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U.S. Citizenship
and Immigration
Services

RG



FILE:

[Redacted]
EAC 03 123 53317

Office: VERMONT SERVICE CENTER

Date:

JUL 13 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile body repair company. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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.

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 April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$24.31 per hour, which amounts to \$50,564.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$636,051, and to currently employ eight workers. In support of the petition, the petitioner submitted:

- An original Form ETA 750;
- A certification from a former employer of the beneficiary verifying prior work experience;
- The petitioner's 2001 Form 1120 return; and,
- A Form G-28.

On April 4, 2003, the director sent a request for evidence (RFE) pertaining to the ability to pay the proffered wage. He specifically asked for copies of 2001 or 2002 Form W-2 Wage and Tax Statements, or Form 1099, issued to the beneficiary, and inquired if the beneficiary would be filling a new or existing position, documenting the wage and work span of any such former employee.

In response, the petitioner submitted:

- The petitioner's CPA's April 29, 2003 letter certifying that the petitioner had the ability to pay the proffered wage, with a reference to the \$93,611 cost of labor on the petitioner's 2001 Form 1120 Corporate tax return for the petitioner, a copy of which is attached.

The submitted tax return reflects the following information for 2001:

Net income	\$2,704
Current Assets	\$21,387
Current Liabilities	\$35,804
Net current liabilities	-\$14,417

On July 2, 2003, 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 denied the petition.

On appeal, counsel asserts that because [REDACTED] "retired from the petitioner's employ" in 2001, freeing up the \$20,420 he was paid that year, along with \$15,120 in 2001 wages paid the beneficiary, still leaves a deficit of \$15,025 to cover of the beneficiary's proffered \$50,564.80 wage to pay. Counsel then asserts that the remainder of the proffered wage could be found in the \$22,328 deduction for depreciation and amortization deductions taken in 2001.

Counsel also submits:

- The beneficiary's 2001 Form W-2 statements, and his 2001 Form 1040 return;
- Fernandez's 2001 Form W-2;
- The CPA's August 29, 2003 letter certifying the petitioner's ability to pay if depreciation and amortization are added back to the petitioner's; and,
- The petitioner's August 29, 2003 letter notifying Citizenship and Immigration Services (CIS) that Fernandez has retired with no replacement.

The submitted copies of 2001 Form W-2, Wage and Tax Statements to the beneficiary and to [REDACTED] together show paid wages of \$15,120 to the beneficiary and \$20,420 to [REDACTED] \$15,025 below the amount needed to establish ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001; rather it established partial payment of the proffered wage to 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 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, despite the assertions in the CPA's August 29, 2003 letter. 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 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 the Service should have considered income before expenses were paid rather than net income.

Nevertheless, 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Further, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 petitioner's net current assets during the year in question, 2001, however, were negative. As such, the director, who considered the petitioner's net current assets, correctly decided that they did not establish the ability to pay the proffered wage.

Counsel asserts that Fernandez's retirement frees up \$20,420 and thereby reduces the amount the petitioner must show it can pay in order to show it has the ability to pay the proffered wage. However, counsel is not contending that the beneficiary is simply filling the vacancy left by Fernandez's retirement, from which this office infers that the vacated position is not the same as that proffered to the beneficiary. Accordingly, the petitioner may need to hire a replacement for [REDACTED] thereby exhausting the extra funds his departure has generated. As such, the \$20,420 is not available to the petitioner to pay the proffered wage.

The petitioner has not demonstrated that it paid the full proffered wage. In 2001, the petitioner shows a net income of only \$2,704, negative net current assets, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. Mr. Fernandez's wage is also not available, since counsel has not established that the beneficiary will serve as his replacement. The petitioner has thus 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 failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.


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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.