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FILE: Office: VERMONT SERVICE CENTER
EAC 03 256 50184

Date: MAY 22 2007

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:



PUBLIC COPY

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 Acting Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the acting director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the acting director and AAO will be withdrawn. The petition will be approved.

The petitioner is a veterinary hospital. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a veterinary assistant. The acting director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

The record shows that the motion 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 acting 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.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The instant motion qualifies as a motion to reopen because counsel provided new evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are unavailable 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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$10.82 per hour, which equals \$22,505.60 per year.

On the petition, the petitioner failed to state the date it was established, the number of workers it employs, its gross annual income and its net annual income in the spaces provided. On the Form ETA 750, Part B, signed by the beneficiary on March 16, 2001, the beneficiary claimed to have worked for the petitioner since November 1998. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in West Trenton, New Jersey.

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 2001 and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) two different versions of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, (3) the beneficiary's 2001, 2002, and 2003 Form W-2 Wage and Tax Statements issued by the petitioner, (4) a document labeled "Find Report," and (5) a letter dated July 7, 2004 from a veterinarian at the petitioning business. 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.

In response to a December 9, 2003 request for evidence counsel provided a letter dated February 27, 2004. Although not evidence,² that letter states that the petitioner was established during 1979 and employs 23 workers.

The W-2 forms provided show that the petitioner paid the beneficiary \$23,646.90, \$29,491.68 and \$22,429.80 during 2001, 2002, and 2003, respectively.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on February 23, 1979, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2001 tax return shows that the petitioner declared a loss of \$5,948 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

A version of the petitioner's 2002 tax return was submitted in response to a December 9, 2003 request for evidence. That version of the return shows that the petitioner declared a loss of \$34,840 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its end-of-year current assets.

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 The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In the decision on appeal this office mistakenly stated that the petitioner's 2002 tax return was not in the record. In response, counsel submitted a version of the petitioner's 2002 tax return with the instant motion. That second version of the return includes a figure for Line 26, Other Deductions that is \$15,327 less than the corresponding figure on the version of the tax return submitted previously. This difference resulted in the petitioner showing a loss of \$19,513 as its Line 28 taxable income before net operating loss deductions and special deductions, rather than a loss of \$34,840 as reported on the version initially submitted. The record does not contain an 1120X Amended Return form, as one would expect if this second version represents an amendment to the petitioner's 2002 tax return. The record contains no evidence to suggest that this second version was submitted to IRS.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The 2003 tax return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$0 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets.

The "Find Report" is a computer printout listing checks the petitioner paid to the beneficiary from March 6, 2001 through December 25, 2001. The amounts range from \$324.82 to \$633.83 and total \$18,347.64.

The July 7, 2004 veterinarian's letter stated that the petitioner's losses during 2001 were due in part to the purchase and rental of expensive equipment during that year. The amounts of those expenses were not listed. The veterinarian did not state whether the equipment purchased was expensed or depreciated on the petitioner's tax returns. The veterinarian further stated that ". . . since we did pay [the beneficiary] \$18,347.64 for the partial year 2001 it should be assumed that we did indeed have the ability to pay his wages."

This office notes that the 2001 W-2 form shows that the petitioner paid the beneficiary more than the amount shown on the "Find Report." No inconsistency exists, as the "Find Report" shows net pay, as shown on paychecks, whereas the W-2 form shows gross pay.

The acting director denied the petition on June 16, 2004. On appeal counsel asserted that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The appeal was dismissed on November 10, 2005. On the instant motion counsel reiterated that the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 \$23,646.90, \$29,491.68 and \$22,429.80 during 2001, 2002, and 2003, respectively. In years during which the amount paid was less than the annual

amount of the proffered wage, the petitioner is obliged to show the ability to pay the balance of the proffered wage.

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 is insufficient. Similarly, showing that the petitioner paid total 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 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 net of 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 \$22,505.60 per year. The priority date is March 21, 2001.

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

During 2001 the petitioner paid the beneficiary \$23,646.90. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary \$29,491.68. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$22,429.80. The proffered wage exceeds that amount by \$75.80. Typically the petitioner would be obliged to show, with its copies of annual reports, federal tax returns, or audited financial statements, the ability to have paid that remaining balance of the proffered wage to the beneficiary during 2003. During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the remaining balance 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 remaining balance of the proffered wage out of its net current assets during that year.

The amount the petitioner paid the beneficiary during 2003, however, is only about 1/3 of one percent less than the annual amount of the proffered wage. The petitioner is an ongoing business with gross receipts ranging from \$1,335,979 in 2001 to \$1,452,195 in 2003. Counsel reported in his February 27, 2004 letter that the petitioner then had 23 employees. Under these circumstances this office finds, pursuant to the totality of circumstances test from *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), that the volume of the petitioner's operations was sufficient to permit it to pay the remaining \$75.80 of the proffered wage during 2003.

The petition in this matter was submitted on September 8, 2003. On that date the petitioner's 2004 tax return was unavailable. On December 9, 2003 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 2004 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2004 and later years.

The petitioner has demonstrated that it was able to pay the proffered wage during each of the salient years. The sole basis for denial of the petition and dismissal of the appeal has been overcome. 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 met that burden.

ORDER: The motion is granted. The AAO's decision of November 10, 2005 is withdrawn. The petition is approved.