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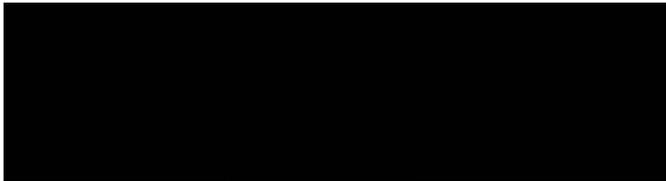
U.S. Department of Homeland Security
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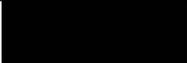
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 02 2007

EAC 05 150 50966

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 Director, Vermont 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 heating and plumbing service. It seeks to employ the beneficiary permanently in the United States as a heating and ventilating drafter. 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 an 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.

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

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 March 6, 2000. The proffered wage as stated on the Form ETA 750 is \$41,298.40 per year.

The Form I-140 petition in this matter was submitted on April 29, 2005. On the petition, the petitioner stated that it was established on October 1, 1979 and that it employs two workers. The petition states that the

petitioner's gross annual income is \$139,025 and that its net annual income is \$42,008.¹ On the Form ETA 750, Part B the beneficiary did not claim to have worked for the petitioner. The visa petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Pearl River, New York.

The AAO reviews *de novo* issues raised 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) the petitioner's 2000, 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a letter dated July 5, 2005 from the petitioner's owner, (3) a letter dated June 16, 2005 from the petitioner's owner, (4) an undated affidavit from the petitioner's owner, (5) an August 30, 2005 letter from [REDACTED] at TPD Industries Corporation, and (6) a copy of the first page of the 2003 Form 1120S, U.S. Income Tax Return for an S Corporation of TPD Industries. 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 October 1, 1979, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2000 tax return shows that during that year the petitioner declared a loss of \$3,041 as its income. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities exceeded its current assets.

The petitioner's 2001 tax return shows that during that year the petitioner declared income of \$1,225. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that during that year the petitioner declared income of \$3,191. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that during that year the petitioner declared income of \$6,155. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities exceeded its current assets.

The petitioner's 2004 tax return shows that during that year the petitioner declared income of \$10,808. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities exceeded its current assets.

¹ The evidence in the record does not confirm this statement of the petitioner's net annual income.

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 petitioner's owner's July 5, 2005 letter states that because the petitioner does not employ a draftsman it is denied some contracts or obliged to pay for the services of outside draftsmen. The petitioner submitted no evidence of any amounts it has paid to outside draftsmen for performing the duties of the proffered position. The petitioner's owner's June 16, 2005 letter states that the beneficiary will replace outside labor.

The petitioner's owner's undated affidavit states that the petitioner is a subcontractor that works for major contractors. The petitioner's owner further states that TDP Industries, which the petitioner's owner characterized as a major corporation, would offer his company much more work if it had a draftsman on its staff, and that in the past he has declined some assignments because of the lack of a draftsman. He stated that the petitioner would be more profitable if it employed a draftsman. The petitioner's owner characterized TPD's 2003 tax return as clearly showing that it does a high volume of business and currently pays other draftsmen for performing the duties of the proffered position, noting that Line 19 of that return shows that TPD paid \$150,000 for outside services.

The August 30, 2005 letter from ██████████ at TPD Industries does not identify ██████████'s position with that company. The letter states that the company has used the services of '██████████' for several years and "would have given him much more work had he been able to provide . . . certain additional services such as an industrial drafter/designer." The letter further states that the company is planning the conversion of a 100-unit apartment building complex "that will no doubt require the service of a full time designer." Finally, ██████████ stated, "We . . . have no doubt that [the petitioner's owner] will be more than able to afford [the beneficiary's] services."

The first page of the 2003 tax return of TPD Industries Corporation shows that the company had gross receipts slightly under \$2 million in that year and had ordinary income of slightly under \$50,000. This office observes that a business with those statistics would not typically be referred to as a "major corporation." Line 19 of that return shows that TPD paid \$153,413 in "Other deductions." Because the schedule segregating those other deductions was not provided this office is unable to determine what portion of that amount, if any, went to employ draftsmen, or even what portion was paid for outside services. Contrary to the petitioner's owner's assertion, that return does not clearly show that TPD does a high volume of business and currently pays other draftsmen for performing the duties of the proffered position.

The director denied the petition on August 1, 2005. On appeal, counsel submitted the undated affidavit, the August 30, 2005 letter from TPD, and TPD's 2004 tax return. Counsel offered no argument, but implied that the evidence demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's owner asserted that the beneficiary will replace contract labor. The petitioner's tax returns show Schedule A Line 3 Cost of Labor of \$29,998 during 2000, \$0 during 2001, \$0 during 2002, \$0 during 2003, and \$0 during 2004. Even during 2000, what amount of the petitioner's outside labor expense, if any, was paid for industrial drafting and designing is unknown. If some portion of those funds was expended for the performance of other essential work, then it was not available to pay the wages of the proffered position, as hiring the beneficiary would not have obviated those expenses.

Other than the assertion of the petitioner's owner and the owner of TPD, the evidence does not include any indication that TPD has paid any amount for draftsmen or even other outside contractors. Further, other than the statements of the petitioner's owner and the owner of TPD the record does not contain any evidence that TPD will require those services in the future. Even though the letter from TPD indicates that they are converting an apartment complex, what it is being converted to was not stated, and other than the unsupported assertion in the letter from TPD the record contains no indication that the project will require a draftsman. The record does not demonstrate that the petitioner will receive additional business from TPD, or from other building contractors, sufficient to pay the proffered wage or any part of it.

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. 612 (Reg. Comm. 1967).

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 did not establish that it employed and paid the beneficiary.

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).

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 typically³ 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 \$41,298.40 per year. The priority date is March 6, 2000.

During 2000 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. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner presented no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared income of \$1,225. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner presented 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.

During 2002 the petitioner declared income of \$3,191. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner presented 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.

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2003 the petitioner declared income of \$6,155. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner presented 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.

During 2004 the petitioner declared income of \$10,808. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner presented no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on April 29, 2005. On that date the petitioner's 2005 tax return was unavailable. On June 1, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, 2002, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

This office further notes that it attempted to confirm the existence through a publicly accessible internet source of information pertinent to New York Corporations but was unable. If the petitioner further pursues this matter it should provide evidence pertinent to the petitioner's corporate standing.

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.