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U.S. Citizenship
and Immigration
Services

B6

FILE: EAC 03 196 51799 Office: VERMONT SERVICE CENTER Date: **SEP 02 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

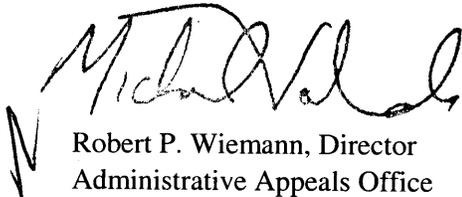
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a janitorial services firm. It seeks to employ the beneficiary permanently in the United States as a janitorial services supervisor. 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 [Citizenship and Immigration Services (CIS)].

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 September 27, 2001. The proffered wage as stated on the Form ETA 750 is \$17.13 per hour, which amounts to \$35,630.40 per annum. On the Form ETA 750B, signed by the beneficiary on July 26, 2001, the beneficiary claims to have worked for the petitioner beginning in June 2001.

On Part 5 of the visa petition, the petitioner claims to have been established in April 2000, have a gross annual income of \$325,000, a net annual income of \$150,000, and to currently employ fourteen workers. In support of its ability to pay the beneficiary's proposed wage offer of \$35,630.40 per year, the petitioner initially submitted a

copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner files its federal returns using a standard calendar year. In 2001, the petitioner reported net income of \$1,259 before the net operating loss (NOL) deduction. Schedule L of the return shows that the petitioner had \$12,168 in current assets and \$694 in current liabilities, resulting in net current assets of \$11,474. Besides net income, as an alternative method of evaluating a petitioner's ability to pay a proffered salary, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period and a possible source out of which a proposed wage offer could be paid.¹ A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal return. If its 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence to demonstrate that the petitioner had the ability to pay the certified wage as of the priority date of September 27, 2001 and continuing to the present. On October 23, 2003, the director instructed the petitioner to provide a copy of its 2002 federal income tax returns. The director also requested the petitioner to provide a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 and 2002 if it employed the beneficiary during this period.

In response, the petitioner, through counsel, provided a copy of its 2002 return, as well as another copy of its 2001 corporate return. The 2002 tax return shows that the petitioner reported -\$2,847 in net income before the NOL deduction. Schedule L reflects that it had \$2,670 in current assets and \$837 in current liabilities, yielding \$1,833 in net current assets.

Counsel also submitted a copy of the beneficiary's 2001 W-2. It shows that the petitioner paid \$5,702.50 in wages to the beneficiary during that year. Counsel's transmittal letter indicates that the beneficiary worked for a limited part-time basis for the petitioner before he had to return to Peru.

The director denied the petition on May 17, 2004, concluding that neither the petitioner's net income nor its net current assets, as shown on the 2001 and 2002 federal tax returns, was sufficient to demonstrate its ability to pay the proffered salary beginning on the priority date of September 27, 2001.

On appeal, counsel resubmits the tax returns previously provided to the record and additionally includes a copy of the petitioner's internal payroll records summarizing wages paid throughout 2001 to approximately 32 workers. Counsel contends that the director failed to consider the petitioner's total assets of \$82,924 as shown on Schedule L of its 2001 tax return or its intangible assets of \$42,439 as shown on line 13 of Schedule L. Counsel also asserts that when the beneficiary returns to work for the petitioner, his salary will come from salaries being paid to some of the part-time workers from 2001 as he will take over a large portion of their janitorial duties as a full-time worker.

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

It is noted that the beneficiary is intended to directly replace "some of the part-time employees from 2001," as noted by counsel, is not directly supported by the record. Counsel's hypothesis in this regard does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, wages already paid to others are not available to prove the ability to pay the certified wage to the beneficiary at the priority date of the petition and continuing to the present. Further, there is no evidence that such duties performed by these employees involved the same duties as those set forth in the Form ETA 750A, which describes the certified position. If such duties are different, then there can be no replacement.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether a petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record shows that the petitioner paid the beneficiary \$5,702.50 in 2001.

If the petitioner does not establish that it may have 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). Showing that the petitioner's gross receipts or compensation already paid to other employees or shareholders exceeded 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. We reject, however, counsel's assertion that the petitioner's 2001 total assets of \$82,924 or its intangible assets listed on line 13 of Schedule L 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. Similarly, the petitioner's intangible assets on line 13 of Schedule L are not listed among the petitioner's current assets and cannot be considered as an isolated figure. Rather, as noted above, CIS will consider *net current assets*, as set forth on Schedule L of the corporate tax return, as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, in 2001, neither the petitioner's net taxable income of \$1,259, nor its net current assets of \$11,474 was sufficient to pay the \$29,927.90 difference between the actual wages paid to the beneficiary and the proffered wage of \$35,630.40.

Similarly, in 2002, the petitioner's tax return fails to demonstrate that the certified wage could be paid by either its net taxable income of -\$2,847 or its net current assets of \$1,833. The petitioner has not demonstrated its continuing ability to pay the proffered wage during this period.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.