's 1998 Form 1120A U.S. Corporation Short-Form Income Tax Return.

The petitioner's 1998 tax return shows that the petitioner is a corporation, that it incorporated on February 16, 1989, and that it reports taxes pursuant to the calendar year and cash convention accounting. During 1998 the petitioner declared a loss of \$848 as its taxable income before net operating loss deduction and special deductions. The corresponding Part III shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 6, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested copies of the petitioner's 2000, 2001, and 2002 tax returns¹ and, if it employed the beneficiary, Form W-2 Wage and Tax Statements showing the wages it paid him during 1998, 1999, 2000, 2001, and 2002.

In response, counsel submitted a letter, dated December 22, 2003, from an accountant. That letter states that, in the accountant's opinion, after a review of the petitioner's tax returns from 1998 to the present, the petitioner is able to pay the proffered wage. As indices of the petitioner's ability to pay additional wages the accountant cites the improvement in the petitioner's gross receipts and states that its gross receipts were then \$2,000,000.² The accountant noted that the petitioner had declared losses during some years, but stated, "there has always been a significant amount of accounts receivable to compensate for the account payable offset."

In a cover letter, dated December 30, 2003, counsel stated that the petitioner was unable to readily locate its tax returns³ but would provide them when they became available. Counsel also stated the petitioner was submitting the accountant's letter instead. Further still, counsel stated that the petitioner had not employed the beneficiary during 1998, 1999, 2000, 2001, or 2002.

Counsel subsequently provided the petitioner's 1999 and 2000 Form 1120A tax returns and its 2001 Form 1120 U.S. Corporation Income Tax Return. Counsel did not state why he failed to provide the petitioner's 2002 tax return as the October 6, 2003 Request for Evidence had requested.

The petitioner's 1999 return shows that the petitioner declared a loss of \$35 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

¹ Why the Service Center did not request the petitioner's 1999 tax return is unknown to this office.

² The tax returns provided show that the petitioner's gross receipts were \$511,022, \$582,868, \$907,464, and \$161,195 during 1998, 1999, 2000, and 2001, respectively. Those figures do not support the accountant's statement, in the December 22, 2003 letter, that the petitioner's gross receipts were then \$2,000,000 annually. Further, they do not support the assertion that the petitioner's gross receipts have risen during the pendency of this petition.

³ Counsel did not state how, if the petitioner was unable to locate its tax returns, the accountant had been able to review them.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$33,338 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$9,001 and current liabilities of \$2,306, which yields net current assets of \$6,695.

The 2001 return shows that the petitioner declared a loss of \$30,926 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 had current assets of \$9,169 and no current liabilities, which yields net current assets of \$9,169.

This office notes that the tax returns submitted show no trade notes or accounts receivable during any of the salient years and do not, therefore, support the accountant's statement that "there has always been a significant amount of accounts receivable." The source of the accountant's information is not in evidence and is unknown to this office.

On February 25, 2004 the Service Center issued another Request for Evidence in this matter. The Service Center requested, inter alia, that the petitioner provide its 2002 tax return and evidence sufficient to show its continuing ability to pay the proffered wage beginning on the priority date. The Service Center also asked whether the proffered position is a newly created position or if it previously existed. The Service Center requested that, if the proffered position previously existed, the petitioner provide evidence of the amount previously paid for performance of the duties of the proffered position.

In response counsel provided the (1) 2002 Form 1065, U.S. Return of Partnership Income of [REDACTED] LLC, (2) the 2001 Form 1040 U.S. Individual Income Tax Return of the petitioner's vice president, (3) a letter, dated April 26, 2004, from the petitioner's vice president, and (4) a letter, dated May 19, 2004, from the petitioner's bank.

In a cover letter dated May 19, 2004 counsel stated that the proffered position is not newly created but that the petitioner's owner has been performing its duties. Counsel stated, "As far as a set salary we are unable to provide exact documentation to that effect. We do however enclose [the petitioner's vice president's] personal income tax return for 2001" Counsel also stated that the petitioner did not employ the beneficiary during 1998, 1999, 2000, 2001, or 2002.

The petitioner's vice president's personal tax return shows that he received \$212,490 in Line 7 salaries, wages, tips, etc. However, the Form W-2 Wage and Tax Statement showing the provenance of those funds was not appended to the return. Further, even if the petitioner paid its vice president that entire amount, the record does not demonstrate what portion of that amount, if any, was paid for performance of the duties of the proffered position.

The April 26, 2004 letter from the petitioner's vice president stated that he had been performing the duties of the proffered position in addition to various other duties for the petitioner. That letter confirms that the vice president is unable to state what portion of his salary was for performance of the duties of the proffered position.

The May 19, 2004 bank letter states that the petitioner has been a customer of the bank since 1991 and had several unsecured revolving credit lines with the bank. That letter further states that one credit line, closed on December 31, 2000, had a credit limit of \$50,000.

The 2002 tax return indicates that the limited liability company was formed on January 1, 2002. During 2002 that company had gross sales of \$289,453⁴ and declared ordinary income of \$21,972. At the end of that year the company had no current assets and no current liabilities, which yields net current assets of \$0.

Counsel also submitted a non-precedent decision of this office; the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. Counsel was free to argue that the reasoning of that decision is compelling and should be extended to the instant case, but did not.

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 June 17, 2004, denied the petition.

The petitioner is self-represented on appeal. The petitioner notes that the beneficiary is fluent in both English and Hungarian and that the petitioner has had four attorneys working in sequence on this case without tangible benefit.

Somewhat more relevant to the subject of the petitioner's finances, the vice president stated that the petitioner has maintained an average balance of \$50,000 in its checking account, at least \$10,000 in its savings account, and once had a line of credit for \$50,000. The vice president stated that W-2 forms were submitted with his personal tax returns that show that "the bonuses increased my salary," and further stated "we merely took the bonus in order to lower the [petitioner's] tax burden" The vice president states that the petitioner's corporate tax returns do not accurately reflect its financial position.

That the beneficiary is fluent in English and Hungarian and that the petitioner has had four attorneys on this case,⁵ are irrelevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority

⁴ If [redacted] LLC is the petitioner, that figure does not support the accountant's December 22, 2003 assertion that the petitioner's annual gross receipts are \$2,000,000.

⁵ Although it is unclear, the petitioner's vice president may have been claiming ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Because these requirements have not been met no claim of ineffectiveness of counsel will be considered in this case.

date, which is the basis upon which the instant petition was denied. As they are irrelevant to the basis for denial they will not be addressed further.

Contrary to the petitioner's vice president's assertion, no W-2 forms were submitted with his personal tax returns. The record contains no indication that his salary was increased by bonuses, or that he merely took bonuses to reduce the petitioner's tax liability.

The assertion that the petitioner's tax returns are a poor index of its ability to pay the proffered wage is inapposite. That assertion neither demonstrates the petitioner's ability to pay the proffered wage nor relieves the petitioner of the obligation of proving it. The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted neither annual reports nor audited financial statements and must, therefore, rely upon its tax returns.

The petitioner's reliance on the bank statements in this case is misplaced. First, bank 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, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁶ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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.*

⁶ 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.

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 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, the petitioner's year-end cash and those assets expected to be consumed or 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 \$40,788.80. The priority date is January 12, 1998.

During 1998 the petitioner declared a loss. The petitioner cannot, therefore, demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner cannot, therefore, demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared a loss. The petitioner cannot, therefore, demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner cannot, therefore, demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared taxable income before net operating loss deduction and special deductions of \$33,338. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$6,695. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2000 with which it

could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner cannot, therefore, demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$9,169. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The 2002 tax return submitted indicates that [REDACTED] LLC declared ordinary income of \$21,972 during that year. That amount is insufficient to pay the proffered wage. At the end of that year the company had no current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of its ability to pay the proffered wage during 2002. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, and 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, however, contains an additional issue that was not raised in the decision of denial. The Form ETA 750 labor certification in this matter was approved for A [REDACTED] Incorporated. [REDACTED] Incorporated filed the Form I-140 petition. As evidence of the petitioner's ability to pay the proffered wage during 2002 counsel submitted the Form 1065, U.S. Return of Partnership Income of A [REDACTED] LLC.

In order for A [REDACTED] LLC to rely on the approved labor certification issued to [REDACTED] Incorporated it must demonstrate that it is the true successor of the petitioner pursuant to the tests in *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

Schedule E of the petitioner's 2001 corporate return indicates that [REDACTED] and [REDACTED], the petitioner's vice president, both owned one-third of the petitioner. That return does not divulge the owner of the remaining third. The 2002 partnership return shows that [REDACTED] and [REDACTED] each own one-third of the partnership. No degree of common ownership, however, is sufficient to establish successorship pursuant to *Dial Auto Repair Shop, Inc., supra*.

To rely upon the original petitioner's approved labor certification the substituted petitioner must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Dial Auto Repair Shop, supra*.

In this instance no evidence was submitted to demonstrate how, or even whether, [REDACTED] LLC acquired [REDACTED] Incorporated. Further, no evidence was

[REDACTED]

Page 9

submitted to show that [REDACTED] LLC assumed all of the rights, duties, obligations, and assets of [REDACTED]

[REDACTED] has not demonstrated that it is the petitioner's true successor within the meaning of *Dial Auto Repair Shop* and may not, therefore, substitute itself for the petitioner named on the labor certification. The petition should have been denied on this additional ground. Because that issue was not relied upon in the decision of denial this office does not rely upon it as a basis for today's decision. If the petitioner seeks to overcome today's decision on motion, however, it should address this additional issue.

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.