

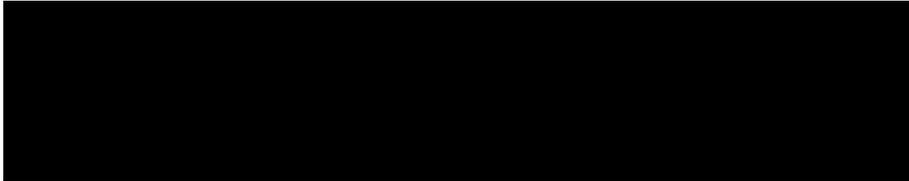
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U.S. Citizenship
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Services



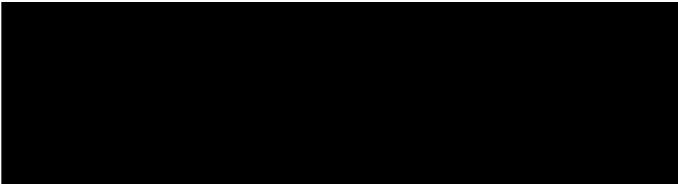
RG

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 12 2005
WAC 03 089 54106

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.


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 certified public accountancy firm. 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 August 2, 2001. The proffered wage as stated on the Form ETA 750 is \$25 per hour, which equals \$52,000 per year.

On the petition, the petitioner stated that it was established during November 1999 and that it employs three workers. The petition states that the 2001 petitioner's gross annual income was \$177,898 and that its net annual income was \$52,522.¹ 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 Los Angeles, California.

¹ The figure provided as the petitioner's 2001 net income corresponds to the amount of the petitioner's net profit and the net profit of the petitioner's owner's spouse's insurance sales business for that year, added together.

In support of the petition, counsel submitted copies of monthly statements pertinent to the petitioner's bank account and copies of the 2000 and 2001 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Those returns show that the petitioner's owner and owner's spouse have two dependents. Corresponding Schedules C, Profit or Loss from Business submitted with those returns show that the petitioner is held as a sole proprietorship.

The 2000 return shows that during that year the petitioner returned a profit of \$44,856. The petitioner's owner and owner's spouse declared adjusted gross income of \$60,123 during that year, including the petitioner's profit.

The 2001 return shows that during that year the petitioner returned a profit of \$19,961. The petitioner's owner and owner's spouse declared adjusted gross income of \$54,096 during that year, including the petitioner's profit.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 15, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center 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.

In response, counsel submitted the 2002 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. The corresponding Schedule C Profit or Loss from Business shows that the petitioner returned a profit of \$47,437 during that year. The tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$49,434 during that year, including the petitioner's profit.

Counsel stressed the amount of the petitioner's gross receipts, expenses, net profit, and wage expense in asserting that the petitioner has shown the continuing ability to pay the proffered wage beginning on the priority date. Counsel implied that the petitioner's net current assets also demonstrate its ability to pay the proffered wage.² Counsel also noted that the petitioner has never failed to pay its employees in the past.

Counsel submitted a 2001 personal financial statement of the petitioner's owner and owner's spouse, the petitioner's California Form DE-6 Quarterly Wage Reports, and additional bank statements.

The personal financial statements contain no indication that they were audited.³ The quarterly wage reports cover the period from the third quarter of 2001 through the first quarter of 2003, inclusive, and show that the petitioner employed between three and five workers during each of those quarters, but do not show that the petitioner employed the beneficiary.

² Counsel cited language from an official of the Vermont Service Center pertinent to the ratio of a petitioner's current assets to its current liabilities.

³ A legend at the bottom of one page of that statement reads, "See accompanying notes and accountant's report." The accountant's report, which would have specified whether or not the statement was audited, did not accompany that financial statement.

Counsel noted that the petitioner's owner earned an MBA at USC in March 1992, passed the CPA exam in January 1996, purchased the business from the previous owner in November 1999, now has approximately 150 business clients and 450 individual clients, and that his wife sells insurance. The proposition for which counsel cited those facts is unknown to this office.

Counsel also cited two non-precedent decisions; the facts of which he asserts are similar to the facts of the instant case. 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. Counsel's citation of a non-precedent decision is of no effect.

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 December 11, 2003, denied the petition.

On appeal, counsel asserts that this office has consistently ruled that a petitioner may not show its ability to pay the proffered wage on the priority date with tax returns for the year in which the priority date fell, and that the petitioner must submit its tax return for the previous year. This office has no such policy. Because the priority date is August 2, 2001, evidence pertinent to the petitioner's or its owner'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. The petitioner's owner's 2000 tax return will not be considered.

Counsel also asserts that the amount of the petitioner's depreciation deduction should be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel submits (1) copies of checks drawn by the petitioner on September 16, October 1, October 16, November 3, November 17, and December 1, 2003, to the beneficiary's order, each in the amount of \$1,775.37, for a total of \$10,652.22, (2) additional bank statements, and (3) a letter, dated January 5, 2004, from the petitioner's owner.

The petitioner's owner's letter states that the beneficiary came to work for the beneficiary on September 1, 2003, and has been working for \$4,333 per month.

Subsequently, counsel submitted a letter, dated January 14, 2005, to supplement the appeal. Counsel cited a May 4, 2004 memo from the CIS Associate Director for Operations. Counsel notes that the memo urges adjudicators to find that a petitioner has affirmatively demonstrated ability to pay the proffered wage when it demonstrates (1) that its net income is greater than the proffered wage, (2) that its net current assets are greater than the proffered wage, or (3) that it has been paying the proffered wage to the beneficiary. Counsel asserts that the evidence submitted satisfies both the first and third prongs of that test.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. 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.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner has never failed to pay its employees is insufficient.⁴ 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.

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.⁷ 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.

⁴ In fact, the petitioner did not show that it had never failed to pay its employees, but merely alleged it.

⁵ 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.

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.

⁷ 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.

Counsel's reliance on unaudited financial records is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the unsupported representations of an interested party. Unsupported representations are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel is correct that the May 4, 2004 memo from the CIS Associate Director for Operations urges adjudicators to find that a petitioner has affirmatively demonstrated ability to pay the proffered wage when it demonstrates that its net income is greater than the proffered wage, that its net current assets are greater than the proffered wage, or that it has been paying the proffered wage to the beneficiary. Counsel is obliged to demonstrate that the petitioner has satisfied one of the three prongs of that test.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporate petitioner's current assets and current liabilities, along with other assets and liabilities, are stated on corresponding Schedules L submitted with the corporation's tax returns.

That statistic is not ordinarily applicable to an individual or a sole proprietorship. Because a sole proprietorship's current assets and current liabilities do not appear on its owner's tax returns, its net current assets cannot be determined from those returns. In order to introduce reliable evidence of its net current assets, a sole proprietorship petitioner would likely be obliged to submit audited financial statements.

A petitioner held as a sole proprietor is ordinarily obliged to show that its net income is sufficient to pay the proffered wage or that it has been paying the proffered wage to the beneficiary since the priority date.⁸ Counsel asserts that the evidence satisfies both of those prongs of the test.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

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,

⁸ A petitioner may also show that, by a combination of those two factors, net income and wages paid to the beneficiary, it has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

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 \$10,652.22 during 2003. The petitioner did not establish that it paid any wages to the beneficiary during 2001 or 2002.

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).

The proffered wage is \$52,000 per year. The priority date is August 2, 2001.

During 2001 the petitioner's owner and owner's spouse declared adjusted gross income of \$54,096, including the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, he would have been left with \$2,096 with which to support his household of four. No evidence pertinent to the household expenses of the petitioner's owner was requested and none was submitted. To expect that the petitioner can support his family of four on that amount, however, is unreasonable. The record contains no reliable evidence of any other funds available to the petitioner's owner with which he could have paid the proffered wage or supported his family during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$49,434, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds available to the petitioner's owner with which he could have paid the proffered wage or supported his family during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The Request for Evidence in this matter was issued on April 15, 2003. Counsel's reply is dated June 20, 2003. On those dates the petitioner's 2003 tax return was clearly unavailable. The petitioner is not obliged to demonstrate its ability to pay the proffered wage during 2003.

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.