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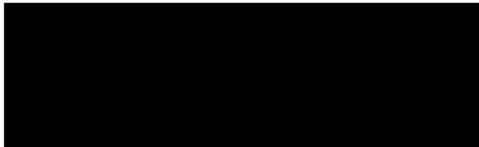
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



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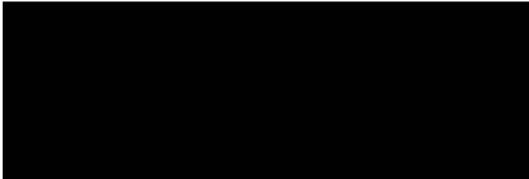


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 16 2007
WAC 04 033 52916

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

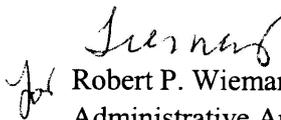
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a surfboard manufacturing company. It seeks to employ the beneficiary permanently in the United States as a production coordinator. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

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

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$25 per hour, which equals \$52,000 per year.

The Form I-140 petition in this matter was submitted on November 17, 2003.¹ On the petition, the petitioner stated that it was established during 1980 and that it employs "15+" workers. On the Form ETA 750, Part B,

¹ The record shows that the petitioner previously, on February 15, 2002, filed another petition for the same beneficiary. Although evidence submitted with that previous petition is incorporated into the record and has been considered, today's decision is concerned only with the petition filed on November 17, 2003.

signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner since February 1995. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in [REDACTED]

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

In the instant case the record contains (1) copies of the first pages of the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the third quarter of 2001, (3) copies of 2000, 2001, and 2002 Form W-2 Wage and Tax Statements showing amounts the petitioner paid to the beneficiary during those years, (4) check stubs the petitioner issued to the beneficiary, and (5) compiled financial statements. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on June 30, 2000, and that it reports taxes pursuant to the calendar year.

The petitioner's 2001 tax return shows that the petitioner declared a loss of \$92,531 during that year. Because the corresponding Schedule L was not provided the record contains no evidence from which the petitioner's end-of-year net current assets can be calculated.

The petitioner's 2002 tax return shows that the petitioner declared a loss of \$4,890 during that year. Because the corresponding Schedule L was not provided the record contains no evidence from which the petitioner's end-of-year net current assets can be calculated.

The petitioner's 2003 tax return shows that the petitioner declared a loss of \$88,690 during that year. Because the corresponding Schedule L was not provided the record contains no evidence from which the petitioner's end-of-year net current assets can be calculated.

The W-2 forms that the petitioner issued to the beneficiary show that the petitioner paid the beneficiary \$10,791.50 during 2000, \$17,109.75 during 2001, and \$19,993.80 during 2002.

The check stubs provided show that the petitioner paid the beneficiary gross income of \$473 on July 18, 2003, \$770 on July 25, 2003, \$818 on August 1, 2003, and \$601 on August 8, 2003.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The compiled financial statements submitted include the petitioner's balance sheet as of June 30, 2000 and its profit and loss statement for the six months ending June 30, 2000. In a letter dated June 29, 2002 counsel incorrectly refers to those statements as audited financial statements.

The director denied the petition on April 5, 2005. On appeal, counsel asserted that the beneficiary now works as a surfboard production coordinator for [REDACTED] another surfboard manufacturer, and asked that the petition be considered pursuant to the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21). In a previous letter counsel urged that the amount of the petitioner's gross receipts shows its continuing ability to pay the proffered wage beginning on the priority date.

The petition in this matter was not denied based on the beneficiary no longer working for the petitioner. Further, AC21 pertains to the approvability of Form I-485 Applications for Adjustment of Status rather than to the approvability of employment-based visa petitions such as the instant petition, as is explained below.

AC21 allows an *application for adjustment of status*³ to be approved, under some circumstances, despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer from the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is the same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

³ The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the *bona fides* of the new prospective employer. Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment.

The provision of AC21 that counsel cited has no relevance to adjudication of the instant Form I-140 visa petition. This office will now address the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (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. (Reg. Comm.1967).

Counsel's reliance on the unaudited financial statements in the record is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$10,791.50 during 2000,⁴ \$17,109.75 during 2001, \$19,993.80 during 2002, and at least \$2,662⁵ during 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

⁴ Because the priority date of the instant visa petition is April 26, 2001, however, evidence pertinent to the petitioner's finances and amounts it paid to the beneficiary during previous years is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date.

⁵ This is the total of the gross pay shown on the four check stubs submitted.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁶ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$52,000 per year. The priority date is April 26, 2001.

The petitioner paid the beneficiary \$17,109.75 during 2001 and is obliged to show the ability to pay the remaining \$34,890.25 balance of the proffered wage during that year. During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. Because the petitioner's 2001 Schedule L was not provided the petitioner's net current assets are unknown to this office and cannot be considered. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$19,993.80 during 2002 and is obliged to show the ability to pay the remaining \$32,006.20 balance of the proffered wage during that year. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

out of its profit during that year. Because the petitioner's 2002 Schedule L was not provided the petitioner's net current assets are unknown to this office and cannot be considered. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner demonstrated that it paid the beneficiary \$2,662 during 2003 and is obliged to show the ability to pay the remaining \$49,338 balance of the proffered wage during that year. During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. Because the petitioner's 2003 Schedule L was not provided the petitioner's net current assets are unknown to this office and cannot be considered. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.