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U.S. Citizenship
and Immigration
Services

B6



FILE:

EAC 04 050 51006

Office: VERMONT SERVICE CENTER

Date: OCT 06 2006

IN RE:

Petitioner:
Beneficiary:



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

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 remanded for further consideration.

The petitioner is a residential construction business. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 14, 2005 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(i) of 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 or seasonal 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. 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, which is the date 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). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour or \$35,360 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case

appeal includes counsel's brief, a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement, and a copy of a memorandum, dated February 16, 2005, from William R. Yates, Associate Director, Operations, entitled *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*. Other relevant evidence includes copies of the petitioner's 2000 through 2002 Forms 1120, U.S. Corporation Income Tax Returns, and copies of the petitioner's 2001 bank statements from two separate checking accounts. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2002 tax returns reflect a taxable income before net operating loss deduction and special deductions or net incomes of \$28,553, -\$11,044, and \$27,279, respectively. The petitioner's 2000 through 2002 tax returns also reflect net current assets of \$19,352, \$9,852, and \$34,944, respectively.

The beneficiary's 2001 Form W-2, issued by the petitioner, reflects wages earned by the beneficiary of \$22,389.75 in 2001 or \$12,970.25 less than the proffered wage of \$35,360.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$35,360 based on its cash flow and its longevity. Counsel also states that the director erred in not issuing a request for evidence, thereby, arriving at a conclusion based on a lack of substantial evidence. Counsel cites a memorandum from William R. Yates, several non-precedent decisions, a Board of Alien Labor Certification Appeals (BALCA) case, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.C. 1988) in support of his contentions.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed on April 20, 2001², the beneficiary claims to have been employed by the petitioner from August 1997 to the present. However, the petitioner has only provided the beneficiary's 2001 Form W-2 showing earnings of \$22,389.75 as evidence that it employed the beneficiary in 2001. Therefore, CIS has no evidence that the petitioner compensated the beneficiary for his employment in 1997 through 2000 or in 2002 to the present. Therefore, any funds paid to the beneficiary in those years cannot be used as evidence of the petitioner's ability to pay the proffered wage in 2002 to the present.

provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² It is noted that the signature does not appear to be that of the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. 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 a corporation's 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. The petitioner's net current assets in 2000 through 2002 were \$19,352, \$9,852, and \$34,944, respectively. The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$35,360 and the actual wages paid to the beneficiary. In this case that difference was \$12,970.25 in 2001. The petitioner could not have paid the difference of \$12,970.25 between the proffered wage of \$35,360 and the actual wages paid to the beneficiary of \$22,389.75 from its net current assets in 2001. In addition, since no Forms W-2 were provided for 2000 or 2002, the AAO cannot determine if the petitioner had sufficient funds to pay the difference between the proffered wage of \$35,360 and the actual wages paid to the beneficiary in 2000 and 2002⁴.

Counsel states that the petitioner has established its ability to pay the proffered wage through its bank statements or cash flow. However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R.

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 It is noted that the petitioner failed to provide its 2003 tax return on appeal; and, therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the proffered wage in 2003.

§ 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 (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Counsel claims that the "Center Director failed to issue a Request for Evidence and made an error when applying the facts to the law and arrived at the conclusion that the Petitioner did not establish its ability to pay the offered wage at the time of filing." Counsel cites *Full Gospel Portland Church v. Thornburgh, Matter of Sonogawa*, several non-precedent decisions, and a BALCA case in support of his contention that CIS must consider all facts, including but not limited to taxable income. Counsel also cites the internal memorandum by William Yates to support his contention that the director erred in not issuing a Request for Evidence.

In the instant case, with regard to *Full Gospel Portland Church v. Thornburgh*, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In addition, with regard to the non-precedent cases, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, the language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases," CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record.

The regulation at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

In the instant case, the petitioner submitted its 2000 through 2002 income tax returns as proof of its ability to pay the proffered wage. The tax returns reflect net incomes of \$28,553, -\$11,044, and \$27,279, respectively. The tax returns also reflect net current assets of \$19,352, \$9,852, and \$34,944, respectively. Since the 2001 tax return represented the year of the priority date and since the petitioner could not pay the difference of \$12,970.25 between the proffered wage of \$35,360 and the actual wage of \$22,389.75 paid to the beneficiary in 2001 from its net income or net current assets, the director determined that the petitioner was ineligible at that point, and he was not obligated to continue the adjudication further by issuing a RFE. The director is not responsible for the type or amount of evidence submitted initially. That responsibility is correctly placed with the petitioner. However, since Form ETA 750 indicated that the petitioner employed the beneficiary from

1997 to the present, the director could have issued a request for evidence for copies of the beneficiary's Forms W-2 or other evidence indicating wages paid to the beneficiary and any other documentation determined to be useful. In addition, the petitioner may have been able to establish its ability to pay the proffered wage based on *Matter of Sonegawa*, which will be discussed below.

If the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In the instant case, counsel has provided three tax returns (2000 through 2002) for the petitioner. None of the tax returns currently demonstrate that the petitioner has the ability to pay the proffered wage. In addition, the three tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

As the petitioner may meet the requirements of *Matter of Sonegawa*, the director must afford the petitioner reasonable time to provide evidence of its ability to pay the beneficiary the proffered wage of \$35,360, to provide copies of the beneficiary's Forms W-2, payroll summaries, cancelled checks, etc., and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 14, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.