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U.S. Citizenship  
and Immigration  
Services



*Blp*

File: EAC 02 167 52671 Office: VERMONT SERVICE CENTER

Date: **MAY 12 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.

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 an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies 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.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$24 per hour, which equals \$49,920 per year.

With the petition counsel submitted copies of 1998, 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing that the petitioner paid wages of \$33,190.92, \$32,439.37, \$35,982.10 during those years, respectively, to Greg Blinowski, presumably the beneficiary.

Counsel also provided the petitioner's 1998, 1999, 2000, and 2001 Form 1120S U.S. Income Tax Returns for an S Corporation, but without the appropriate schedules and attachments. Those returns show that the petitioner declared (\$17,918), \$758, (\$365), and (\$6,363) as its ordinary income during those years, respectively. Because the corresponding Schedules L were not submitted with those returns, the petitioner's net current assets could not be calculated.

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 August 1, 2002, requested additional evidence pertinent to that ability.

In response, counsel submitted the missing Schedules L. Those schedules show that, at the end of each

of the four salient years, 1998, 1999, 2000, and 2001, the petitioner's current liabilities exceeded its current assets.

Counsel noted that, during each of those salient years, the wages paid to the beneficiary, the petitioner's ordinary income, the petitioner's depreciation expense, and the petitioner's Schedule L, Line 1, Cash, added together, exceeded the proffered wage. Counsel argued that this calculation showed that the petitioner was continuously able, beginning on the priority date, 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 November 14, 2002, denied the petition.

On appeal, counsel reiterates his argument that the wages paid to the beneficiary, the petitioner's ordinary income, the petitioner's depreciation expense, and the petitioner's year-end cash-on-hand, taken together; demonstrate the petitioner's ability to pay the proffered wage.

Counsel also submits a letter, dated December 30, 2002, from an accountant. In the letter, the accountant concurs with counsel's calculation. The accountant further states that, because the petitioner reports taxes based on the accrual method, and because the petitioner seeks to report the least income possible consistent with the relevant tax law, its tax returns do not present a fair picture of its financial condition or cash position. The accountant states,

Thus, the Government agency cannot make a determination as to a companies [sic] financial health based upon tax returns that are filed and prepared on an accounting method other than one prepared using Generally Accepted Accounting Principles (GAAP).

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. Thus the petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage.

The argument made by counsel and seconded by the accountant that the petitioner's depreciation deduction should be included in the computation of the funds available to pay the proffered wage is not convincing.

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, 537 (N.D. Texas 1989). See also *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.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, Supra at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, Supra; *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 January 13, 1998. The proffered wage is \$49,920 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 12 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 353 days. The proffered wage multiplied by  $353/365^{\text{th}}$  equals \$48,278.79, which is the amount the petitioner must show the ability to pay during 1998.

In addition, the W-2 forms demonstrate that the petitioner paid wages to the beneficiary during each of the salient years. The petitioner has demonstrated the ability to pay the amount of those wages, and must show only the ability to pay the balance of the proffered wage. During 1998, the petitioner paid the beneficiary \$33,190.92, which, subtracted from the salient portion of the proffered wage, leaves a balance of \$15,087.87.

During 1998, however, the petitioner posted a loss and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income or its assets. The petitioner has not shown that any other funds were available with which to pay the proffered wage during that year. The petitioner has failed to demonstrate the ability to pay the proffered wage during 1998.

During 1999 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage minus the wages it actually paid to the beneficiary. During 1999, the petitioner paid the beneficiary \$32,439.37, leaving a balance of \$15,839.42. During that year, the petitioner declared ordinary income of \$758 and ended the year with negative net current assets. The petitioner has not demonstrated that it was able to pay that balance of the proffered wage out of either its income or its assets during 1999. The petitioner has not shown that any other funds were available to pay the proffered wage. The petitioner has failed to demonstrate the ability to pay the proffered wage during 1999.

During 2000, the petitioner paid the beneficiary \$35,982.10, leaving a balance of \$12,296.69 it must demonstrate the ability to pay. During 2000, the petitioner declared a loss and ended the year with negative net current assets. The petitioner has not demonstrated the ability to contribute any amount out of its income or assets toward paying the proffered wage during 2000. The petitioner has not shown that any other funds were available to pay the proffered wage during that year. The petitioner has failed to demonstrate the ability to pay the proffered wage during 2000.

During 2001, the petitioner paid the beneficiary \$35,790.07, leaving a balance of \$12,488.72. The petitioner declared a loss during that year and ended the year with negative net current assets. The petitioner has not shown that it could pay the salient portion of the proffered wage during 2001 out of either its income or its assets and has not shown that any other funds were available to pay the proffered wage. The petitioner has failed to demonstrate the ability to pay the proffered wage during that year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 2001. 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.