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U.S. Citizenship
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Services

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MAY 18 2005



FILE: WAC 03 012 55204 Office: CALIFORNIA 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California 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 an installer of interior building systems. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. 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, the petitioner submits a statement 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 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 February 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.52 per hour, which equals \$38,521.60 per year.

On the petition, the petitioner stated that it was established during 1994 and that it employs 100 workers. The petition states that the petitioner's gross annual income is \$6,500,000 and that its net annual income is \$150,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. In one of two July 2, 2001 amendments to that form, however, the beneficiary amended his claim of qualifying employment to include employment as an interior lay-out worker from December 1999 through February 2001 for the petitioner.

The petition indicates that the petitioner would employ the beneficiary in Dana Point, California. The Form ETA 750 indicates that the petitioner would employ the beneficiary "As per contracted project location."¹

With the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the California Service Center, on March 24, 2003, issued a Request for Evidence. The Service Center requested, *inter alia*, additional evidence pertinent to the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center 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 observed, however, that, if the petitioner employs 100 or more workers, the statement of a financial officer of the company might suffice to show the petitioner's ability to pay the proffered wage.

The Service Center also requested a copy of the petitioner's W-3 transmittals for 1999 through 2001, and copies of Form W-2 Wage and Tax Statements showing the wages the petitioner paid to the beneficiary from 1999 through 2001.

In response, the petitioner submitted copies of its unaudited balance sheets for 1999, 2000, 2001, 2002, and an unstated part of early 2003.

The petitioner also submitted copies of its 1999 and 2001 W-3 transmittals. In a letter dated June 11, 2003, the petitioner's president stated that he had been unable to locate the petitioner's 2000 W-3 transmittal, but would submit it as soon as it could be located. The petitioner's 1999 W-3 shows that the petitioner paid total wages of \$436,518.50² during that year. The petitioner's 2001 W-3 shows that the petitioner paid total wages of \$1,366,289.09³ during that year.

The petitioner submitted copies of the beneficiary's 1999, 2000, 2001, and 2002 Form 1040 U.S. Individual Income Tax Returns and the associated W-2 forms from his various employers during those years. Among those W-2 forms are 1999, 2000, and 2001 W-2 forms issued by the petitioner, showing that it paid the beneficiary \$21,003, \$25,592.40, and \$20,154⁴, during those years, respectively. Two 2002 W-2 forms show that the petitioner paid the beneficiary \$1,297.92 and \$22,232, for a total of \$23,529.92 during that year.⁵

¹ The petitioner did not state, on the Form ETA 750, precisely where the beneficiary would be employed. This raises the additional issue of whether the proffered wage is at least equal to the predominant wage for the proffered position in the area of intended employment, as required by 20 C.F.R. § 656.20(c)(2). Because that issue formed no part of the basis for the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, it forms no part of the basis for the decision today.

² This office notes that, if the petitioner actually employed 100 workers during that calendar year, they were paid an average of \$4,365.19 each.

³ If the petitioner actually employed 100 workers during that calendar year, they were paid an average of \$13,662.89.

⁴ That the petitioner paid the beneficiary \$20,154 during 2001 appears to be inconsistent with the assertion, made on one of the July 2, 2001 amendments to the Form ETA 750, that the petitioner employed the beneficiary only through February of 2001, and did not employ him again until at least the date of that amendment. Because this discrepancy was not included in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, it forms no part of the basis of today's decision.

On June 25, 2003, the California Service Center issued another Request for Evidence in this matter. The Service Center reiterated that the petitioner must 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, but also noted that if the petitioner employs 100 or more workers, a statement from a financial officer of the company may suffice to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted copies of the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner reports taxes based on the calendar year.

The 2001 return shows that the petitioner declared a loss of \$5,905 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that the petitioner declared a loss of \$294,521 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 December 19, 2003, denied the petition.

On appeal, the petitioner submits a letter, dated January 14, 2003, from its CFO stating that it employs more than 100 workers and implying that it has the ability to pay the proffered wage. In that letter the CFO also states the net and gross incomes of the petitioner during 2001 and 2002. The CFO's statement of the petitioner's gross income accords approximately with the figures from the petitioner's tax returns. The figures the CFO provides for the petitioner's net income during those years do not accord with the figures from the petitioner's tax returns and are not supported by audited financial statements.

As is noted above, in the case of a company that employs 100 or more workers, a statement from a financial officer of the company that *accompanies* the petition *may* suffice to show the petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). Such a statement would be subject to investigation at the Service Center prior to approval of the petition. The Service Center would be entitled to conduct an independent investigation of the assertion that the petitioner employs 100 or more employees or the require the petitioner to submit evidence in support of that assertion. The Service Center might also find, based on the evidence, that this is a suitable case in which to require additional evidence in the form of copies of annual reports, federal tax returns, or audited financial statements.

⁵ None of the evidence submitted in response to the Request for Evidence was responsive to the request for copies of annual reports, federal tax returns, audited financial statements or a statement from a financial officer that the petitioner has the ability to pay the proffered wage.

In this case, the petitioner claimed, on the petition, to employ exactly 100 employees, but submitted no evidence in support of that assertion⁶ and no statement from a financial officer asserting that it is able to pay the proffered wage. Both of the Requests for Evidence issued in this matter reminded the petitioner that, if it employs 100 or more employees, a statement from a financial officer might suffice to show its ability to pay the proffered wage. No such statement was submitted in response to those requests. Only now, on appeal, when the assertion is relatively secure from a Service Center investigation, does the petitioner finally provide such a statement. That late statement does not convince this office that the petitioner has the ability to pay the proffered wage, and does not overcome the basis of the decision of denial. The appeal will be decided based on the reliable evidence pertinent to the petitioner's finances during the salient years.

The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The statements of the petitioner's CFO pertinent to the amount of the petitioner's 2001 and 2002 net income is not supported by copies of annual reports, federal tax returns, or audited financial statements, and is the unsupported assertion of management. Again, the unsupported assertions of management are insufficiently reliable to demonstrate 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. In the instant case, the petitioner established that it employed and paid the beneficiary \$20,154 during 2001 and \$23,529.92 during 2002. The petitioner must establish that it was able to pay the petitioner the \$18,367.60 and \$14,991.68 balances of the proffered wage during those years, respectively.

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, 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 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,

⁶ The record does contain the petitioner's 1999 and 2001 W-3 transmittals. Those transmittals show that the petitioner paid wages of \$436,518.50 and \$1,366,289.09 during those years, respectively. If the petitioner employed 100 workers during those years, it paid them an average of \$4,365.19 and \$13,662.89 during those years. That evidence does not support the proposition that the petitioner employed 100 workers during those years.

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, 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 \$38,521.60 per year. The priority date is February 27, 2001.

Having demonstrated that it paid the beneficiary \$20,154 during 2001 the petitioner must demonstrate that it was able to pay the remaining \$18,367.60 during that year. During 2001, however, the petitioner declared a loss. 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 the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. 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.

Having demonstrated that it paid the beneficiary \$23,529.92 during 2002 the petitioner must demonstrate that it was able to pay the remaining \$14,991.68 during that year. During 2002, however, the petitioner declared a loss. 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 the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. 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 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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. The petition was appropriately denied on that basis.

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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.