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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

AUG 16 2005

EAC 03 016 53652

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a cleaner/alteration shop. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.75 per hour, which equals \$26,520 per year.

On the petition, the petitioner stated that it was established during August 2001 and that it employs three workers. The petition states that the petitioner's gross annual income is \$93,918 and that its net annual income is \$83,399.¹ 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 Stafford, Virginia.

With the petition counsel submitted a notarized letter, dated September 11, 2002, from the president of the petitioning company. That letter states that Cuddy Loop, Incorporated succeeded the prior owner of the business, Brafferton Cleaners, Incorporated, by purchasing the business during August 2001. The petition,

¹ The evidence subsequently submitted does not support that representation of the petitioner's net annual income.

however, which was submitted October 7, 2002, indicates that it was filed by [REDACTED] Incorporated.

In support of the petition, counsel submitted the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation of Brafferton Cleaners, Incorporated, the original petitioner. That return shows that Brafferton Cleaners reported taxes pursuant to the calendar year and that during 2000 it declared ordinary income of \$10,452. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$7,758 and current liabilities of \$2,590, which yields net current assets of \$5,168. This office notes, however, that the priority date is April 30, 2001, and that evidence of 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.

Counsel also submitted the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of Cuddy Loop, Incorporated, the substituted petitioner. That return covers the period from August 1, 2001 to December 31, 2001, and indicates that Cuddy Loop incorporated on August 1, 2001 and that the 2001 return is its initial return. During that five-month period Cuddy Loop declared ordinary income of \$13,041. The corresponding Schedule L shows that at the end of the 2001 calendar year the petitioner had current assets of \$8,952 and current liabilities of \$435, which yields net current assets of \$8,517.

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 December 31, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested that, if it employed the beneficiary during 2001, the petitioner submit a Form W-2 Wage and Tax Statement showing wages it paid to the beneficiary during that year.

In response, counsel submitted an additional copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel submitted no W-2 forms and no other evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel notes that the 2001 return covers only five months of 2001. Counsel argues that, extrapolating from that five months of income, the petitioner would be expected to have a 12-month income of \$31,295.90, an amount sufficient to pay the annual amount of the proffered wage. As shall be explained in detail below, the weight of authority does not support that approach.

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 November 4, 2003, denied the petition.

On appeal, counsel submits the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of Brafferton Cleaners, Incorporated. That return states that it is the final return of Brafferton Cleaners and purports to cover the entire calendar year. The return shows that Brafferton Cleaners declared ordinary income of \$4,156 during that year. At the end of that year Brafferton Cleaners had no current assets and no current liabilities, which yields \$0 net current assets.

Counsel argues that the two companies' income, depreciation deductions, net current assets, and total wages demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

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, even far in excess of the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ 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. 1080, 1084 (S.D.N.Y. 1985), the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (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.

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 did not establish that it employed and paid the beneficiary.

² 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.

³ 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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, supra*, *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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 \$26,520 per year. The priority date is April 30, 2001. The determination of the ability to pay the proffered wage during 2001 is complicated by the allegation that Brafferton Cleaners, Incorporated owned the petitioning business during the first seven months of 2001 and Cuddy Loop, Incorporated owned it during the remaining five months.

A substituted petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

The prorated amount of the proffered wage for the first seven months of 2001 is \$15,470.⁴ The 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of Brafferton Cleaners, Incorporated shows that Brafferton Cleaners declared ordinary income of \$4,156 during that year.⁵ That amount is insufficient to pay the proffered wage. At the end of that year Brafferton Cleaners had net current assets of \$0. The petitioner is

⁴ $\$26,520 / 12 \times 7 = \$15,470$.

⁵ Because the 2001 return of Brafferton Cleaners, Incorporated purports to be for an entire year, an argument may be made that the profit shown on that return should also be prorated at 7/12th. Because the profit, even without prorating, is insufficient to show that Brafferton Cleaners was able to pay the prorated portion of the proffered wage, this office need not reach that issue.

unable to show that Brafferton Cleaners was able to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to Brafferton Cleaners during the first seven months of 2001. The evidence does not demonstrate that the original petitioner was able to pay the proffered wage during the first seven months of 2001.

The prorated amount of the proffered wage during the last five months of 2001, during which the substituted petitioner owned the petitioning business, is \$11,050.⁶ The substituted petitioner must show that it was able to pay that portion of the proffered wage during the final five months of 2001.

The 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of Cuddy Loop, Incorporated, which covers the period August through December of 2001, inclusive, indicates that it declared ordinary income of \$13,041. That amount was sufficient to pay the proffered wage during the five months in question. The substituted petitioner has demonstrated the ability to pay the proffered wage during the last five months of 2001.

The evidence is insufficient to demonstrate that the original petitioner had the ability to pay the proffered wage during the first seven months of 2001. Therefore, the continuing ability to pay the proffered wage beginning on the priority date has not been established and the petition was correctly denied on that ground.

An additional issue exists in this matter that was not addressed in the decision of denial. On approximately August 1, 2003, the petitioning business changed hands. The substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc, supra*.¹⁹ I&N Dec. at 481. It must submit proof of the change in ownership and of how the change in ownership occurred and that it assumed all of the rights, duties, obligations, and assets of the original.⁷ In the instant case, no such evidence was submitted, the substituted petitioner has not demonstrated that it is entitled to rely on the approved labor certification in this case, and the petition should have been denied on that additional basis. Because the petitioner has not been accorded an opportunity to address that issue, however, it forms no part of the basis of today's decision.

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.

⁶ $\$26,520 / 12 \times 5 = \$11,050$.

⁷ In addition the substituted petitioner must show that it operates the same type of business as the original petitioner, which has been amply demonstrated in this case.