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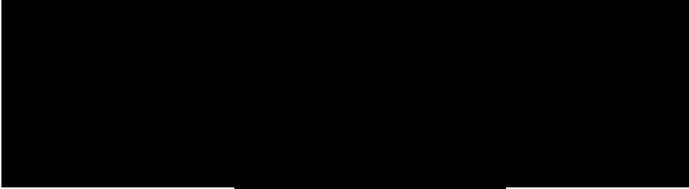


U.S. Citizenship
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Office: CALIFORNIA SERVICE CENTER

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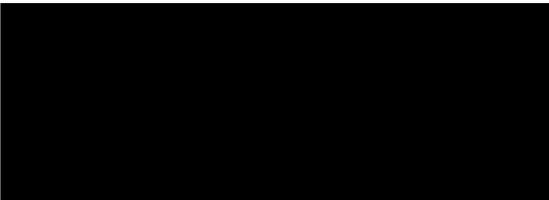
Petitioner:

Beneficiary:



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

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a construction cleaning company. It seeks to employ the beneficiary permanently in the United States as a industrial truck mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 27, 1999. The proffered salary as stated on the labor certification is \$11.94 per hour or \$24,835.20 per year.

With the petition, counsel submitted a copy of the petitioner's 1999 through 2001 Forms 1120, U.S. Corporation Income Tax Returns. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of \$9,101 and net current assets of -\$50,265. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$71,471 and net current assets of -\$179,212. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$9,338 and net current assets of -\$218,727. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on May 29, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage for 2002 to be in the form of copies of annual reports, federal tax returns with appropriate signature(s), or audited financial statements.

In response, counsel provided a copy of the petitioner's Form 7004, Application for Automatic Extension of Time To File Corporation Income Tax Return, for the year 2002 and a letter stating that the 2002 tax returns were not available.

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. On July 8, 2003, the director denied the petition.

On appeal, counsel submits cancelled paychecks for the beneficiary for thirty-three weeks in 2000 and for 24 weeks in 2001. Counsel also provided a letter from the petitioner's CPA, [REDACTED]. The 2000 cancelled checks reflect wages paid of \$19,100, and the 2001 cancelled checks reflect wages paid of \$13,100. The letter from the petitioner's CPA states:

At your request and authorization from Mr. [REDACTED] we have the following comments regarding [REDACTED]'s ability to pay wages during 1999, 2000 and 2001:

1. The Company was reporting profits every year during the periods:
 - a. 1999 \$ 9,101
 - b. 2000 \$71,471
 - c. 2001 \$ 9,338

Please note that these net profits were after paying all wages, independent contractors, and other general and administrative expenses.

2. Wages for all employees were paid during those three years.
3. The "negative cash assets" referred to in the Notice of Decision dated 7/8/03 should more appropriately refer to the "bank overdraft" lines, and they were as follows:
 - a. 1999 (\$50,740)
 - b. 2000 (\$54,088)
 - c. 2001 (\$27,950)

We have some comments regarding these items. First of all, these bank overdrafts arose from the Company's year-end tax planning. Furthermore, these checks did not bounce, because they were covered by the income earned and receivable collected in the following months. So, they were negative simply due to timing. Please note that the corporate tax returns were on a cash basis.

4. Finally, we have prepared the attached schedule showing the bank account balances at the month-ends for 2000 and 2001. As you can see, except for a

couple of months, the corporation had substantial positive balances as of those month-ends.

Counsel states:

Subsequently, the petition was denied based on the Service observation of negative cash assets on the petitioner's tax returns. But, the Service failed to review the petitioner's cost of labor that shows labor paid to independent contractors in the following amounts:

- a) year 1999 - \$193,832.00
- b) year 2000 - \$159,649.00, and
- c) year 2001 - \$ 23,638.00

Part of the cost of labor was paid to the beneficiary, while providing part-time independent contractor services in the sum of \$19,100.00 in 2000 and \$13,100.00 in 2001. Copies of the checks paid to the beneficiary are attached herein as Exhibit #1.

With regard to the negative cash assets observed by the Service, these were due to bank overdrafts that happened at the time of the Company's year-end tax planning. Please refer to the letter of July 29, 2003, signed [REDACTED] Sulistio, CPA. Attached herein as Exhibit "2".

Please take in consideration that in addition to the amounts paid to independent contractors, the petitioner reported profits as follows:

- a) year 1999 - \$ 9,101.00
- b) year 2000 - \$71,471.00, and
- c) year 2001 - \$ 9,338.00

These funds added to the amounts paid for outside services/independent contractors can be used to pay the beneficiary's wages once he is granted the legal right to work or the permanent residency in the United States.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1999 through 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return,

without consideration of depreciation or other expenses. 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. 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(d) through 6(d). Its 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 out of those net current assets. The petitioner's net current assets during 1999 through 2001 were -\$50,265, -\$179,212, and -\$218,727, respectively. The petitioner could not have paid the proffered wage in 1999 through 2001 from its net current assets.

The petitioner's CPA points to the petitioner's bank statements as evidence of its ability to pay the proffered wage. However, the CPA's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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

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

ability to pay a proffered wage. 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 reflected on its tax return, such as the cash specified on Schedule L.

The petitioner's CPA also indicates that the petitioner's negative cash balances (-\$50,740 in 1999, -\$54,088 in 2000, and -\$27,950) are due to bank overdrafts that arose from the company's year-end tax planning and that they were negative simply due to timing. The petitioner's CPA does not, however, explain how this shows that the petitioner had the ability to pay the proffered wage during those years. Additionally, the petitioner's CPA does not explain how declaring certain liabilities in one tax year and then accounting for that negative figure out of the subsequent tax year's assets would significantly alter the overall picture of the petitioner's finances as set forth in its tax returns. Further, that the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's assertion, make them poor indices of the funds available to the petition with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns pursuant to accrual. In addition, the petitioner's CPA fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a).

Counsel asserts that the wages paid to the beneficiary and other subcontractors can be included in the petitioner's ability to pay the proffered wage. Counsel is correct that the wages paid to the beneficiary can be considered when determining the ability to pay the wage. However, the wages paid to other subcontractors may not be considered unless the beneficiary is replacing one or more of the other subcontractors. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The visa petition, as well as the petitioner's documents submitted to the record, suggests that the petitioner employed more than one subcontractor.

Moreover, there is no evidence that the position of the other independent subcontractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those contractors performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's 1999 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$9,101 and net current assets of -\$50,265. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 1999. In addition, there is no evidence in the record that the petitioner paid the beneficiary any wages in 1999 as a subcontractor.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$71,471 and net current assets of -\$179,212. The petitioner could have paid the

proffered wage from its taxable income in 2000. In addition, the beneficiary earned wages of \$19,100 as a subcontractor working for the petitioner.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$9,338 and net current assets of -\$218,727. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2001. Even when adding the beneficiary's wages of \$13,100 to the taxable income, the sum arrived at is still \$2,397.20 less than the proffered wage. (\$9,338 taxable income + \$13,100 wages paid = \$22,438; \$24,835.20 proffered wage - \$22,438 wages and taxable income = \$2,397.20)

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.