

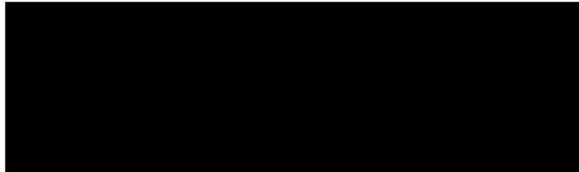
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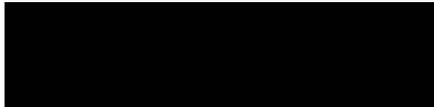


FILE: 
WAC-06-094-52187

Office: TEXAS SERVICE CENTER

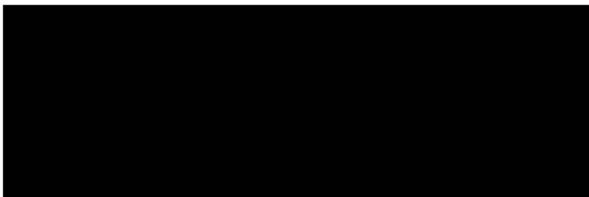
Date: OCT 25 2007

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:



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 preference visa petition¹ was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and marketing company. It seeks to employ the beneficiary permanently in the United States as a computer software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's July 26, 2006 denial, 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 1, 2001. The proffered wage as stated on the Form ETA 750 is \$45.25 per hour (\$94,120 per year). The Form ETA 750 requires 4 years college studies, and a bachelor's degree in computer science, electric/electronic engineering or computer engineering for the proffered position. On the petition, the petitioner claimed to have been established in 1981, to have a gross annual income of \$2.7 million, and to currently employ 25 workers. On the Form ETA 750B, signed by the beneficiary on September 24, 2001, the beneficiary claimed to have worked for the petitioner since November 2000. On appeal counsel claims that the beneficiary worked for the petitioner until 2002 and then restarted

¹ While the instant appeal is pending with the AAO, the petitioner filed a new I-140 immigrant petition (SRC-07-162-51344) on behalf of the instant beneficiary with the Texas Service Center on May 1, 2007 based on another labor certification and the petition was approved on October 3, 2007.

his employment with the petitioner from July 1, 2006 after working for another company during 2003 through 2005.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits a brief, the petitioner's corporate federal tax return for 2005 and the beneficiary's paystubs for periods from July 16 to 31, 2006 and from August 1, to 15, 2006. Other relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2004, the petitioner's Form 941 Employer's Quarterly Tax Returns for all quarters of 2005 and the first quarter of 2006, W-2 forms for 2001 through 2005 issued by the petitioner to its employees, the beneficiary's W-2 forms for 2001 through 2005, and the beneficiary's paystub from the petitioner for a period from July 1 to 15, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel suggests that CIS recognize the petitioner's de facto ability to pay the proffered wage taking into account the fact that the beneficiary has been paid the amount close to the proffered wage during his employment periods with the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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 first examine whether the petitioner employed and paid 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 submitted its Form 941s for all quarters of 2005 and the first quarter of 2006, W-2 forms issued to its employees during 2001 through 2005, the beneficiary's W-2 forms for 2001 through 2005, and the beneficiary's paystubs for a period from July 1, 2006 to August 15, 2006. These documents show that the petitioner paid the beneficiary \$100,092.75 in 2001 and \$94,500.49 in 2002; the petitioner did not pay any compensation to the beneficiary in the years 2002 through 2005; and the petitioner has been paying the beneficiary at a rate of \$28.846 per hour since July 1, 2006 and as of August 15, 2006 the petitioner has paid

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, counsel does not submit any new evidence on appeal except for a letter from the petitioner's accountant.

the beneficiary the year to date salary of \$7,307.84. The beneficiary's W-2 forms for 2003 through 2005 were issued by another company. Compensation paid by another company cannot be used in determining the petitioner's ability to pay the proffered wage. Therefore, the petitioner established its ability to pay for 2001 and 2002 with wages actually paid to the beneficiary. While the proffered wage in the instant case is \$45.25 per hour, the petitioner has been paying the beneficiary at the rate of \$28.846 per hour since July 1, 2006. Therefore, the petitioner failed to establish that it is currently paying the beneficiary the proffered wage. Furthermore, even if the petitioner had been currently paying the beneficiary the proffered wage since July 1, 2006, counsel's reliance on currently paying the proffered wage to establish the petitioner's continuing ability to pay from the priority date is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is October 1, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2006, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2005. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, the petitioner failed to establish that it paid the beneficiary any compensation in 2003 through 2005 and failed to establish that it paid the full proffered wage in 2006. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$94,120 per year in 2003 through 2005 and the difference of \$16.404 per hour or \$34,120.32 in 2006 between wages actually paid to the beneficiary and 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 that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537

The record contains the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 through 2005. According to the tax returns in the record, the petitioner is structured as a C corporation and the petitioner's fiscal year is based on a calendar year. Although the priority date in the instant case is October 1, 2001, as previously discussed the petitioner established its ability to pay the proffered wage for 2001 and 2002 through the examination of wage actually paid to the beneficiary, the petitioner is obligated to demonstrate its ability to pay for 2003 through the present only. Therefore, the AAO will review the petitioner corporate federal tax returns for 2003 through 2005. The tax returns for 2003 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2003, the Form 1120 stated a net income³ of [REDACTED]
- In 2004, the Form 1120 stated a net income of \$ [REDACTED]
- In 2005, the Form 1120 stated a net income of \$ [REDACTED]

Therefore, for the years 2003 through 2005, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets including real estates will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2003 were \$(1,480,693).
- The petitioner's net current assets during 2004 were \$(37,153).
- The petitioner's net current assets during 2005 were \$(726,518).

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2003 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved or pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner has filed at least 10 Immigrant Petitions for Alien Worker (Form I-140) since 2001 including two petitions for the instant beneficiary. Eight of them were approved⁵. Therefore, the petitioner must show that it had sufficient income to pay all wages from the priority date to the date the beneficiary obtained the permanent resident status or the present for each of the beneficiaries.

Therefore, from 2003 the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income, or its net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁵ The eight approved petitions are: WAC-01-199-56435 filed on April 5, 2001 with the priority date of August 10, 2000 and approved on July 19, 2001; WAC-04-110-52170 filed on March 8, 2004 with the priority date of September 6, 2001 and approved on December 21, 2004; WAC-04-192-53204 filed on June 28, 2004 with the priority date of October 1, 2001 and approved on February 15, 2005; WAC-06-091-51967 filed on January 30, 2006 with the priority date of September 20, 2005 and approved on May 5, 2006; LIN-06-159-52429 filed on May 5, 2006 with the priority date of February 1, 2006 and approved on September 16, 2006; SRC-06-201-52901 filed on June 16, 2006 with the priority date of January 5, 2001 and approved on July 7, 2006; LIN-07-060-52545 filed on December 22, 2006 with the priority date of September 8, 2006 and approved on December 29, 2006; and SRC-07-162-51344 filed on May 1, 2007 with the priority date of October 22, 2002 and approved on October 3, 2007.