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U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: AUG 21 2006

EAC 04 238 50890

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, Chief
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 services company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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).

Here, the Form ETA 750 was accepted on May 8, 2001. The proffered wage as stated on the Form ETA 750 is \$38.82 per hour (\$80,740 per year).

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 1995 and to currently employ 18 workers. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on August 11, 2004, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28;
- A certified Form ETA 750A;
- An ETA 750B;
- An August 3, 2004 letter requesting that the beneficiary be substituted for the employee named in the certified ETA 750A;
- Form 1120S for the years 2001–2003; and,
- A credentials evaluation of the beneficiary's educational background.

The director denied the petition on December 28, 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.

On appeal, counsel asserts that the petitioner had the ability to pay the proffered wage, starting in 2001, when it paid the original beneficiary the equivalent of \$57,012.22 if the beneficiary's wages for part of the year 2001 if recalculated for the full year. In addition, the petitioner is currently paying the beneficiary at a rate in excess of the proffered wage. The petitioner's net income for the year 2002 totals more than \$100,000, even though it lost \$17,384 in the year 2001. Further, counsel asserts, if the petitioner's income were figured on an accrual basis instead of a cash basis, its income would be many times more than the proffered wage. Counsel further asserts its ability to pay the proffered wage under the May 4, 2004 Interoffice Memorandum of William R. Yates, Associate Director for Operations. Finally, it has a 17-to-1 ratio of current assets to current liabilities for the year 2001, and an 11-to-1 ratio for 2002.

At the outset, this office will not accept counsel's assertion that treats tax returns or financial statements prepared by the cash-basis method as if prepared on an accrual basis, thereby seeking to shift revenue or expenses from one year to another according to the petitioner's convenience. The amounts shown on the petitioner's tax returns shall be considered as submitted to Internal Revenue Service, not as if on a different accounting basis. We would consider income figured using accrual accounting only if an accountant were to submit audited financial statements prepared according to generally accepted accounting principles. This counsel has not done.

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 not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through the present. We note that the petitioner has submitted the W-2 (Wage and Tax Statement) for the year 2004 showing wages paid of \$61,320 for employment in part of the year, which if annualized at \$85,754.02, would exceed the proffered wage annualized. While that establishes the petitioner's ability for the year 2004, it does not alter the evidence that fails to show the petitioner had the ability to pay the proffered wage in earlier years.

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 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$80,740 per year from the priority date.

In 2003, the Form 1120S stated net income¹ of \$101,442.

In 2002, the Form 1120S stated net income of \$(17,384).

In 2001, the Form 1120S stated net income of \$(4,222).

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

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, counsel's idea of a favorable asset-to-liability ratio as establishing the petitioner's 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.² 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 the years in question, were as follows:

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

² 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.

| <u>2001</u> | <u>2002</u> | <u>2003</u> |
|-------------|-------------|-------------|
| \$(17,639) | \$(46,540) | \$57,834 |

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, except for the year 2003, 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 asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the petitioner's net income reported on its federal income returns, recalculated on an accrual basis, would show that it had the ability to pay the proffered wage. However, we note that the petitioner's tax returns were reported on a cash basis, or in other words, a method in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS. Refiguring net income on a hypothetical accrual basis can only be done by an accountant if prepared in accordance with accepted accounting principles.

Finally, counsel asserts that it has established its ability to pay under the Yates memo of May 4, 2004. The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 8, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004, when counsel claims it actually began paying the beneficiary the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001, 2002 and 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel's assertions on appeal, therefore, 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.



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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.