



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 06 200 51710

Office: TEXAS SERVICE CENTER Date:

JUL 17 2008

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 petition 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 nature of the petitioner's business is business and financial services. It seeks to employ the beneficiary permanently in the United States as a financial business analyst.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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 demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denial dated October 19, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 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, 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

¹ The beneficiary had been denied the requested benefit previously according to Citizenship and Immigration Services (CIS) record No. SRC 05 195 51978.

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 23, 2002.² The proffered wage as stated on the Form ETA 750 is \$64,378.00 per year.

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 appeal.³

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a support letter from the petitioner dated June 14, 2005 along with a company informational sheet; the petitioner's unaudited "draft for review" balance sheet and income statements entitled "year to date December 2003"; the Certificate of Incorporation and Articles of Incorporation for the petitioner; a lease agreement for the petitioner's business premises; the petitioner's business tax registration certificate; and copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$14,568.00 and \$740,154.00 respectively. On the Form ETA 750, signed by the beneficiary on December 15, 2004, the beneficiary did claim to have worked for the petitioner since November 2001.

The director issued a request for evidence to the petitioner dated July 3, 2006, for evidence of its ability to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2), and the beneficiary's W-2 statements from the priority date to present.

In response counsel submitted an explanatory letter dated September 21, 2006 and the following relevant evidence: W-2 Wage and Tax Statements for 2002, 2003, 2004 and 2005 issued by the petitioner to the beneficiary in the amounts of \$38,142.74, \$43,117.88, \$43,117.88 and \$43,117.88 respectively; a pay stub evidencing payment of wages to the beneficiary by the petitioner for the

² It has been approximately six years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

period August 27, 2006 to September 9, 2006, of \$2,476.08 and year-to-date of \$47,045.52; and the petitioner's financial statements for the years 2002, 2003, 2004 and 2005.

On appeal, counsel asserts that the income tax returns, submitted for the first time on appeal, and company financial statements submitted are evidence of the petitioner's ability to pay the proffered wage.

Accompanying the appeal, counsel submits a legal brief and the following evidence: W-2 Wage and Tax Statements for 2002, 2003, 2004 and 2005 issued by the petitioner to the beneficiary; pay stubs evidencing payment of wages to the beneficiary by the petitioner for the period September 14, 2006 to November 9, 2006; five pay checks issued by the petitioner to the beneficiary in the individual equal amounts of \$1,503.24; a statement dated December 15, 2006 on the petitioner's letterhead by [REDACTED], CPA, president; a statement issued dated January 8, 2007, by [REDACTED], of Guardian Capital Inc. of Alpharetta, Georgia; the petitioner's income statement for the year ended December 31, 2002; the petitioner's balance sheet for the year ended December 31, 2002; the petitioner's income statements-accrual basis for the years ended December 31, 2003, December 31, 2004 and December 31, 2005; the petitioner's financial statements-accrual basis for the years ended December 31, 2003, December 31, 2004 and December 31, 2005; and the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2002, 2002, 2003, 2004 and 2005.

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 (BIA 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

Counsel submitted W-2 Wage and Tax Statements for 2002, 2003, 2004 and 2005 issued by the petitioner to the beneficiary in the amounts of \$38,142.74, \$43,117.88, \$43,117.88 and \$43,117.88, and a pay stub evidencing payment of wages to the beneficiary by the petitioner for the period August 27, 2006 to September 9, 2006, of \$2,476.08 and year-to-date of \$47,045.52. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$64,378.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which for 2002, 2003, 2004 and 2005, \$26,235.26, \$21,260.12, \$21,260.12, and \$21,260.12 respectively.

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. *See 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 gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2002, the Form 1120 stated net income of \$33,648.00.
- In 2003, the Form 1120 stated net income of \$8,443.00.
- In 2004, the Form 1120 stated net income of \$3,358.00.
- In 2005, the Form 1120 stated net income of \$18,322.00.

In the subject case, as set forth above, the petitioner did have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, for the year 2002, but not years 2003, 2004 and 2005 for which the petitioner's tax returns are offered for evidence.

If the net income the petitioner demonstrates it had available during the 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 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 and include cash-on-hand. **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.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets as represented on its tax returns during 2003, 2004 and 2005 were \$6,483.00, \$9,315.00, \$27,353.00 respectively.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, 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, or its net income or net current assets in years 2003 or 2004. In years 2002 and 2005 the petitioner has demonstrated its ability to pay the proffered wage.

Counsel asserts⁵ that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel contends that financial statements provided in response to the director's request for evidence "were in fact certified and prepared by a certified public accountant." The statements were prepared by [REDACTED], CPA, who is the petitioner's president and were in fact internally generated statements. Counsel's reliance on unaudited financial records 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Mr. [REDACTED] also advises that the tax returns submitted were prepared using the cash basis and the financial statements on the accrual basis. As the petitioner's tax returns were prepared pursuant to cash convention, the petitioner's revenue was recognized when received, and expenses recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not satisfactorily demonstrated why changing from the cash to accrual method would make available tens of thousands of dollars that would otherwise not have appeared in any year.

⁵ Counsel's contentions as they relate specifically to tax years 2002 and 2005 will not be repeated here as there is evidence in the record to demonstrate that the petitioner has the ability to pay the proffered wage in those years. While counsel states that the petitioner paid the beneficiary the "full proffered wage" in 2006, evidence submitted in the record shows as of September 9, 2006, only \$47,045.52 was paid.

⁶ 8 C.F.R. § 204.5(g)(2).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage in 2002 and 2004.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.