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U.S. Department of Homeland Security

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Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536


File:  Office: VERMONT SERVICE CENTER

Date: APR 15 2004

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:



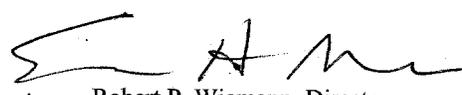
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a roofing and sheet metal company. It seeks to employ the beneficiary permanently in the United States as a roofer. 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, the petitioner submits a statement.

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.

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. Here, the Form ETA 750 was accepted for processing on January 3, 1997. The proffered wage as stated on the Form ETA 750 is \$25.58 per hour, which equals \$53,206.40 per year.

The petition was submitted on September 27, 2001 and states that the petitioner employs six workers. With the petition, counsel submitted copies of the petitioner's nominal 1997 and 1999 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes based on a fiscal year which

runs from March 1 of the nominal year to the last day of February of the following year.

The 1997 return covers the fiscal year from March 1, 1997 through February 28, 1998. That return shows that the petitioner declared a loss of \$37,241 as its taxable income before net operating loss deduction and special deductions during the fiscal year. The corresponding Schedule L shows that at the end of the fiscal year the petitioner had current assets of \$55,486 and current liabilities of \$18,279, which yields net current assets of \$37,207.

The 1999 return covers the fiscal year from March 1, 1999 through February 29, 2000.¹ That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,099 during the fiscal year. The corresponding Schedule L shows that at the end of the fiscal year the petitioner had current assets of \$58,473 and current liabilities of \$5,381, which yields net current assets of \$53,092.

Counsel submitted a letter, dated July 6, 2001, from the relationship manager of Chase Manhattan Bank. The letter states that Philip and Silvana Madonia have maintained a savings account since June 1988, that its balance was \$193,271.38, and that its year-to-date average balance was \$188,213. Counsel submitted a cover letter, dated September 19, 2001. In that letter, counsel noted that Philip Madonia is owner and officer of the petitioner. Counsel states that, therefore, the petitioner's ability to pay the proffered wage should be found based on the statement from Mr. Madonia's bank.

Finally, counsel submitted copies of 1997, 1998, and 1999 Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to the beneficiary. Those forms indicate that the petitioner paid \$24,230, \$26,914, and \$29,338 during those years, respectively.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 13, 2001, requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center stipulated that the petitioner must demonstrate that ability with copies of annual reports, federal tax returns, or audited financial statements. The Service Center also noted that, because the petitioner is a corporation, the income and assets of the owner are not part of the determination of the

¹ Although a caption states that the return covers a fiscal year ending on February 28, this office assumes that to be an error, and that the return also covers February 29 of that year.

petitioner's ability to pay the proffered wage.

In response, counsel provided copies of the petitioner's New York Form IA 5, Employer's Report of Contributions for all four quarters of 1996 and 1997. Those forms show the amount the petitioner paid in wages during those quarters.

Counsel submitted copies of some pages of the petitioner's fiscal year 1998 Form 1120 U.S. Corporation Income Tax Return. That fiscal year covers the period from March 1, 1998 through February 28, 1999. The return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,403. Because the corresponding Schedule L was not submitted with the return, this office is unable to compute the petitioner's net current assets at the end of the fiscal year.

Counsel submitted a letter, dated January 22, 2002, from the petitioner's accountant. The letter recites the petitioner's Gross Sales, Gross Profits, Net Income, Wage Expense, and Depreciation Deductions for 1997 through 2000, and states the accountant's opinion that the petitioner has been able, since 1997, to pay the proffered wage.

Counsel also submitted a letter, dated February 8, 2002, in which she asserts that the petitioner's wage expense demonstrates its ability to pay the proffered wage.

Because the evidence submitted still did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on April 30, 2002, issued a second request for evidence. The Service Center noted that the petitioner is obliged to demonstrate the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent resident status.

In response, counsel submitted a letter from the petitioner's president. The president stated that the petitioner's payroll expense demonstrates its ability to pay the proffered wage.

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 October 16, 2002, denied the petition.

On appeal, the petitioner asserts that the amount of the petitioner's wage expense demonstrates its ability to pay the proffered wage. The petitioner further asserts that the petitioner's taxable income before net operating loss deduction and special deductions is a poor indicator of the petitioner's ability to pay the proffered wage because its loss during 1997

was a "paper loss." The petitioner submits no evidence of that assertion, nor does counsel state, or provide evidence to demonstrate, what the petitioner's actual profit or loss was during that fiscal year. Finally, the petitioner asserts that the petitioner's gross receipts indicate that it is able to pay the proffered wage.

With the appeal, counsel provided additional copies of the 1996 and 1997 New York Form IA 5, Employer's Report of Contributions, copies of which were previously submitted.

Counsel's reliance on the petitioner's gross receipts, gross profits, wage expense, and depreciation deductions is misplaced. 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. Showing that any of the petitioner's expenses exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income³, 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 ordinary income.

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*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. 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

² 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.

³ The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS and 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 the INS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

The priority date is January 3, 1997. The proffered wage is \$53,206.40 per year. The determination of the petitioner's ability to pay the proffered wage is complicated by the fact that the petitioner reports taxes based on a fiscal year, rather than the calendar year. The petitioner did not submit its fiscal year 1996 tax return. Therefore, this office has no tax information pertinent to the period from January 3, 1997, the priority date, to March 1, 1997, the first day of the petitioner's 1997 fiscal year.

The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during that period, but only that portion which would have been due if it had hired the petitioner on the priority date. That period encompasses 57 days. The proffered wage multiplied by $57/365^{\text{th}}$ equals \$8,308.88, which is the amount the petitioner must show the ability to pay during the period between the priority date and the beginning of its 1997 fiscal year.

A W-2 form submitted in this case indicates that during the 1997 calendar year the petitioner paid the beneficiary \$24,230. Of that amount, approximately one-sixth, or \$4,038.33, was likely paid during January and February, and the balance, \$20,191.67, during the remainder of 1997. The amount the petitioner has demonstrated it likely paid during January and February, \$4,038.33, is insufficient to pay the salient portion of the proffered wage, \$8,038.88. The petitioner has not demonstrated that it had any additional funds at its disposal to pay the proffered wage. Therefore, the petitioner has not demonstrated

the ability to pay the proffered wage from January 3, 1997 to March 1, 1997.

During its 1997 fiscal year and ensuing fiscal years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. The petitioner's 1997 fiscal year began on March 1, 1997 and ended on February 28, 1998. During that fiscal year, the petitioner declared a loss of \$37,241. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profits during that fiscal year. At the end of that year, the petitioner had net current assets of \$37,207. That amount is insufficient to pay the proffered wage.

As was stated above, the 1997 W-2 form indicates that the petitioner paid the beneficiary approximately \$20,191.67 during the last ten months of 1997, which period was within the petitioner's 1997 fiscal year. In addition, the record contains a copy of a 1998 W-2 form showing that the petitioner paid the beneficiary \$26,914 during that year. Of that amount, approximately five-sixths, or \$22,428.33, is attributable to the petitioner's 1998 fiscal year. The petitioner has demonstrated that it paid the beneficiary approximately \$42,620 during its 1997 fiscal year. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage during its 1997 fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage during its 1997 fiscal year.

The petitioner's 1998 fiscal year ran from March 1, 1998 through February 28, 1999. During that fiscal year, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,403. This amount is insufficient to pay the proffered wage. Because the corresponding Schedule L was not submitted with that return, this office is unable to compute the petitioner's net current assets at the end of the fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net current assets.

The balance of the amount shown on the 1998 W-2 form that was not attributable to the 1997 fiscal year is attributable to the 1998 fiscal year. That amount is \$4,485.67. In addition, the record contains a 1999 W-2 form showing that the petitioner paid the beneficiary \$29,338 during that calendar year. Of that amount, five-sixths, or \$24,448.33, is attributable to the petitioner's 1998 fiscal year. The petitioner has demonstrated that it paid the beneficiary approximately \$28,934 during its 1998 fiscal year. Adding the petitioner's fiscal year 1998 taxable income before net operating loss deduction and special deductions, \$4,403, to that amount yields a sum of \$33,337. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the petitioner has not demonstrated

the ability to pay the proffered wage during its 1998 fiscal year.

The petitioner's 1999 fiscal year ran from March 1, 1999 through February 29, 2000. During that fiscal year, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,099. This amount is insufficient to pay the proffered wage. The petitioner had fiscal year-end net current assets of \$53,092. This amount was insufficient to pay the proffered wage. The balance of the amount shown on the 1998 W-2 form not attributable to the petitioner's 1998 fiscal year, \$4,889.67, is attributable to its 1999 fiscal year. The record contains a 1999 W-2 form showing that the petitioner paid the beneficiary \$29,338 during that calendar year. Of that amount, five-sixths, or \$24,448.33, is attributable to the petitioner's 1999 fiscal year. Adding that amount to the amount of the beneficiary's 1998 wages attributable to the petitioner's 1999 fiscal year yields a sum of \$29,338. The petitioner has demonstrated that it paid the beneficiary approximately \$29,338 its 1999 fiscal year. Adding that amount to the petitioner's 1999 fiscal year taxable income before net operating loss deduction and special deductions of \$1,099 yields a sum of \$30,437. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during its 1999 fiscal year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the period from the priority date to March 1, 1997, the first day of its 1997 fiscal year. The petitioner also failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its 1997, 1998, and 1999 fiscal years. 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 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.