

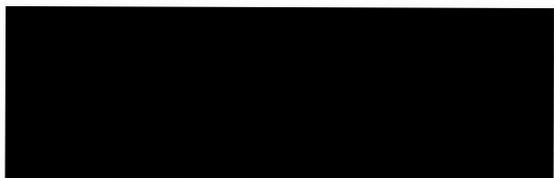
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 06 800 00844

Office: TEXAS SERVICE CENTER

Date:

OCT 24 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: SELF-REPRESENTED

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 a talent agency. It seeks to employ the beneficiary permanently in the United States as a systems 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. 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 either 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 1, 2003. The proffered wage as stated on the Form ETA 750 is \$33.35 per hour, which equals \$69,368 per year.

The Form I-140 petition in this matter was submitted on October 26, 2005. On the petition, the petitioner stated that it was established on April 29, 1999 and that it employs five workers. The petition states that the petitioner's gross annual income is \$264,262 and that its net annual income is \$23,307. On the Form ETA 750, Part B, signed by the beneficiary on March 8, 2003, the beneficiary claimed to have worked 40 hours per

week for the petitioner since April 2002. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Sun Valley, California.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. 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 the petitioner's 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Returns for an S Corporation. 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 November 1, 1990, and that it reports taxes pursuant to the calendar year.

The petitioner declared Schedule K, Line 23 Income of \$16,121 during 2003. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$8,473 and current liabilities of \$270, which yields net current assets of \$8,203.

The petitioner declared Schedule K, Line 23 Income of \$24,873 during 2004. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$15,709 and current liabilities of \$3,963, which yields net current assets of \$11,746.

The petitioner declared a loss of \$772 as its Schedule K, Line 23 Income during 2005. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Neither those tax returns nor any other evidence of the petitioner's ability to pay the proffered wage was provided when the petition was filed. On April 24, 2006 the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage during 2003, 2004, and 2005 as required by 8 C.F.R. § 204.5(g)(2). In its response, the petitioner did not provide any of those requested items of evidence or any other evidence pertinent to its continuing ability to pay the proffered wage beginning on the priority date.

The director denied the petition on June 20, 2006. On appeal, the petitioner stated,

The original I-140 application was missing copies of the company's Federal Tax Returns for 2003, 2004 & 2005. Enclosed with this appeal please find copies of the above[-]mentioned tax returns required to further process this application.

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).

Also please note that [REDACTED] works at [the petitioner] on a part[-]time basis. He does less than 20 hours of work per week for which he is paid more than the proffered wage of [REDACTED] for the hours he clocks on a weekly basis.

With the appeal the petitioner provided the 2003, 2004, and 2005 tax returns described above. The petitioner did not, however, provide any evidence of wages it has paid to the beneficiary.

If the petitioner can show that it paid wages to the beneficiary during a given year then, pursuant to CIS policy, it has demonstrated the ability to pay the proffered wage during that year, either in whole or in part, depending on the amount of the wages it paid the beneficiary during that year. However, absent supporting evidence, merely asserting that it paid some amount of wages to the beneficiary is insufficient. The amount the petitioner claims to have paid to the beneficiary will not be included in the calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.²

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

² Even if this office were inclined to include that amount in the calculations, the petitioner did not state during which year or years it paid that amount to the beneficiary.

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 \$69,368 per year. The priority date is April 1, 2003.

During 2003 the petitioner had net income of \$16,121.⁴ That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$8,203. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner had net income of \$24,873. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$11,764. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during

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

⁴ For the purpose of determining the ability to pay the proffered wage of a taxpayer reporting on a Form 1120S, U.S. Income Tax Return for an S Corporation, Schedule K, Line 23 Income is considered its net income.

2004 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner declared a loss for 2005. 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 reliable evidence of any funds available to it during 2005 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on October 26, 2005. On that date the petitioner's 2006 tax return was unavailable. On April 4, 2006 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. CIS received the petitioner's response to that request on June 15, 2006, and the record is deemed to have closed on that date. On that date the petitioner's 2006 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 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2003, 2004, and 2005. 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.