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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]
LIN 03 215 52929

Office: NEBRASKA SERVICE CENTER

Date: DEC 21 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:

[Redacted]

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 preference visa petition was denied by the Director, Nebraska Director, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a consulting company. It seeks to employ the beneficiary permanently in the United States as an engineering programmer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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.

On appeal, the 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 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 28, 2002. The proffered wage as stated on the Form ETA 750 is \$57,450.00 per year. The Form ETA 750 states that the position requires six months experience.

With the petition, counsel submitted the following copies of documents: the original Form ETA 750; Application for Alien Employment Certification, approved by the Department of Labor; U.S. federal tax Form 1065 tax return; "Employers Quarterly Federal Tax Form" (Form 941); and, documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested a copy of the petitioner's "Employers Quarterly Federal Tax Form" (Form-941); "State Unemployment Compensation Report Form;" Internal Revenue Service (IRS)

Form 1099, and, Form W-2 Wage and Tax Statements for 2002. The Director also requested the petitioner's last annual report, audited financial statements, bank account records, and monthly balance sheets.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted, among other document copies of: petitioner's 2002 U.S. federal tax return; 2002 Form W-2 Wage and Tax Statements and earnings summaries; checking account statements; money market account statements; brokerage account statements; the petitioner's "Employers Quarterly Federal Tax Form" (Form-941); and, State quarterly tax reports, among other documents.

The director denied the petition on May 17, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner's net income is equal or greater than the proffered wage of \$57,450.00 per year; that the "initial" evidence demonstrates that the petitioner's net current assets are equal to or greater than the proffered wage; and, that the petitioner "... has paid or currently is paying the proffered wage." Counsel submitted additional evidence, which is one (1) earnings statement dated June 16, 2004, and, an memorandum from the U.S. Citizenship and Immigration Services (CIS) entitled "Determination of Ability to Pay under 8 C.F.R. [§] 204.5(g)(2)".

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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. Evidence was submitted to show that the petitioner employed the beneficiary. One earnings statement dated June 6, 2004, stated that the beneficiary received wages from the petitioner, year to date, in the amount of \$19,041.70. The beneficiary is noted on a W-2 Wage and Tax Statements submitted showing receipt of wages from the petitioner in 2003 of \$33,333.40. According to Form G-235A prepared by the beneficiary in the record of proceeding, the beneficiary is currently employed by the petitioner as an engineering programmer since October 2001 in H1B status. Since the proffered wage is \$57,450.00 per year, the petitioner has not paid the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax return¹ submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$57,450.00 from the priority date of March 28, 2002:

¹ The petitioner submitted its 2001 tax return, but since that return is for a period before the priority date of March 28, 2002, it has little probative value in this discussion.

- In 2002, the Form 1065 stated a taxable income loss² of <\$56,867.00>.³

Based upon its taxable income for the year examined, the petitioner could not pay the 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. According to all the evidence submitted in that regard only one earnings statement was submitted for a part of a year in 2004, which is insufficient for determining if the petitioner paid the beneficiary the proffered wage from the priority date. The W-2 statement submitted for year 2003 is \$33,333.40 which is lower than the proffered wage.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1065 federal tax return. The petitioner's 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.

Examining the Form 1065 U.S. Income Tax Return submitted by the petitioner, Schedule L found in that return indicates the following:

- In 2002, the petitioner's Form 1065 return stated current assets of \$9,202.00 and \$38,209.00 in current liabilities. Therefore, the petitioner had <\$29,007.00> in net current assets for 2002. Since the proffered wage was \$57,450.00, this sum is less than the proffered wage.

Therefore, for the year 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Brokerage account records and money market were submitted showing balances in 2003. Since there are no tax returns submitted after year 2002, it is unclear for what purpose these accounts were submitted to prove. As current assets, the balances in the account would be offset by current liabilities for 2003, but since there is no information submitted to determine net current assets, the information submitted has little probative value.

Counsel advocates the use of the cash balances of the a business checking account and money market account to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows

² IRS Form 1065, Line 22.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁴ 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.

additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner’s net current assets. As stated above, the current assets noted as “cash” as stated on Schedule L to the petitioner’s 2002 tax return is \$9,202.00. Counsel submits the “Combined Balances” of two cash accounts, checking and money market, beginning at a combined balance total of \$101,972.40 and ending at \$10,269.70 in tax year 2002. Counsel contends that there were sufficient funds in these two accounts to pay the proffered wage, but we note that without paying the proffered wage, despite the amount of balances in the accounts only approximately between \$9,000 to \$10,000 remained at years end. Clearly, the money found in these two accounts were drawn down during the year to a level that would not have supported the proffered wage especially when the current liabilities of \$38,209.00 for 2002 is considered.

Petitioner’s counsel advocates the addition of depreciation taken as a deduction in those years’ tax returns to eliminate the abovementioned deficiency. Since depreciation is a deduction in the calculation of taxable income on tax Form 1065, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel’s contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel is combining various expenses incurred for the year 2002, such as expenses for wages and salaries, outside services, the depreciation deduction mentioned above, and he is asserting that they demonstrate the ability to pay when added to the 2002 year’s ending balance of \$9,202.00 noted as “cash” on Schedule L.

Contrary to all of counsel assertions on appeal, the petitioner’s net income is not equal or greater than the proffered wage of \$57,450.00 per year. In 2002, the Form 1065 stated a taxable income loss of <\$56,867.00>. Counsel stated that petitioner’s evidence demonstrated that the petitioner’s net current assets are equal to or greater than the proffered wage. The petitioner had <\$29,007.00> in net current assets for 2002. Counsel stated that the petitioner “... has paid or currently is paying the proffered wage.” According to all the evidence submitted wages paid in 2003 were lower than the proffered wage, and only one earnings

statement was submitted for a part of 2004 which is insufficient to prove that the petitioner paid the beneficiary the proffered wage from the priority date,

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.