



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 036 50297 Office: VERMONT SERVICE CENTER Date: APR 04 2006

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 Director, Vermont Service Center. The petitioner appealed. The director denied the motion to reopen on May 20, 2004, and the petitioner submitted an appeal (Form I-290B) dated June 16, 2004. On July 16, 2004, the petitioner then filed a legal brief in support of the I-290B dated June 16, 2004. The Administrative Appeals Office (AAO) affirmed the director's decision. The motion will be granted. The prior decision will be affirmed. The petition will be denied.

The petitioner is a refrigeration systems corporation. It seeks to employ the beneficiary permanently in the United States as a refrigeration mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 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 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 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. 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 January 23, 2001. The proffered wage as stated on the Form ETA 750 is \$23.66 per hour (\$49,212.80 per year). The Form ETA 750 states that the position requires two years experience.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director on December 19, 2001, requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner's U.S. federal tax return for 2000 as well as the beneficiary's W-2 Wage and Tax Statement for 2000.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted a financial statement; and, the petitioner's statement that the beneficiary was trained by another company to fabricate and install ductwork.

The director denied the petition on August 12, 2002, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal of the director's decision, counsel asserted it would be a hardship if the beneficiary was not employed since there is a high volume of work available, and, that the beneficiary's labor would "have paid for himself." Also, the company (at the time of the appeal) had gross revenues of \$271,829.00. Counsel states that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), indicates that the petitioner's expectations of continuing business and increased profits indicate the ability to pay the proffered wage. Counsel submits a letter from an accountant, general ledger sheets, and, business contracts in support of this contention.

Matter of Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. There is insufficient financial evidence to make this determination.

Counsel had submitted the petitioner's 2001 U.S. federal tax returns to accompany the appeal statement, and the petitioner owners' personal tax return for 2000. Also, the counsel stated that another petition for the same occupation was approved.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$49,212.80 per year from the priority date of January 23, 2001:

- In 2001, the Form 1120S stated taxable income of \$14,205.00

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage for which the petitioner's tax return is offered for evidence.

Examining the Form 1120S U.S. Income Tax Returns¹ submitted by the petitioner, Schedule L found in that return indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$21,702.00 and \$1,299.00 in current liabilities. Therefore, the petitioner had \$20,403.00 in net current assets. Since the proffered wage is \$49,212.80 per year, this sum is less than the proffered wage.

Therefore, for the period 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,² copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserted it would be a hardship if the beneficiary was not employed since there is a high volume of work available, and, that the beneficiary's labor would "have paid for himself." Counsel assertion is erroneous. Proof of ability to pay begins on the priority date, that is January 23, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a refrigeration mechanic will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax return.

¹ According to the petitioner, the business' income was reported on the personal tax return of Sergio Ariz and spouse in 2000. The Form 1040 year tax return for 2000 stated adjusted gross income of \$121,810.00. The business stated a net profit on Schedule C of that return of \$45,562.00.

² 8 C.F.R. § 204.5(g)(2).

The petitioner noted that CIS approved one other petition that had been previously filed on behalf of the petitioner. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel asserts as evidence of the ability to pay the proffered wage, that the company (at the time of the appeal) had gross revenues of \$271,829.00. As mentioned above, in *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084.

Counsel contends that the ownership of the building used in its business, a plasma-cutting machine, and six trucks all evidence its ability to pay the proffered wage. We reject the petitioner's assertion 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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 motion is granted. The prior decision is affirmed. The petition remains denied.