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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: LIN 02 271 51237 Office: NEBRASKA SERVICE CENTER Date: APR 14 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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: [redacted]

INSTRUCTIONS:
This is the decision 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the 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.

On appeal, counsel submits a brief and additional evidence.

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.

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.

Eligibility in this matter hinges on the petitioner's 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. Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $10.75 per hour, which equals $22,360 per year.

With the petition counsel submitted copies of the petitioner's 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns. This office notes that, because the priority date is April 25, 2001, tax returns for years prior to 2001 are not

directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

The 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $11,324 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $21,835 and current liabilities of $5,892, which yields net current assets of $15,943.

Counsel also submitted monthly statements of a bank account belonging to the petitioner's owner. Those accounts state that they are business checking accounts.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on October 23, 2002, requested additional evidence pertinent to that ability. In addition, the Service Center requested a copy of the beneficiary's 2001 Form W-2 Wage and Tax Statement, if the petitioner employed the beneficiary during that year.

In response, counsel submitted a letter dated January 8, 2003. In that letter, counsel stated that he was providing audited financial statements as proof of the petitioner's ability to pay the proffered wage. Counsel also stated that the petitioner did not employ the beneficiary during 2001.

Counsel did provide financial statements with that letter. The accountant's report did not accompany those financial statements. A subscript on each page of those statements, however, clearly states that the statements were produced pursuant to a compilation, not an audit.

The director noted that the bank accounts appear to relate to a person or entity other than the petitioner. The director stated that the financial statements submitted are compiled, rather than audited, and are not competent evidence of the ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). The director noted that the petitioner's 2001 income was less than the proffered wage. The director therefore 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 March 27, 2003, denied the petition.

On appeal, counsel states that the compiled financial statements constitute annual reports within the meaning of 8 C.F.R. § 204.5(g)(2), and are therefore competent evidence of the ability to pay the proffered wage.

In a brief submitted to supplement the appeal, counsel states that the petitioner had mistakenly labeled the documents

submitted as audited financial statements. This office notes that counsel, in his letter of January 8, 2003, stated that those reports were audited.

Counsel asserted, possibly in the alternative to his original assertion on appeal, that the financial statements submitted should be considered, notwithstanding that they are unaudited, because 8 C.F.R. § 204.5(g)(2) states that,

> 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].

Counsel cited the petitioner's gross receipts and gross profit as demonstrating the ability to pay the proffered wage. Counsel also asserted that the petitioner's depreciation deduction should be included in the determination of the petitioner's ability to pay the proffered wage. Counsel noted that the bank statements submitted are in the name of the petitioner's owner and indicate that they are business checking account statements.

With the appeal, counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return, and copies of additional bank statements. The newly submitted bank statements bear the same account number as the previously submitted statements, but they bear the name of the petitioning corporation rather than the its owner. Although the name is misspelled, this office accepts counsel's representation that the account belongs to the petitioning corporation.

The 2002 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $35,811 during that year. The corresponding Schedule L shows that the petitioner ended the year with current assets of $19,563 and current liabilities of $4,933, which yields net current liabilities of $14,630.

Contrary to counsel's assertion on appeal, the unaudited financial statements are not annual reports within the meaning of 8 C.F.R. § 204.5(g)(2). The writers of those regulations explicitly and clearly included audited financial reports among the types of evidence competent to show the ability to pay the proffered wage. Had they wished to include compiled or reviewed financial statements, they would have done so equally explicitly and clearly.

The omission of compiled financial statements from the list of evidence competent to show the ability to pay the proffered wage was not accidental. Had counsel submitted the accountant's report with those financial statements, it would have stated that the figures on those statements are the representations of

management compiled into the standard format and that the accountant who compiled them expressed no opinion and gave no assurance pertinent to their accuracy.

Counsel correctly points out that in appropriate cases 8 C.F.R. § 204.5(g)(2) permits CIS to consider profit and loss statements. In that passage, the regulations do apparently refer to unaudited financial statements. Counsel provided no reason, however, for this office to find that this is an appropriate case to consider the unsupported representations of management in determining the ability to pay the proffered wage. Thus, the unaudited financial statements are of little evidentiary value.

Counsel's reliance on the petitioner's gross receipts and gross income is inapposite. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

Counsel's assertion that the petitioner's depreciation deduction should be included in the determination of the ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989);

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent and probative evidence of a petitioner's ability to pay a proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra*. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The priority date is April 25, 2001. The proffered wage is $22,360 per year. During 2001 the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 114 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 251 days. The proffered wage multiplied by 251/365th equals $15,376.33, which is the amount the petitioner must show the ability to pay during 2001.

During 2001 the petitioner declared income of $11,324 and had year-end net current assets of $15,943. The petitioner's net current assets exceed the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage out of its assets during 2001.

During 2002 the petitioner is obliged to show the ability to pay the entire proffered wage. During 2002, the petitioner declared income of $35,811, an amount that exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.