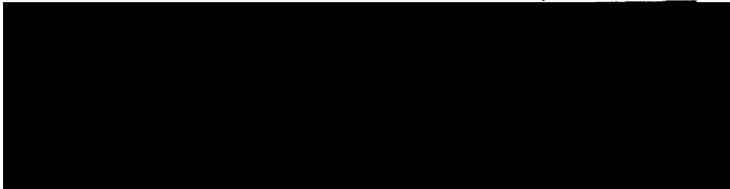


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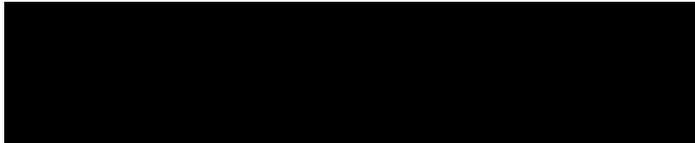
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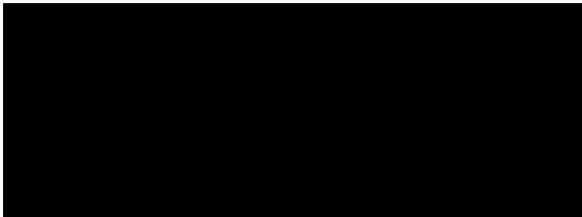
FILE: WAC 04 103 52912 Office: CALIFORNIA SERVICE CENTER Date: **DEC 19 2005**

IN RE: Petitioner:
Beneficiary:



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

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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a mechanical repair of [REDACTED] business. It seeks to employ the beneficiary as an automobile mechanic. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on December 10, 1998. The proffered salary as stated on the labor certification is \$18.36 per hour or \$38,188.80 per year.

With the petition, the petitioner, through counsel, submitted copies of the petitioner's 2000 through 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation, a copy of the petitioner's 1999 Form 1120, U.S. Corporation Income Tax Return for the fiscal year July 1, 1999 through September 30, 1999, a copy of the beneficiary's 2003 Form W-2, Wage and Tax Statement, and a copy of the beneficiary's 2003 Form 1040, U.S. Individual Income Tax Return. The petitioner's 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of \$15,990 and net current assets of \$0. The 2000 tax return reflected an ordinary income of \$15,304 and net current assets of \$5,181. The 2001 tax return reflected an ordinary income of \$34,173 and net current assets of \$16,394. The 2002 tax return reflected an ordinary income of \$1,776 and net current assets of -\$8,950. The beneficiary's 2003 Form W-2 reflected wages earned of \$8,949.36.

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 July 8, 2004, denied the petition.

On appeal, counsel provides previously submitted evidence, a letter from the petitioner's accountant, copies of the petitioner's 1997 and 1998 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years beginning on July 1 and ending on June 30, and a copy of the petitioner's 1999 Form 1120S, U.S. Income Tax Return for an S Corporation, for the fiscal year October 1, 1999 through December 31, 1999. The tax return for 1997 reflects a taxable income before net operating loss deduction and special deductions of \$13,836 and net current assets of \$20,262. The 1998 tax return reflects a taxable income before net operating loss deduction and special deductions of \$670 and net current assets of \$18,004. The 1999 tax return reflects an ordinary income of \$1,580 and net current assets of \$8,300. Counsel states:

Attached are detailed IRS tax returns of the business (1120S) for these years. Note that in 1999 there was a name change of the business meaning that there were two 1120S tax returns for 1999. Also note that the company's accountant, Mr. [REDACTED], CPA, states that the company elected to expense all assets according to IRS rules. However, he states that "depreciable assets would have a substantially higher value if depreciated over their true economic life."

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 1998 through 2003 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further,

the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets from 1998 through 2002 were \$18,004, \$8,300 and \$0, \$5,181, \$16,394, and -\$8,950, respectively. The petitioner could not have paid the proffered wage in 1998 through 2002 from its net current assets.

Counsel suggests that depreciation should be considered when determining the ability to pay the proffered wage. However, a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible 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 cost of equipment and buildings and the value lost as they 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel indicates that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not shown that it was able to pay the proffered wage in any of the years from 1998 through 2002. It has not established that the business has met all of its obligations in the past and has not established its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

The 1998 tax return reflects a taxable income before net operating loss deduction and special deductions of \$670 and net current assets of \$18,004. The petitioner could not have paid the proffered wage from either its taxable income or net current assets in 1998.

The 1999 Form 1120 reflects a taxable income before net operating loss deduction and special deductions of \$15,990 and net current assets of \$0. The petitioner could not have paid the proffered wage from either its taxable income or net current assets in 1999.

The 1999 Form 1120S reflects an ordinary income of \$1,580 and net current assets of \$8,300. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1999.²

The 2000 tax return reflects an ordinary income of \$15,304 and net current assets of \$5,181. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of \$34,173 and net current assets of \$16,394. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2001.

² Please note: Even when adding the taxable income and ordinary income in 1999, the petitioner was unable to pay the proffered wage (\$15,990 taxable income + \$1,580 = \$17,570 or \$20,618.80 less than the proffered wage of \$38,188.80). In addition, even when adding the net current assets from both the Form 1120 and 1120S, the petitioner was unable to pay the proffered wage (\$0 Form 1120 + \$8,300 Form 1120S = \$8,300 or \$29,888.80 less than the proffered wage of \$38,188.80).

The 2002 tax return reflects an ordinary income of \$1,776 and net current assets of -\$8,950. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2002.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.