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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 05 139 50055

Office: VERMONT SERVICE CENTER

Date: **MAY 22 2007**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker pursuant to § 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. Wieman, Chief
Administrative Appeals Office

DISCUSSION: The Acting 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 house-painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$22 per hour, which equals \$45,760 per year.

The Form I-140 petition in this matter was submitted on April 7, 2005. On the petition, the petitioner stated that it was established during March 1982 and that it employs two workers. The petition states that the

petitioner's gross annual income is \$180,000 and that its net annual income is \$65,000.¹ On the Form ETA 750, Part B, signed by the beneficiary on March 27, 2001, the beneficiary claimed to have worked for the petitioner since 2000. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Paramus, New Jersey.

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 the petitioner's 2001, 2002, 2003, and 2004 Form 1065 U.S. Returns of Partnership Income. 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 limited liability company (LLC), that it began business on April 5, 2001,³ and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2001 tax return shows that the petitioner returned ordinary income⁴ of \$136 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$785 and no current liabilities, which yields net current assets of \$785.

The petitioner's 2002 tax return shows that the petitioner returned ordinary income of \$44 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$4,652 and no current liabilities, which yields net current assets of \$4,652.

¹ The tax returns submitted confirm that the petitioner had gross annual income of roughly \$180,000 per year as asserted on the Form I-140. Those returns, however, show that the petitioner never returned an annual ordinary income of \$65,000. The highest ordinary income the petitioner declared during any of the salient years was \$3,448, barely five percent of the net annual income the petitioner claimed on the Form I-140 petition.

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).

³ The record indicates that the petitioner filed the Form ETA 750 labor certification application during the same month it commenced business, only 19 days later. Further, both the petitioner's owner and the beneficiary signed the ETA 750B during March of 2001, prior to the petitioner's commencement of business. How the petitioner was able to determine, when it was not yet engaged in business, that a shortage of painters existed is unknown to this office. Because this issue was not raised by the service center, and the petitioner has not been accorded an opportunity to address it, the issue will form no part of the basis for today's decision. If the petitioner attempts to overcome today's decision on motion, however, it should address the issue.

⁴ Ordinary income is located at Line 22 of the Form 1065 U.S. Return of Partnership Income. It is analogous to net income and is used as such in the analysis of a petitioning partnership's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2003 tax return shows that the petitioner returned ordinary income of \$3,448 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$2,158 and no current liabilities, which yields net current assets of \$2,158.

The petitioner's 2004 tax return shows that the petitioner returned ordinary income of \$644 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$3,355 and no current liabilities, which yields net current assets of \$3,355.

The acting director denied the petition on December 6, 2005. On appeal, counsel asserted that a recent amendment of 8 C.F.R. § 204.5(g)(2) had eliminated the requirement that a petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Counsel is incorrect. The current text of 8 C.F.R. § 204.5(g)(2) is set out above in its entirety.⁵

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, although the beneficiary claims to have worked for the petitioner since 2000 the record contains no evidence of wages the petitioner paid to him at any time.

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

⁵ Counsel may have mistakenly believed that a recent change to the regulations governing the responsibilities of the Department of Labor in adjudicating labor certification applications amended 8 C.F.R. § 204.5(g)(2).

net income figure, as stated on the petitioner's 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 typically⁶ 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 \$45,760 per year. The priority date is April 24, 2001.

During 2001 the petitioner declared ordinary income of \$136. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that year the petitioner had net current assets of \$785. That amount is also insufficient to pay the annual amount of the proffered wage. The petitioner submitted 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 ordinary income of \$44. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that year the petitioner had net current assets of \$4,652. That amount is also insufficient to pay the annual amount of the proffered wage. The petitioner submitted 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.

During 2003 the petitioner declared ordinary income of \$3,448. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that year the petitioner had net current assets of \$2,158. That amount is also insufficient to pay the annual amount of the proffered wage. The petitioner submitted no

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

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 ordinary income of \$644. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that year the petitioner had net current assets of \$3,355. That amount is also insufficient to pay the annual amount of the proffered wage. The petitioner submitted 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 7, 2005. On that date the petitioner's 2005 tax return was unavailable. On July 11, 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. 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 2001, 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.

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.