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U.S. Citizenship
and Immigration
Services

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FILE: WAC-02-251-54754 Office: CALIFORNIA SERVICE CENTER

Date: NOV 07 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a Montessori teacher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$28,090 per year. The Form ETA 750 states that the position requires two years experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$356,654, and to currently employ nine workers. On the Form ETA 750B, signed by the beneficiary on December 27, 2000, the beneficiary claimed to have worked for the petitioner since June 2000.

With the petition, the petitioner submitted its 2000 corporate tax return¹.

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On October 22, 2002, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a complete and signed copy of the petitioner's 2001 corporate tax return, quarterly wage reports, and any W-2 forms issued to the beneficiary.

In response, the petitioner submitted its 2001 corporate tax return, monthly bank statements for the year 2001, quarterly wage reports for the first three quarters in 2002 and last two quarters in 2001, and W-2 forms issued to the beneficiary in 2000 and 2001. The quarterly wage reports reflect a total of \$10,975 paid from the petitioner to the beneficiary for three quarters in 2002. The W-2 form for 2001 reflects that the petitioner paid the beneficiary \$12,620 in that year.

On March 30, 2004, because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director again requested additional evidence pertinent to that ability. The director specifically requested a complete and signed copy of the petitioner's 2002 and 2003 corporate tax returns and any W-2 forms issued to the beneficiary since the year 2000.

In response, the petitioner submitted portions of its 2002 and 2003 corporate tax returns and W-2 forms issued to the beneficiary from 2000 to 2003. The W-2 forms reflect that the petitioner paid the beneficiary \$14,575 in 2002 and \$14,600 in 2003, respectively.

The director denied the petition on May 13, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director specifically noted that the petitioner had multiple immigrant visa petitions pending and the petitioner's net income and net current assets in each year of its corporate tax returns failed to illustrate its ability to pay multiple wages in each year.

On appeal, counsel asserts that multiple pending petitions are not "germane" to the instant petition and submits an amended tax return with an accompanying letter from the petitioner's certified public accountant, [REDACTED] who states that \$120,636 was erroneously reported as a current liability, and a signed copy of an "amended" corporate tax return for 2001.

At the outset, the AAO notes that the "amended" tax return submitted on appeal reflects no indication of being filed as it was presented to our office with the Internal Revenue Service (IRS). Amended corporate tax returns for S corporations marks box F(5) on page 1 to indicate an amended tax report. See <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 2005). The amended return's box F(5) is not even checked. The AAO does not accept the tax return submitted on appeal because the record of proceeding fails to demonstrate that it was filed with the IRS and thus the petitioner has undertaken responsibility and liability for erroneously reporting a long-term liability as a current liability for 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 has established that it

employed and paid the beneficiary \$12,620 in 2001, \$14,575 in 2002, and \$14,600 in 2003. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year. Instead, the petitioner paid partial wages, which for each relevant year, 2001, 2002, and 2003, was \$15,470, \$13,575, and \$13,490 less than the proffered wage, respectively. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$28,090 per year from the priority date.

In 2001, the Form 1120S stated net income² of -\$17,377.

In 2002, the Form 1120S stated net income of \$3,119.

In 2003, the Form 1120S stated net income of -\$9,714.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

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.³ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 2001 were -\$85,851.
The petitioner's net current assets during 2002 were \$45,515.
The petitioner's net current assets during 2003 were \$30,139.

The petitioner could not pay the difference between the wage paid and the proffered wage out of its net current assets in 2001. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the difference between the wage paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In addition, the petitioner has filed and received approvals for two other Immigrant Petitions for Alien Worker (Form I-140)⁴. Contrary to counsel's appellate assertion, the petitioner must show that it had sufficient income to pay all the wages from the priority date until final disposition out of wages actually paid, net income, or net current assets. The petitioner's net current assets during 2002 are insufficient to pay the difference between the wages paid and the proffered wage to the beneficiary and its other sponsored beneficiary. The petitioner's net current assets during 2003 are insufficient to pay the difference between the wages paid and the proffered wage to the beneficiary and two other sponsored beneficiaries.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.

³ 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.

⁴ It is notable that one of those beneficiaries, [REDACTED] was only paid \$2,537.50 during the third quarter of 2001 and \$3,825, which would be annualized pay rates of \$10,150 and \$15,300, respectively. Although the AAO does not have that record and does not know the proffered wage in that case, it is improbable that the petitioner was paying [REDACTED] the proffered wage rate, which fails to demonstrate that the petitioner could pay the proffered wage to all immigrants it has sponsored.

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ORDER: The appeal is dismissed.