

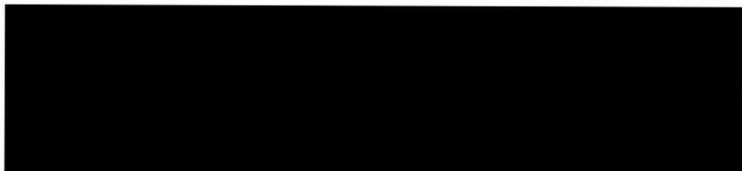


U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 01 2007
EAC 04 168 50043

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.

u 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 computer software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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 and was accompanied by new evidence. 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 Immigration and Nationality Act (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 August 28, 2003. The proffered wage as stated on the Form ETA 750 is \$62,000 per year.

The Form I-140 petition in this matter was submitted on May 3, 2004. On the petition, the petitioner stated that it was established during 2001 and that it employs ten workers. In the space provided for the petitioner to report its gross annual income the petitioner entered, "\$750,000 projected." The space provided for the

petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on August 8, 2003, the beneficiary did not claim to have worked for the petitioner.

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.¹

In the instant case the record contains (1) the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, (2) two earnings statements, (3) a balance sheet and income statement for the petitioner's 2003 fiscal year and (4) a letter dated August 19, 2004 from the petitioner's accountant. 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 income tax return shows that the petitioner is a corporation, that it incorporated on August 1, 2001, and that it declares taxes pursuant to cash accounting and a fiscal year running from July 1 of the nominal year to June 30 of the following year.

During its 2003 fiscal year, which ran from July 1, 2003 to June 30, 2004, the petitioner declared taxable income before net operating loss deductions and special deductions of \$40,356. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$22,417 and current liabilities of \$8,961, which yields net current assets of \$13,456.

The earnings statements show amounts that the petitioner paid to the beneficiary for work performed during the second half of March 2005 and the first half of April 2005. Both show gross pay of \$2,388 for one-half of a month.² The more recent earnings statement shows that the petitioner had paid the beneficiary a year-to-date total of \$16,716 for work performed through April 15, 2005.³

The petitioner's accountant's August 19, 2004 letter notes that the petitioner's tax return was prepared pursuant to cash convention rather than accrual. The accountant notes that cash convention accounting is not in accord with Generally Accepted Accounting Principles (GAAP) promulgated by the Financial Accounting Standards Board. The accountant also stated that the petitioner would bill its customers for the beneficiary's time at a rate that would exceed the wage proffered in this case.

¹ 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).

² That amount, annualized, equals \$57,312 per year, an amount less than the annual amount of the proffered wage.

³ Because \$16,716 is equal to exactly seven times \$2,388, the semimonthly amount shown on the earnings statements, this office gathers that the petitioner had employed him since at least January 1, 2005 and paid him \$2,388 twice a month from that date to at least April 15, 2005.

The accountant's report that accompanied the financial statements submitted indicate that they were prepared pursuant to a compilation and that, "[The petitioner] elected to omit substantially all of the informative disclosures and the statement of cash flows required by [GAAP]."

The director denied the petition on July 19, 2005. On appeal, counsel asserted that the evidence in the record demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The accountant's projection that the petitioner's employment of the beneficiary would be profitable rests on various assumptions that must be considered.

First, the proffered wage in this case is \$62,000, which equals \$29.81 per hour, based on a 40-hour work. The accountant asserts that the petitioner will be able to bill its clients for the beneficiary's time at a higher rate. The accountant cites no basis for that assertion and the record contains no support for it. Further, whether the petitioner has sufficient work for the beneficiary that it will be able to employ him for 40 hours each week throughout the year is neither demonstrated nor even explicitly alleged.

Further still, that the petitioner's business will be successful and able to meet its wage obligations depends not only upon the ability to bill clients for more than it pays its employees, but also the petitioner's ability to cover various overhead items with the difference. If the petitioner were to hire the beneficiary, the additional overhead incurred would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages has not been demonstrated.

That the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's implication, make them poor indices of the funds available to the petitioner with which to pay wages. Tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, for which reason they are not in accord with GAAP. However, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

Further, this office notes that neither the petitioner's tax returns nor its financial statements were prepared in accordance with GAAP. For different reasons, neither is required to be prepared in accordance with GAAP. However, in light of the fact that the financial statements were not prepared in accordance with GAAP, the argument interposed by the accountant that the financial statements are superior evidence because the tax returns are were not prepared in accordance with GAAP is unconvincing.

Counsel's reliance on the unaudited financial statements submitted 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.⁴ 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

⁴ Audited financial statements would necessarily be prepared in accordance with GAAP.

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.

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 Sonegawa*, 12 I&N Dec. (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 established that it paid the beneficiary \$16,716 between January 1, 2005 and April 15, 2005. The petitioner did not establish that it paid any other wages to 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 typically⁵ 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 \$62,000 per year. The priority date is August 28, 2003. That date fell within the petitioner's 2003 fiscal year.

During its 2003 fiscal year petitioner declared taxable income before net operating loss deductions and special deductions of \$40,356. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had net current assets of \$13,456. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no evidence of any other funds available to it during its 2003 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

The petitioner's 2004 fiscal year ran from July 1, 2004 to June 1, 2005. The petitioner demonstrated that it paid the beneficiary \$16,716 between January 1, 2005 and April 15, 2005, which was during that fiscal year. Ordinarily the petitioner would be obliged to show the ability to pay the remaining \$45,284 balance of the proffered wage during that fiscal year.

The visa petition, however, was submitted on May 3, 2004. On that date the petitioner's fiscal year 2004 had not begun and its 2004 tax return was unavailable. On January 4, 2005 the Vermont Service Center issued a request for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's fiscal year 2004 had not ended, and its 2004 tax return was still unavailable. The petitioner is excused from providing evidence pertinent to its ability to pay the proffered wage during its 2004 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2003 fiscal year and has not established, therefore, 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.

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.