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U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

AUG 16 2005

EAC 03 201 50287

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 an automobile towing and automobile and truck repair service. It seeks to employ the beneficiary permanently in the United States as an automobile and 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 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 \$17.31 per hour, which equals \$36,004.80 per year.

On the petition, the petitioner stated that it was established during July 2000 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$694,090 and that its net annual income is \$294,137.<sup>1</sup> On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since August 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Salem, Massachusetts.

In support of the petition, counsel submitted a letter, dated June 2, 2003, from the petitioner's president stating that "[the beneficiary] continues to be employed [by the petitioner] . . . [at a salary of] \$17.31 per hour for 40 hours per week."

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<sup>1</sup> None of the evidence subsequently submitted supports that representation of the petitioner's net annual income.

Counsel also provided a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on the calendar year. During 2002, the petitioner reported a loss of \$135,794 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$31,097 and current liabilities of \$28,010, which yields net current assets of \$3,087.

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 August 11, 2003, requested, *inter alia*, 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 showing the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted (1) a letter, dated September 10, 2003, from the petitioner's accountant, (2) the petitioner's Massachusetts Form WR-1 Employer's Quarterly Report of Wages Paid for the first and second quarters of 2003, and (3) copies of the 2002 Form W-2 Wage and Tax Statements issued by the petitioner.

The 2002 W-2 forms do not show that the petitioner employed the beneficiary during that year.

The petitioner's quarterly wage reports show that it paid \$27,950 and \$25,450 to seven employees during the first and second quarters of 2003, respectively. Those reports do not show that the petitioner employed the beneficiary during either of those quarters. Those reports appear to conflict with the petitioner's president's statement in his letter of June 2, 2003 that it continued, on that date, to employ the beneficiary at \$17.31 per hour for 40 hours per week.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The accountant's letter states that the petitioner's loss during 2002 was occasioned by its depreciation deduction of \$194,946 during that same year. The accountant also notes that, as the petitioner's returns were prepared pursuant to cash accounting, rather than accrual convention, it does not include the petitioner's accounts receivable.

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 February 19, 2004, denied the petition.

In his brief on appeal, counsel argues that the petitioner's depreciation deduction should be added to its net profit, or loss, in the determination of the petitioner's ability to pay the proffered wage.

Counsel also provides another letter, dated March 15, 2004, from the petitioner's accountant. The accountant again urges that adjustment to the petitioner's tax returns is necessary to make them accurately reflect the petitioner's financial condition because they were prepared pursuant to cash convention. The accountant again asserts that the petitioner's depreciation deduction should be added to the petitioner's net income.

The accountant also notes that the decision of denial was made without the benefit of the petitioner's financial statements for 2001 and the first half of 2002, which are provided with the appeal. The accountant states that his office prepared those financial statements. The accountant asserts that the financial statement were also prepared pursuant to cash convention rather than accrual, and do not, therefore, accurately reflect the petitioner's liquid assets.

The record does contain the financial statements to which the accountant refers. Contrary to the accountant's assertion, those financial statements indicate that they were prepared pursuant to accrual, rather than cash convention. Further, the financial statements were submitted without the accountant's reports that should accompany them whenever they are presented for any purpose. Without those reports, the financial statements contain no indication of whether they were prepared pursuant to an audit, a review, or a compilation.

Finally, counsel submits copies of the petitioner's 2001 and 2003 Form 1120 U.S. Corporation Income Tax Returns.

The 2001 return shows that the petitioner declared a loss of \$32,727 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's current liabilities exceeded its current assets.

The 2003 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$56,695 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$100,944 and current liabilities of \$56,015, which yields net current assets of \$44,929.

The assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel and the accountant are 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.

The record contains no indication that the financial statements submitted were audited. The petitioner's reliance on apparently unaudited financial records is 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 representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In response to the Request for Evidence issued in this matter and on appeal, the accountant has implied that the petitioner's tax returns are a poor indicator of its financial condition because they were prepared pursuant to cash accounting rather than accrual, and do not, therefore, include the amount of the petitioner's end-of-year receivables.

Merely adding the petitioner's receivables to its net income, however, is unlikely, in itself, to convert the petitioner's cash basis tax returns into accrual basis returns. The cash-basis petitioner's gross receipts for a given year, for instance, likely includes some portion of the previous year's year-end receivables that were collected during the current year. Subtraction of that amount from the petitioner's net income would also be necessary to convert the returns to accrual convention. Any number of other additions **and subtractions** might be required to convert petitioner's tax returns to accrual basis returns. If the petitioner wished to rely upon accrual convention to show its ability to pay the proffered wage, it was obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to provide tax returns based on accrual, audited financial statements based on accrual, or annual reports containing audited tax returns based on accrual.

Further, that the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's assertion, make them poor indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

In any event, the assertion of the accountant that the petitioner's tax returns do not show the true financial condition of the corporation is inapposite. It neither demonstrates the petitioner's ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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, although the petitioner's president's June 2, 2003 letter states that, on that date, it was continuing to employ the beneficiary at \$17.31 per hour for 40 hours per week, no evidence was submitted to demonstrate the veracity of that statement, and the evidence submitted, 2002 Form W-2 forms and 2003 quarterly wage reports, appear to contradict the president's assertion. The petitioner did not establish that it employed and paid the beneficiary at any time.

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*, 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 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 \$36,004.80 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability 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 it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits. At the end of that year the petitioner had net current assets of \$3,087. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$56,695. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the 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 or 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.