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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

APR 13 2005

FILE:

[REDACTED]
LIN 03 135 50288

Office: NEBRASKA SERVICE CENTER

Date:

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 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, Director
Administrative Appeals Office

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

The petitioner is a gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 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 granting 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.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$18.05 per hour, which equals \$37,544 per year.

On the petition, the petitioner stated that it was established during July 1993 and that it employs four workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1994.¹ Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Milwaukee, Wisconsin.

In support of the petition, counsel submitted copies of the petitioner's 1998, 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns.

¹ That is, the beneficiary stated that he worked for the petitioner beginning during October of 1994, and continuing at least until January 11, 1998, the date he completed and signed that form.

The 1998 return shows that the petitioner declared a loss of \$734 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$52,796 and current liabilities of \$22,817, which yields net current assets of \$29,979.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,272 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$30,112 and current liabilities of \$25,167, which yields net current assets of \$4,945.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$7,236 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$48,480 and current liabilities of \$22,807, which yields net current assets of \$25,673.

The 2001 return shows that the petitioner declared a loss of \$22,516 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$85,183 and current liabilities of \$30,103, which yields net current assets of \$55,080.

Counsel submitted copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001. The petitioner's quarterly returns show that it paid \$21,050, \$19,100, \$9,800, and \$16,815 in wages and other compensation during those four quarters, respectively.

In connection with a previous petition, filed July 5, 2000 and denied as abandoned on December 14, 2000, the petitioner provided copies of its Form 941 Employer's Quarterly Wage Reports for all four quarters of 1998. Those returns show that the petitioner paid wages and other compensation of \$15,542, \$0, \$4,502, and \$14,240 during those quarters, 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 Director, Nebraska Service Center, on April 18, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested Forms W-2 Wage and Tax Statements showing wages the petitioner paid the beneficiary during each year since 1998, a copy of the beneficiary's most recent pay voucher, and the petitioner's bank accounts for 12 consecutive months including January 1998.

In response, counsel submitted a letter, dated July 10, 2003. Counsel stated that the beneficiary has not worked for the petitioner since 1998. Counsel states that bank records for 1998 are unavailable, but that the petitioner's tax returns and Form 941 reports clearly show the ability to pay the proffered wage. Counsel observed that the petitioner paid wages during both 1998 and 2002 that exceeded the amount of the proffered wage. Counsel also implies that the petitioner's depreciation deduction during 1998 should be included in the determination of the petitioner's ability to pay the proffered wage.

With that response, counsel provided W-2 forms showing amounts the petitioner paid the beneficiary during 1995, 1996, 1997, and 1998. Because the priority date is January 14, 1998, evidence of wages paid to the beneficiary during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The 1998 W-2 form shows that the petitioner paid the beneficiary \$2,750 during that year.

Counsel submitted copy of a letter, dated July 9, 2003, from a bank. That letter states that the petitioner's two bank accounts had average balances of \$5,325.54 and 9,267.65 during the past 12 months.

Counsel also submitted copies of the joint 1995, 1996, 1997, 1998, and 1999 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. The petitioner, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.² As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel submitted the Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2000. Those returns show that the petitioner paid wages and other compensation of \$12,060, \$17,020, \$23,400, and \$20,400 during those quarters, respectively.

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 15, 2003, denied the petition.

On appeal, counsel states,

The decision of denial is erroneously flawed [sic] in the respect that you conclude that the best evidence of ability to pay wages during the critical times, 1998 to present, consisting of the 941 Quarterly returns; [sic] shows wages paid to "other employees", [sic] and thus doesn't demonstrate [the] ability to pay the beneficiary's wage. There is an assumption present that this beneficiary wouldn't replace some other person leaving, which has no basis for conclusion. [sic] Additionally, the statement that wages paid out during the time frames were not monies retained by the petitioner for future use is difficult to comprehend insofar as relevance. This decision borders on being arbitrary and capricious.

On the appeal form counsel indicated that he would submit a brief or additional evidence within 30 days. No additional information, argument, or documentation has been submitted.

Initially this office will address counsel's contention that the director made an improper assumption in denying the petition. Counsel is correct that, if the beneficiary will replace another employee, that other

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

employee's wages can be included in the determination of the petitioner's ability to pay the proffered wage. The burden of demonstrating that the beneficiary will replace another employee, however, is on the petitioner.³ Absent such proof the director may not simply assume, in that determination, that the beneficiary will replace another employee whose wages would be sufficient to pay the proffered wage. The director did not err in failing to make the assumption counsel apparently urges.

The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.⁴

Counsel's implicit assertion that the petitioner's depreciation deductions should be included in the determination of its ability to pay the proffered wage does not convince this office, notwithstanding that the director appears to have concurred. 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). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). 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.

The average balances of the petitioner's bank accounts are not convincing evidence of its ability to pay wages. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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.

³ Further, because the point of this petition is to acquire an employee to fill a position for which no U.S. workers are available, the petitioner might be obliged to show that it is not replacing the incumbent out of preference.

⁴ In this case, counsel did not explicitly state that the beneficiary would replace an existing employee, but merely implied it. The evidentiary value of an implication, of course, is no stronger than that accorded to an assertion.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 the beneficiary during 1998 and paid him \$2,750. The petitioner did not establish that it employed and paid the beneficiary at any other time since the priority date.

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, the AAO will, in addition, examine the net income figure 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*, 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 paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ 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 it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

⁵ The petitioner might be able to show, for instance, rather than to imply on appeal, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The proffered wage is \$37,544 per year. The priority date is January 14, 1998.

The petitioner demonstrated that it paid the beneficiary \$2,750 during 1998 and must demonstrate the ability to pay the \$34,794 balance of the proffered wage. During 1998 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of \$29,979. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999 or subsequent years and must show the ability to pay the entire proffered wage during each of those years. During 1999 the petitioner declared a profit of \$1,272. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$4,945. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared a profit of \$7,236. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$25,673. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year, however, the petitioner had net current assets of \$55,080. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, and 2000. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.