

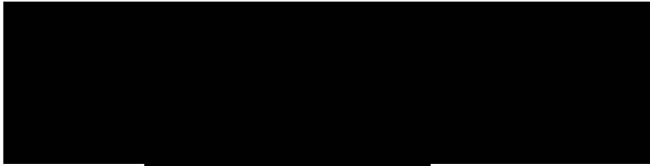


U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAY 16 2006**

LIN-03-262-54041

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter appeal will be dismissed.

The petitioner is a software development and IT consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

On appeal, counsel submits a brief and additional evidence.

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 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 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 June 17, 2002. The proffered wage as stated on the Form ETA 750 is \$57,000 per year. On the Form ETA 750B, signed by the beneficiary on June 5, 2002, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$2 million¹, and to currently employ 20 workers. In support of the petition, the petitioner submitted its 2002 corporate federal tax return and pay stubs it issued to the beneficiary in 2003 reflecting total wages paid in the amount of \$50,124.80 from January to August of that year.

The petitioner's 2002 tax return reflects the following information:

	<u>2002</u>
Net income ²	\$57,486
Current Assets	\$81,868
Current Liabilities	\$4,132
Net current assets	\$77,736

¹ The petition was filed in September 2003. The record of proceeding contains the petitioner's 2002 corporate tax return, which reports the petitioner's gross receipts in that year as \$887,214.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 3, 2004, the director issued a notice of intent to deny pertinent to that ability. The director sent a copy of a Department of Labor (DOL) review that reflected that the petitioner failed to pay wages to 27 workers. Thus, the director stated that the petitioner did not have the ability to pay the proffered wage since a court order was issued on December 24, 2003 for a fine levied against the petitioner for its failure to meet its payroll obligations. The record of proceeding contains the DOL review conducted from the director's Nebraska Office of Fraud Detection and National Security's Fraud Detection Unit. The review reflects that the petitioner was fined \$297,327.54 with a summary of an interview with the petitioner's counsel who noted that the petitioner would not pay the fine and would begin bankruptcy proceedings.

In response, the petitioner submitted a letter from counsel stating that the beneficiary has "done nothing wrong and he was paid" but that the current owner and beneficiary are victims of the prior owners. Counsel claimed that the petitioner has the continuing ability to pay the proffered wage based on its 2002 corporate tax return, wages paid to the beneficiary from 2002 through 2004, and that the petition is still eligible for approval based on the beneficiary's change of employment and the provisions of the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313). The petitioner submitted a Sale of Stock Agreement between two shareholders of the petitioner and IKF Software Com Limited on June 1, 2001; copies of W-2 forms issued by the petitioner to the beneficiary in 2002 and 2003 reflecting wages paid in the amount of \$55,000 and \$62,400 in those years, respectively; a copy of a pay stub issued by the petitioner to the beneficiary in March 2004 reflecting wages paid year-to-date in the amount of \$15,600; a copy of a pay stub from Global Consulting Group to the beneficiary in April 2004; a DOL listing of the petitioner's employees not paid wages dated May 30, 2003; and a letter from Global Consulting Group dated September 2, 2004 offering the beneficiary a position as a software engineer at a pay rage of \$62,400 "per hour" which is presumably a mistake and meant to be per year.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 24, 2004, denied the petition. The director also determined that AC21 does not apply to the case since the petition had not been approved. On appeal, counsel reasserts past arguments and resubmits previously submitted evidence.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 established that it employed and paid the beneficiary the full proffered wage in 2003. However, it did not pay the beneficiary the full proffered wage of \$57,000 per year in 2002 but \$55,000, which is \$2,000 less than the proffered wage. The petitioner is obligated to demonstrate that it can pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2002³.

³ The AAO also notes that there are conflicting representations made on the various forms contained in the record of proceeding. As noted above, the beneficiary represented on Form ETA 750B that he did not work for the petitioner as of the date he signed that form, which was June 2002. The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's concurrently filed application to adjust status to lawful permanent resident. On the Form G-325, the beneficiary represented that he commenced employment with the petitioner on December 26, 2002, and signed that form on August 1, 2003. In

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). Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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 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 a corporation's end-of-year 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.

connection with the director's notice of intent to deny the petition, however, the petitioner submitted a W-2 form for 2002 reflecting wages paid in the amount of \$55,000. No explanation for how the beneficiary earned \$55,000 in five days or six months was provided or why he represented two conflicting dates concerning his beginning employment with the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary during 2002 and has to show that it can pay \$2,000 in that year as the difference between the wages it actually paid to the beneficiary and the proffered wage. In that year, the petitioner shows a net income of \$57,486 and net current assets of \$77,736. While both were greater than the wages actually paid to the beneficiary and the proffered wage and might ordinarily demonstrate the petitioner's ability to pay the proffered wage in that year; however, in this case, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) that is also on appeal (A97 589 221 / LIN-03-273-50448) at a similar wage and using the same priority date year reflected on a Form ETA 750. Internal CIS records reflect that the petitioner filed an additional case in 2003 that was denied by the director, affirmed by the AAO, and upheld in court. One other case was filed and withdrawn in 2003. The petitioner must show that it had sufficient funds to pay all wages for all sponsored aliens at the priority date and continuing. The record of proceeding for LIN-03-273-50448 reflects that the petitioner did not pay that alien any wages in 2002 and must then have the full \$59,775 in net income or net current assets to pay that alien's wages in that year in addition to the \$2,000 to pay the difference between wages actually paid to the beneficiary of this petition in 2002 and the proffered wage. The petitioner's net current assets cover both. Thus, the petitioner demonstrated its ability to pay the proffered wage in 2002, the year of the priority date.

Nevertheless, the director had valid reason to question the petitioner's continuing ability to pay the proffered wage and validity of the job offer based upon a December 2003 court order concerning a fine received by the petitioner based upon its failure to pay wages and counsel's admission that the petitioner would commence bankruptcy proceedings. The director's decision was issued on August 24, 2004, which predates a memorandum issued by William R. Yates (Mr. Yates), CIS Associate Director for Operations, on May 12, 2005 entitled "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]."

In that memorandum, Mr. Yates stated the following:

Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under § 106(c) of AC21?

Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

- A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of a petition, approve the petition on its [sic] merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.
- B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, an if the petition is approvable, follow the procedures in part A above.

(Emphasis in original).

The petition and adjustment of status application were concurrently filed on September 3, 2003, and 180 days later would have been March 3, 2004. At that time, the court order was in effect with financial penalties levied against the petitioner.⁵ The AAO also notes that the court order's effective date in December 2003 prospectively impacts the petitioner's showing of its continuing ability to pay the proffered wage in 2004. In April 2004, the beneficiary quit the petitioner's employ and moved to another company.

The beneficiary's request for benefit eligibility through the application of AC21 appears to hinge upon the following language from Mr. Yates's memorandum: "If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of a petition, approve the petition on its [sic] merits." The petition was not approvable in March 2004 due to the facts that there was a court order against it and the petitioner's counsel indicated that it was initiating bankruptcy proceedings. However, for the purpose of adjudicating an application for adjustment of status wherein the beneficiary wants to use the benefits of section 106(c) of AC21, it would be most appropriate for the director to view the petition as if it was "unapproved" with specific reference to question number one in the May 12, 2005 memorandum. To determine whether or not the beneficiary qualifies to adjust status using section 106(c) of AC21, adjudicators are instructed to review the *bona fides* of the petition and determine whether it was "approvable" at the time of filing as if it had been adjudicated within 180 days of filing. The AAO, while affirming the director's ultimate finding that the petitioner has not demonstrated its *continuing* ability to pay the proffered wage beginning on the priority date due to DOL's findings and court order imposing fines and the petitioner's pending bankruptcy, does find that the petitioner had demonstrated its ability to pay for 2002 and 2003.

Nevertheless, the AAO notes that a determination of "approvable" should not mean that the initial petition itself must be approved. The approval of a third preference immigrant petition for an alien worker signifies that the petitioner named on that petition has demonstrated, among other things its ability to pay the proffered wage as set forth on the ETA 750 during the entire pertinent timeframe. Conversely, a determination that the petition was *approvable* means only that CIS determined that petition to be *bona fide* at the time it was filed and as such is necessarily only relevant for purposes of the adjudication of the *beneficiary's* I-485. By definition, an application for adjustment under AC21 conveys that the initial petitioner is no longer the sponsoring employer.

In this case, the director has jurisdiction over the beneficiary's I-485. Thus the petition will be returned to the director so that he may consider the entire record relative to the beneficiary's attempt to adjust status under the terms and conditions of section 106(c) of AC21.

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.

⁵ The AAO finds counsel's argument that the current owner of the petitioning entity was a victim from a prior owner's filing of H-1B petitions that the new owner was unaware of disingenuous. The acquisition occurred almost a year prior to the filing of the instant petition and it is doubtful that the current owner was not aware of its company's financial obligations by that time and whether or not an additional sponsorship was possible.