

*Administrative data referred to  
person clearly represented  
purpose of agency policy  
[unclear]*



U.S. Citizenship  
and Immigration  
Services



*B6*

FILE: EAC 02 232 52446 Office: VERMONT SERVICE CENTER Date: AUG 11 2005

IN RE: Petitioner: [Redacted]  
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:



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.

*[Signature]*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont 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 trucking company. It seeks to employ the beneficiary permanently in the United States as a truck mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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.

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 \$19.11 per hour, which equals \$39,748.80 per year.

On the petition, the petitioner stated that it was established on May 28, 1999 and that it employs three workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1998. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Woodbridge, Virginia.

In support of the petition, counsel submitted copies of the petitioner's 2000 and 2001 Form 1065, U.S. Returns of Partnership Income. Those returns show that the petitioner reports taxes pursuant to the calendar year.

During 2000 the petitioner declared ordinary income of \$1,891. At the end of that year the petitioner had current assets of \$1,000 and no current liabilities, which yields net current assets of \$1,000. This office notes, however, that because the priority date is April 25, 2001, evidence pertinent to the petitioner's finances during

previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2001 the petitioner declared ordinary income of \$8,278. At the end of that year the petitioner had current assets of \$1,000 and no current liabilities, which yields net current assets of \$1,000. Counsel also submitted a 2001 Form 1099 Miscellaneous Income statement showing that the petitioner paid the beneficiary nonemployee compensation of \$14,298.85 during that year.

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 March 31, 2003, requested, *inter alia*, additional evidence pertinent to that ability.

In response, counsel submitted copies of monthly statements pertinent to the petitioner's bank account. In a letter, dated June 30, 2003, counsel stated that the monthly balances shown on those account statements demonstrate the petitioner's ability to pay the proffered wage.

The Acting 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 20, 2003, denied the petition.

On appeal, counsel cites a non-precedent decision of this office for the proposition that some unspecified deductions may not represent real expenses. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to argue that the reasoning of that decision is persuasive, counsel's citation of a non-precedent decision is, in itself, of no effect.

Counsel further argues that the petitioner's depreciation deduction does not represent a real expense, and the amount of that deduction should be viewed as having been available to pay additional wages. In support of that assertion, counsel provides a printout of IRS directions stating,

Depreciation is an annual income tax deduction that allows you to recover the cost or other basis of certain property over the time you use the property. It is an allowance for the wear and tear, deterioration, or obsolescence of the property.

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. But 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.

Counsel's reliance on the bank statements in this case is misplaced. 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.<sup>1</sup> 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 reported on its tax returns.

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 paid the beneficiary nonemployee compensation of \$14,298.85 during 2001.

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 total 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 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.

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<sup>1</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 \$39,748.80 per year. The priority date is April 25, 2001.

During 2001 the petitioner paid the beneficiary \$14,298.85. The petitioner must demonstrate the ability to pay the \$25,449.95 balance of the proffered wage. During 2001 the petitioner declared ordinary income of \$8,278. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$1,000. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

Further, on March 31, 2003 the Vermont Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel responded to that request with a letter dated June 30, 2003. On that date, the petitioner's 2002 tax return should have been available. Counsel did not provide that return, nor any other reliable evidence<sup>2</sup> pertinent to the petitioner's finances during 2002, and did not explain that omission. The petitioner has failed to demonstrate its ability to pay the proffered wage during 2002.

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 record contains an additional issue that was not mentioned in the decision of denial. The petitioner is Lopez Trucking Company LLC. Its majority owner, as shown on its tax returns, is [REDACTED]. The beneficiary's name is [REDACTED]. That the petitioner's majority owner has the same family name as the beneficiary raises the question of whether they may be blood relations or have some other familial tie. The record does not indicate that this issue was pursued. If the petitioner's majority owner and the beneficiary are, in fact, related, this casts doubt on the assertion that the job offer was open to qualified U.S. workers. Because this issue was not previously raised, however, and the petitioner was not accorded the opportunity to respond to it, today's decision does not rely upon that issue, even in part.

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<sup>2</sup> In this context, "reliable evidence" would necessarily include copies of annual reports, federal tax returns, or audited financial statements, as required by 8 C.F.R. § 204.5(g)(2).

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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.