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U.S. Citizenship
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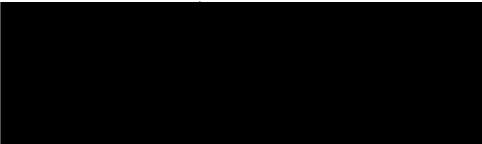
Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



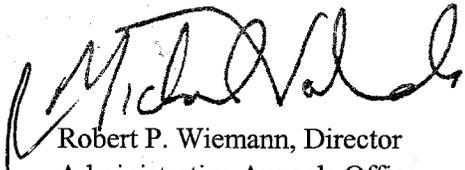
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The Director, California 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 home health care company. It seeks to employ the beneficiary permanently in the United States as an accountant. 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)(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.

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 granting 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$38,000 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 60 workers. The petition states that the petitioner's gross annual income is \$2.2 million but does not state its net annual income in the space provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in West Covina, California.

In support of the petition, counsel submitted the petitioner's 1999, 2000, and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner reports taxes based on the calendar year.

The 1999 return indicates that the petitioner declared ordinary income of \$12,203 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return indicates that the petitioner declared ordinary income of \$960 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the priority date is April 25, 2001, however, evidence pertinent to the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 return indicates that the petitioner declared a loss of \$85,976 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On April 15, 2003 the California Service Center requested additional evidence in this matter. The Service Center specifically requested that the petitioner furnish IRS computer printouts of its tax data since 2001. The Service Center also requested that the petitioner submit copies of its California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response counsel submitted a 2001 IRS printout confirming that the petitioner declared a loss of \$85,976 as its ordinary income during that year. Counsel also provided a Form 7005 Application for Automatic Extension of Time to File its 2002 return until September 15, 2003.

Finally, counsel provided the petitioner's Form DE-6 quarterly reports for the last three quarters of 2002 and the first quarter of 2003. The quarterly reports show that the petitioner employed between 42 and 74 workers during those quarters. Those quarterly reports also show that the petitioner employed the beneficiary during the last quarter of 2002 and paid him \$18,000, but that it employed him at no other time.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date the Service Center issued a second Request for Evidence on July 16, 2003. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also noted that the beneficiary had worked the petitioner and requested copies of Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 2001 and 2002.

In response, counsel submitted an additional copy of the petitioner's 2001 tax return and a copy of a 2002 W-2 form showing that the petitioner paid wages of \$18,000 to the beneficiary during that year. As to 2001, counsel submitted a letter, dated September 18, 2003, from the beneficiary, who stated that although he was authorized to work during 2000 he delayed his employment until January 2002. No explanation for that delay was given.

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 15, 2003, denied the petition.

The appeal in this case is dated November 12, 2003 and was received on November 14, 2003. Although Service Center previously requested previously copies of 2002 annual reports, federal tax returns, or audited financial statements to demonstrate the ability to pay the proffered wage during that year and the petitioner's 2002 tax return should, by the date of the appeal, have been available, that tax return was not submitted, nor was any explanation of its absence provided.

On appeal, counsel submits a letter, dated November 12, 2003, from an accountant who notes that the petitioner paid officer compensation during 2001 and 2002 that was more than sufficient to cover the proffered wage. The accountant states that the petitioner's earnings are distributed among the owners as compensation. Counsel apparently intended to imply that the petitioner's owners might forego that compensation as necessary to pay the proffered wage. That letter also cites the petitioner's depreciation deduction as evidence of the petitioner's ability to pay the proffered wage. Counsel further notes that the petitioner employs 60 workers and has always paid their wages, apparently an assertion that the size of the petitioner's payroll clearly shows the petitioner's ability to pay the proffered wage in addition to the wages it already pays.

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.

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 expenses¹ 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

¹ The petitioner might be able to show, for instance, 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.

² 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.

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 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 and paid the beneficiary \$18,000 during 2002. The petitioner did not establish that it paid wages to the beneficiary during any other salient period.

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'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 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.

The proffered wage is \$38,000 per year. The priority date is April 25, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage during that year out of its income. At the end of that year the petitioner had negative net current assets. The petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year.

The petitioner's 2001 tax return shows that it paid compensation of \$275,975 to its two officers during that year. The petitioner's accountant, in his letter of November 12, 2003, intimated that the petitioner's owners might forego their compensation as necessary to pay the proffered wage to the beneficiary. The accountant did not state how he formed the opinion that the petitioner's officers are willing and able to forego their compensation in order to pay the proffered wage. No evidence has been submitted to demonstrate that they would not insist on, and do not need, to be compensated. No evidence was submitted of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated that it paid the beneficiary \$18,000 during 2002. In order to prevail the petitioner must demonstrate the ability to pay the \$20,000 balance of the proffered wage. Although the Service Center requested, on July 16, 2003, that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage during 2002, the petitioner provided no such evidence pertinent to 2002.

Even if the petitioner's argument pertinent to 2001, that it could have withheld compensation from its officers as necessary to pay the proffered wage, had been convincing, the petitioner submitted no evidence that the compensation it paid to its officers during 2002 exceeded the \$20,000 balance of the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

Further still, CIS electronic records show that the petitioner has filed eight I-140 petitions since January 2001, and that five of those petitions were approved and two, including the instant case, were denied. In addition, one case was initially approved but the approval then revoked. In addition to the instant appeal, that revoked petition is now pending before the AAO on appeal. CIS electronic also show that the petitioner has also filed 32 I-129 petitions since January 2001.

Even if the evidence in the instant case indicated financial resources of the petitioner sufficient to pay the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. For I-129 petitions, which pertain to temporary workers, the regulations do not require evidence to establish a petitioner's ability to pay the proffered wages. Nonetheless, the added costs to a petitioner of hiring temporary workers authorized by I-129 petitions are relevant to any I-140 petitions for permanent workers filed by that same petitioner, since the regulations do require the petitioner to establish its ability to pay the proffered wages to the beneficiaries of any I-140 petitions.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of I-129 and I-140 petitions filed by the petitioner, nor about the priority dates of any of the I-140 petitions, nor about the present employment status of other potential beneficiaries. Lacking such evidence, even if the reasons set out above were overcome, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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.