

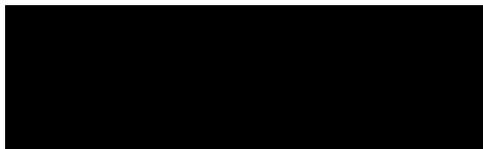
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BE

FILE:



Office: VERMONT SERVICE CENTER

Date: **NOV 16 2005**

EAC-03-054-50882

IN RE:

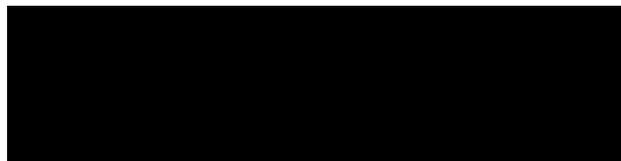
Petitioner:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a Software Engineer. 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.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 1, 2002. The proffered wage as stated on the Form ETA 750 is \$70,000 per year. The Form ETA 750 states that the position requires Bachelor's degree or equivalent in Computer Science, Mathematics, Engineering or Computer Applications plus two (2) years of experience.

The record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$4.4 million, and to currently employ 110 workers. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the Form ETA 750B, signed by the beneficiary on March 12, 2002, the beneficiary did not claim to have worked for the petitioner. However, counsel claimed that the beneficiary has worked for the petitioner since May 2003.

With the petition, the petitioner submitted the following documents: Form 1120, U.S. Corporation Income Tax Return for 2001 and the beneficiary's credentials with evaluation.

In the request for additional evidence (RFE) issued on November 14, 2003, the director requested that the petitioner submit the 2002 United States federal income tax return with all schedules and attachments, or

annual reports for 2002 which are accompanied by audited or reviewed financial statements, and Form W-3, Transmittal of Wage and Tax Statements to establish that the petitioner had the ability to pay the proffered salary of \$70,000 per year as of April 1, 2002.

In response, the petitioner submitted a statement from [REDACTED] (Human Resources Director of the petitioner), the beneficiary's paycheck stub for the period of 11/16/2003 to 12/15/2003, the petitioner's 2002 federal income tax return, bank statements, printouts from tax filing service of quarterly tax reports for fourth quarter of 2002, first and second quarters of 2003, W-2 forms for 2002 and 2003.

The director denied the petition on April 16, 2004, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the ability to pay the offered wage at the time of filing.

On appeal, counsel submitted a brief and a copy of documents submitted in response to the RFE. Counsel asserts that with the enclosed documentation the petitioner demonstrated the ability to pay the beneficiary the proffered salary of \$70,000 per year beginning as of April 1, 2002, the date of filing of the application for alien employment certification and continuing to the present.

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 did not establish that it employed and paid the beneficiary any amounts as salary in 2002. However the record of proceeding contains a copy of the beneficiary's W-2 for 2003, which shows that the petitioner paid partial wages in the amounts of \$29,440 in 2003, which is \$40,560 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the full proffered salary of \$70,000 in 2002 and that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Counsel advised that the beneficiary would replace an alien H-1B worker who was paid \$97,000 in 2002 and 2003. The record does not, however, name this worker, verify his/her full-time employment, or provide evidence that the petitioner has replaced or will replace the worker with the beneficiary. In general, 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. Moreover, there is no evidence that the position of the alien H-1B worker involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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. Counsel's reliance on depreciation is misplaced. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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 evidence indicates that the petitioner is a C corporation. The record contains copies of the Form 1120 U.S. Corporation Income Tax Return of the petitioner for 2001¹ and 2002. The record before the director closed on February 5, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available and also for the year of the priority date.

The petitioner's Form 1120 for 2002 stated net income² of \$(229,004). Counsel asserts that the petitioner did have positive income of more than \$229,000 but the director considered it to be negative. It is noted that the petitioner's 2002 tax return evidences that its net income for 2002 was negative. It is the counsel who erred in reading the negative net income as a positive. Therefore, for the year 2002, the petitioner did not have sufficient net income to pay the proffered wage. The record does not contain copies of the petitioner's 2003 tax return.

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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

¹ Evidence preceding the priority date in 2002 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 current assets for 2002 were \$8,644 and the current liabilities were \$335,351. Therefore, the petitioner's net current assets during the year 2002 were \$(326,707), a negative figure.

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 proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel states in his brief that the petitioner had the retained earnings of \$221,341 as of December 31, 2002⁴, which was sufficient by itself to pay the salary of \$70,000 to the beneficiary. Counsel's reliance on retained earnings is misplaced. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel submitted the petitioner's bank statements as an alternate method. First, however, 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 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 petitioner's taxable income**

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

⁴ In fact, the retained earnings line on Schedule L of the Form 1120 is negative \$221,341, just like the net income.

(income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel also asserts that the petitioner has a bank credit line amounting to \$750,000. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In addition, CIS records indicate that the petitioner filed 31 Form I-140 petitions in the year 2002 and 45 petitions in 2003 with the Vermont Service Center⁵. Presumably, the petitioner had filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Any further proceedings in this matter must address the petitioner's ability to pay all of its prospective employees.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had 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.

ORDER: The appeal is dismissed.

⁵ The petitioner also filed 326 Form I-129 nonimmigrant petitions in the years 2000 through 2003.