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U.S. Citizenship
and Immigration
Services

BL

[Redacted]

FILE:

SRC 05 130 50195

Office: TEXAS SERVICE CENTER

Date: JUL 25 2007

IN RE:

Petitioner:

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:

[Redacted]

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, Texas 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 an automobile repair and restoration shop. It seeks to employ the beneficiary permanently in the United States as an automotive electrician. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition.¹ 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20 per hour, which equals \$41,600 per year.

The Form I-140 petition in this matter was submitted on April 4, 2005. On the petition, the petitioner stated that it was established during May 2000 and that it employs "25+" workers. The petition states that the petitioner's gross annual income is "\$3 million+" and that its net annual income is "\$50,000+." On the Form ETA 750, Part B, signed by the beneficiary on March 3, 2005, the beneficiary claimed to have worked for the

¹ The Form ETA 750 submitted, however, is a copy, rather than the original. If the petitioner wishes to pursue this matter further it should submit the original Form ETA 750 labor certification.

petitioner since August of 2003. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

The instant beneficiary is not the original beneficiary for whom the petitioner petitioned on the Form ETA 750B. Counsel indicated in a letter dated March 31, 2005 that the Form ETA 750 and the Form I-140 visa petition had been approved for a previous beneficiary [REDACTED] but that he no longer wished to work for the petitioner. The petitioner asked that the previous visa petition be withdrawn in favor of the instant petition.

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 2001, 2002, 2003, 2004 Form 1120, U.S. Corporation Income Tax Returns. 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 27, 2000, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$49,675. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$54,857. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$22,829. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared a loss of \$12,041 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

The director denied the petition on April 18, 2006.

On appeal, counsel stated,

The Director based her findings on her examination of the petitioner's U.S. Income Tax Returns (Forms 1120). However, the Director's conclusions are false and fail to follow standard accounting practices.

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).

Counsel continued,

“ . . . [The] petitioner’s net assets for both years, as represented by its retained earnings, were clearly sufficient to pay the proffered wage”

Counsel further asserted that his analysis was consistent with a May 4, 2004 memorandum issued by Associate Director of Operations for Citizenship and Immigration Services.

Counsel did not cite a standard accounting practice for determining a company’s ability to pay the wages of a projected additional employee. If the petitioner pursues this matter further counsel should provide the authority for the standard accounting practice to which he referred.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year’s retained earnings are typically last year’s retained earnings plus this year’s net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner’s continuing ability to pay the proffered wage, because they do not represent funds available for disposition. The amount shown as retained earnings is the sum of net earnings and losses from prior years, less any dividends paid to owners. While it represents equity in the assets of the company, it does not represent equity in any one particular asset or another -- current or non-current, cash or non-cash. It may or may not represent equity in assets of a type readily available to the employer to pay to its employees in cash while continuing in business. It is not, therefore, an index of a company's ability to pay additional wages.

Equating retained earnings with net assets is at least technically incorrect. Further, all of the petitioner’s assets and liabilities are listed as such on its Schedule L, and no reference to retained earnings is necessary in order to consider the sufficiency of the petitioner’s assets in the determination of its continuing ability to pay the proffered wage beginning on the priority date.

Further still, the memorandum counsel cited did not indicate that a petitioner is able to show its ability to pay the proffered wage with total assets or with net assets, but with net current assets. The calculation of net current assets is detailed below.

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, 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, although the beneficiary stated that he had worked for the petitioner since August of 2003, 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.

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

The proffered wage is \$41,600 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions⁴ of \$49,675. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$54,857. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$22,829. 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 submitted no other evidence pertinent to its ability to pay the proffered wage during 2003. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 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 submitted no other evidence pertinent to its ability to pay the proffered wage during 2004. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

The petition in this matter was submitted on April 4, 2005. On that date the petitioner's 2005 tax return was unavailable. On May 14, 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 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.

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.

⁴ For purposes of analyzing a petitioner's continuing ability to pay the proffered wage, taxable income before net operating loss deduction and special deductions is considered to be the petitioner's net income.