



U.S. Citizenship  
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JAN 29 2007

FILE:

WAC 04 217 50576

Office: CALIFORNIA SERVICE CENTER

Date:

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

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a first-line manager of retail sales workers. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 based on the petitioner's net income or net current assets for tax years 2001 to 2003. The director also determined that the income and assets of the owner or stockholders of the petitioner were irrelevant to the instant petition and would not be further considered. The director denied the petition accordingly.

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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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). 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 April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$21.62 per hour (\$44,969.60 per year). The Form ETA 750 states that the position requires four years of college with no specified college degree or major field of study and three years of experience in the job offered. Although the ETA 750 specifies a related occupation as “manager travel agency,” the form does not indicate any specific number of years of work experience in the related occupation.

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 appeal<sup>1</sup>. On appeal, counsel submits a copy of an interoffice memorandum written by then Citizenship and Immigration Services (CIS) Associate Director William Yates.<sup>2</sup> Counsel resubmits pages of the petitioner’s bank statements from United Commercial Bank for tax years 2001 to 2004; a statement of cash flows for tax years 2001 through 2004 with a comparative average monthly cash balance for years 2001-2004; the petitioner’s register and payroll journal from October 1, 2004 to December 2004; a payroll register report for January 1, 2005 to March 31, 2005 that notes wages paid to the beneficiary during this period; a copy of the petitioner’s Form DE-6 for the final quarter of 2004 that indicates the beneficiary received wages of \$10,896.28 during this quarter; a Form W-3 that indicates the petitioner paid wages of \$100,170.14 in tax year 2004; the beneficiary’s 2004 W-2 Wage and Tax Statement that states the petitioner paid her \$10,896.28; and copies of the beneficiary’s tax return for 2004, IRS Form 1040EZ, and her state of California tax return that both indicates the beneficiary earned \$10,896 in tax year 2004.

Relevant evidence in the record submitted either with the initial petition or in response to the director’s request for further evidence includes the petitioner’s corporate tax returns, Forms 1120 for tax years 2001 to 2004, Forms 941, Employer’s Quarterly Federal Tax Return, for the fourth quarter of tax year 2004 and the first quarter of tax year 2005. The petitioner also submitted W-2 statements for its employees for tax year 2003, and a payroll register and journal for the first quarter of 2004, with individual employees’ wages noted. Finally the record contains a list of six employees, including the beneficiary, that identified each employee’s job title. The record does not contain any other evidence relevant to the petitioner’s ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in August 18, 1988, to have a gross annual income of \$469,924, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director by his statement with regard to the petitioner’s stockholders and owners, appeared to indicate that the petitioner would use the assets of its stockholders as evidence of the petitioner’s ability to pay the proffered wage. Counsel states that this issue had never been raised by the petitioner or counsel, and points out that the bank statements submitted to the record are in the name of the petitioner, not the petitioner’s owner or shareholders.

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<sup>1</sup> 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 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).

<sup>2</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

Counsel also asserts that the director erred in not considering the bank statements from tax years 2001 to 2004 that the petitioner submitted in its response to the director's request for further evidence. Counsel notes that it is discretionary for Citizenship and Immigration Services (CIS) to accept the petitioner's bank statement as evidence of the petitioner's ability to pay the proffered wage; however, the director should have considered these statements. Counsel states that each bank statement indicates a monthly average balance in its basic business checking account that is more than the monthly proffered wage, or \$3,747.46. Counsel states that between 2001 and 2004, the highest monthly average balance was \$46,957.54, while the lowest monthly average balance was \$11,855.67. Counsel also asserts that the petitioner's statement of cash flows from tax year 2001 to 2004 are also additional financial evidence that can be utilized to support the petitioner's ability to pay the proffered wage. Counsel states that on the average the petitioner posted a monthly cash flow of \$25,324.82.

Finally counsel states that the director erred in assuming that the beneficiary's Form W-2 for 2004 could not be used to establish the petitioner's ability to pay the beneficiary's proffered wages. Counsel states that the petitioner's payroll journal reveals that the beneficiary started working for the petitioner in October 2004, and that her Form W-2 did not reflect wages for the entire year. Counsel states that the record does contain evidence that the petitioner not only is employing the beneficiary but is also currently paying her the proffered wage. Counsel contends that as such the petition falls within one of the guidelines outlined in the Yates memo that would merit a positive determination of the petitioner's ability to pay the proffered wage.

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).

Counsel's assertion with regard to the director's statements of assets of shareholders or owners not being considered in these proceedings is correct. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is not clear why the director included such remarks in his decision. This part of the director's decision is withdrawn.

On appeal, counsel also asserts that since the petitioner has paid the beneficiary at the proffered wage rate since October 2004, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage. Counsel urges CIS to consider the wage rate paid beginning in the final quarter of 2004, as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

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 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 proffered wage rate, but it must also show its continuing ability to pay the proffered wage in tax years 2001, 2002, 2003 and the first three quarters of 2004. 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 reliance on the balances in the petitioner's bank account is misplaced. First, as counsel correctly noted, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 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 will be considered below in determining the petitioner's net current assets.

Further on appeal, counsel asserts that the petitioner's cash flow should be considered an additional manner of establishing the petitioner's ability to pay the proffered wage. However, counsel provides no further regulatory or statutory authority that such an analysis would be warranted in the consideration of a petitioner's ability to pay the proffered wage. As previously stated, 8 C.F.R. § 204.5(g)(2) requires one of three types of evidence 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. It is further noted that the petitioner's cash flow statements are unaudited. Counsel's reliance on unaudited financial records 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Furthermore, as will be discussed further in these proceedings, the petitioner's net income and net current assets are more reliable bellwethers of the petitioner's ability to pay the proffered wage, rather than the petitioner's cash flow.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 established that it employed and paid the beneficiary \$10,896.28 in tax year 2004, based on the beneficiary's W-2 form. In addition the petitioner's payroll register for the first quarter of 2005 indicate that the petitioner paid the beneficiary \$10,723.50 in 2005. Although the petitioner established that these wages were paid to the beneficiary, the petitioner did not provide any further documentation as to whether these wages paid in 2004 and 2005 are commensurate with an hourly wage of \$21.62. Therefore, although the petitioner has established that it employed the beneficiary in tax year 2004 and 2005, it did not establish that it paid the beneficiary a salary commensurate with the hourly wage, or that it paid the beneficiary the entire proffered wage during either year. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003, and the difference between the beneficiary's actual wages and the proffered wage in 2004.<sup>3</sup>

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 contrary to counsel's assertions\*. 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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.

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<sup>3</sup> It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated June 7, 2005. At this time, the petitioner's 2005 income tax return would not have been available. Therefore the AAO will not examine whether the petitioner had sufficient net income or net current assets to pay the difference between the beneficiary's actual 2005 wages and the proffered wage.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$44,969.60 per year from the priority date:

- In 2001, the Form 1120 stated a net income<sup>4</sup> of -\$26,066.
- In 2002, the Form 1120 stated a net income of -\$68,061.
- In 2003, the Form 1120 stated a net income of -\$19,599.
- In 2004, the Form 1120 stated a net income of \$22,211.

Therefore, for the years 2001 to 2003, the petitioner, with negative net income, did not have sufficient net income to pay the proffered wage. In tax year 2004, although the petitioner had positive net income of \$22,211, it is not sufficient to pay the difference between the beneficiary's actual wages of \$10,896.28 and the proffered wage of \$44,969.60, namely, \$34,073.32. Therefore the petitioner cannot establish its ability to pay the proffered wage based on the petitioner's net income from the 2001 priority date to the present.

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.<sup>5</sup> 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 2001 were -\$92,637.
- The petitioner's net current assets during 2002 were -\$125,965.
- The petitioner's net current assets during 2003 were -\$106,421.
- The petitioner's net current assets during 2004 were -\$91,627.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage. In tax year 2004, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$34,073.32.<sup>6</sup>

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<sup>4</sup>Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>6</sup> It is noted that the director examined the petitioner's net income and net current assets for the tax years 2001 through 2004. However, when the director summarized his determination, he only stated that the petitioner did not have the ability to pay the proffered wage in tax years 2002 to 2003. However, as discussed

Therefore, 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 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's assertions on appeal 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 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.

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.

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above, the petitioner did not establish its ability to pay the proffered wage as of the 2001 priority year date through 2004.