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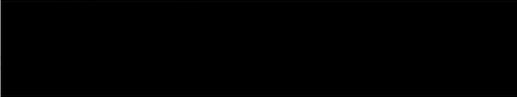
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Office: VERMONT SERVICE CENTER

Date:

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 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 school. It seeks to employ the beneficiary permanently in the United States as a teacher. 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.

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:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 10, 2001. The proffered wage as stated on the Form ETA 750 is \$32,820 per year.

On the petition, the petitioner stated that it was established during 1913 and that it employs 28 workers. The petition does not state the petitioner's gross and net incomes, stating instead that the petitioner is not operated for profit. 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 Jersey City, New Jersey.

In support of the petition, counsel<sup>1</sup> submitted a 2001 wage transmittal showing that the petitioner paid total wages of \$359,830.79 during that year to 28 employees. With the petition counsel submitted a letter, dated December 16, 2002. In that letter, counsel stated that he was submitting the petitioner's 2001 income tax return. No such tax return was submitted. Counsel submitted no other evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 March 20, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also noted that the petitioner might submit a W-2 form showing wages the petitioner paid to the beneficiary as evidence of the petitioner's ability to pay wages.

In response, counsel submitted a letter, dated May 9, 2003, from the petitioner's principal stating that the petitioner has the ability to pay the proffered wage.

Counsel also submitted a 2001 annual reconciliation prepared by a tax filing service. That reconciliation confirms that the petitioner paid wages of \$359,830.79 during that year. In a letter, dated June 10, 2003, counsel represented that reconciliation as "showing a gross income of \$492,577.35 and State Wages paid to its employees of \$359,830.00." That reconciliation does not show the petitioner's gross income.

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 August 18, 2003, denied the petition.

On appeal, counsel states,

1. [CIS] erred in requiring the W-2 form of [the beneficiary] for 2002 since [the beneficiary] only started working [for the petitioner] on a part time [sic] basis, in May 2002.
2. [CIS] erred in not considering the W-2 wage and Tax Statement of the Petitioner for 2001, despite showing \$358,831.00 was paid out in salaries and wages to 28 employees.
3. [CIS] erred in denying the petition.

Subsequently, the petitioner's new counsel submitted a brief.<sup>2</sup> In that brief counsel asserts that the Associate Director of USCIS Operations stated that the underlying purpose of establishing ability to pay the proffered

<sup>1</sup> The petitioner's current counsel did not file this petition. The petitioner's current counsel appears to have been retained during the pendency of this appeal.

<sup>2</sup> The brief on appeal is the first submission by the petitioner's current counsel. All previous references to "counsel"

wage is merely to establish that the employer is a bona fide company, and that if the employer has been in business for several years that concern is satisfied. Counsel provides no citation in support of that assertion.

Counsel asserts that,

The petitioner has been in business for nearly 100 years [Emphasis in the original.] and its (i.e., the Petitioner's and its parent organization's) revenues exceed \$100 million, and total assets exceed \$200 million, clearly evidencing the Petitioner's ability to pay the proffered wage of \$32,820.00 per year.

Counsel further asserts that,

[CIS] should have more appropriately focused on, or considered, the Petitioner's total assets, gross income, total income, and salaries paid, as reflected in the financial statements, which clearly evidence the Petitioner's ability to pay.

Further still, counsel asserts, "The Beneficiary's employment clearly evidences the ability to pay," and that "The petitioner is only required to demonstrate the 'ability to pay' the difference [Emphasis in the original] between the proffered wage and the wage actually paid.

Finally, counsel asserts that, "The beneficiary's hiring in the proffered position, Teacher, will also have a profitability effect on the company in that additional teachers increases [sic] student body size, which generates additional revenues."

With the brief, counsel submitted (1) a letter, dated July 1, 2004, from the United States Department of the Treasury, and other documents stating, *inter alia*, that Catholic schools are charitable and tax exempt, (2) a copy of the official 2004 Catholic directory and Catholic telephone guide, and directory and almanac of the Archdiocese of Newark, showing that the petitioner is a Catholic school, (3) the 2001, 2002, and 2003 consolidated audited financial statements of the United States Conference of Catholic Bishops, (4) the petitioner's 2002 wage transmittal showing that it employed 32 workers during that year to whom it paid total wages of \$378,614.18 during that year, (5) the petitioner's 2003 wage transmittal showing that it employed 34 workers during that year to whom it paid total wages of \$441,468.50 during that year, (6) the petitioner's 2004 wage transmittal showing that it employed 34 workers during that year to whom it paid total wages of \$458,579.08 during that year, (7) 2002, 2003, and 2004 W-2 forms showing that the petitioner paid wages of \$12,461.40, \$22,246.40, and \$24,318.40 to the beneficiary during those years, respectively, and (8) four 2005 earnings statements showing that the petitioner paid the beneficiary \$1,242.80 during each of the four bimonthly pay periods covered by those statements.<sup>3</sup> The statements are for the pay periods ending January 15, January 30, February 15, and February 30, 2005.

The argument of the petitioner's previous counsel that the Service Center erred in requesting the 2001 W-2 form showing wages paid to the beneficiary is incorrect. The Service Center did not require that the

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refer to the petitioner's previous counsel.

<sup>3</sup> This office notes that \$1,242.80 twice per month equals \$29,827.20, an amount less than the proffered wage.

petitioner submit that W-2 form, but only suggested it as one avenue to pursue in demonstrating the petitioner's ability to pay the proffered wage. Submission of W-2 forms showing wages paid to the beneficiary is one means of showing that the petitioner was able to pay at least some portion of the proffered wage.

The assertion by the petitioner's previous counsel and current counsel that the petitioner's ability to pay the proffered wage is demonstrated by its having paid wages of \$359,830.79<sup>4</sup> during 2001 is unconvincing. The regulation at 8 C.F.R. § 204.5(g)(2) makes an exception to the necessity of a petitioner demonstrating, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage, if the petitioner is able to demonstrate that it employs 100 or more workers. No such exception is included in that regulation based on the size of a petitioner's payroll and none will be construed. That the petitioner was able to pay its expenses during the salient years does not demonstrate the ability to pay any additional wages.

The assertion that because of the petitioner's longevity it is not obliged to demonstrate its ability to pay the proffered wage consistent with 8 C.F.R. § 204.5(g)(2) is similarly unconvincing. That regulation contains no provision exempting companies of any particular age, and no such exemption will be construed in this case.

In that regard, counsel purports to quote the Associate Director for Operations of CIS as saying that the ability to pay the proffered wage requirement is not applicable to companies which have been in existence for an appreciable period. Counsel has provided no citation for that asserted quotation, and this office is aware of none. In any event, statements of the Associate Director of Operations do not bind this office. The regulation will be enforced as written.

Counsel's reliance on the audited financial statements of the United States Conference of Catholic Bishops, and figures taken from it, is misplaced. The petitioner in this case is not the Conference of Catholic Bishops. Counsel has not demonstrated that the Conference of Catholic Bishops would be obliged to pay the proffered wage, if the petitioner were unable to do so. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

Counsel is correct that, having demonstrated that it paid a portion of the proffered wage to the beneficiary during the salient years, the petitioner is obliged only to show the ability to pay the balance of the proffered wage during each of those years. The wages that the petitioner demonstrated that it paid to the beneficiary during the salient years is included in the calculations pertinent to the petitioner's ability to pay the proffered wage, below.

If counsel had demonstrated, rather than alleging, that hiring the beneficiary would result in greater profits, the amount by which the beneficiary would have increased the petitioner's profits would properly be included in the calculations pertinent to the petitioner's ability to pay the proffered wage. In the case of a school, demonstrating that fact would have required, at a minimum, a showing that the school has a ready supply of additional applicants waiting to pay tuition if admitted and that the school has facilities, physical and

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<sup>4</sup> On appeal, counsel's previous counsel misstated that amount by approximately \$1,000.

administrative, sufficient to accommodate additional students. Counsel would also be obliged to show the amount by which the school's expenses would be increased by the increased enrollment. The difference between the anticipated rise in total receipts and the anticipated rise in expenses would represent a fund available to pay additional wages. No such showing was made in the instant case. Counsel's unsupported assertion is insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The May 9, 2003 letter from the petitioner's principal states that the petitioner has the ability to pay the proffered wage. If a petitioner employs 100 or more workers, 8 C.F.R. § 204.5(g)(2) states that such a letter may be sufficient. The evidence in the record, however, suggests that the petitioner employed 28 to 34 workers during the salient years. Under these circumstances, the May 9, 2003 does not suffice to show the petitioner's ability to pay the proffered wage.

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.

The petitioner has established that it paid the beneficiary \$12,461.40, \$22,246.40, and \$24,318.40 during 2002, 2003, and 2004. Having paid those amounts, the petitioner is obliged to demonstrate the ability to pay the balance of the proffered wage during those years.

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,<sup>5</sup> 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).

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 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.

<sup>5</sup> If the petitioner is, as the Form I-140 petition implies, a not-for-profit corporation, then the petitioner might have submitted its Form 990, Returns of Organization Exempt from Income Tax for the salient years, or, if it files no such return, some other reliable evidence of the funds available to it during each of the salient years.

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 \$32,820 per year. The priority date is April 10, 2001.

The petitioner did not demonstrate that it paid any wages to the beneficiary during 2001 and must demonstrate the ability to pay the entire proffered wage during that year. The petitioner submitted no reliable evidence of any funds at its disposal during that year that it could have used to pay additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary wages of \$12,461.40. The petitioner is obliged to show its ability to pay the \$20,358.60 balance of the proffered wage. The petitioner submitted no reliable evidence of any funds at its disposal during that year that it could have used to pay additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary wages of \$22,246.40. The petitioner is obliged to show its ability to pay the \$10,573.60 balance of the proffered wage. The petitioner submitted no reliable evidence of any funds at its disposal during that year that it could have used to pay additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary wages of \$24,318.40. The petitioner is obliged to show its ability to pay the \$8,501.60 balance of the proffered wage. The petitioner submitted no reliable evidence of any funds at its disposal during that year that it could have used to pay additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not 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 not met that burden.

**ORDER:** The appeal is dismissed.