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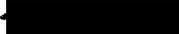


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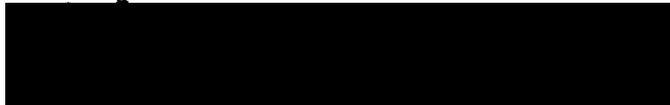
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FILE: 
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Office: VERMONT SERVICE CENTER

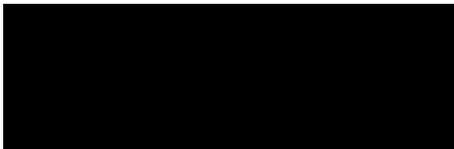
Date: **DEC 21 2005**

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 on appeal. The appeal will be dismissed.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 a statement 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$17.99 for a 35-hour week, which equals \$32,741.80 per year.

On the petition, the petitioner did not state the date it was established, the number of workers it employs, its gross annual income, or its net annual income¹ in the spaces provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1998. The petition indicates that the petitioner will employ the beneficiary in Croton Falls, New York.

With the petition counsel submitted a cover letter dated September 16, 2003. In that letter counsel stated that she was providing evidence of the petitioner's ability to pay the proffered wage. Nevertheless, no such evidence was submitted with the petition.

¹ In the space provided for net annual income the petitioner entered "N/A" without explanation.

Therefore, on January 12, 2004 the Vermont Service Center, requested, *inter alia*, additional evidence pertinent to the petitioner's ability to pay the proffered wage. The Service Center also specifically requested the petitioner's 2001 and 2002 tax returns and, if it employed the beneficiary during those years, the Form W-2 Wage and Tax Statements showing the wages it paid him. Finally, the Service Center requested that the petitioner provide the information that it had omitted from the petition.

In response, counsel submitted (1) an undated letter from the petitioner's president stating that the company declined to provide its tax returns to CIS, (2) the petitioner's 2002 wage and tax transmittals, (3) the petitioner's New York state quarterly wage reports, (4) monthly statements pertinent to the petitioner's bank account, and (5) an earnings statement produced by a payroll company.

The petitioner did not submit the requested 2001 and 2002 W-2 forms nor explain that omission. Further, the petitioner did not state the date it was established, the number of workers it employs, its gross annual income, or its net annual income.

The petitioner's 2002 transmittal shows that it had 14 employees during that year and paid them a total of \$209,398.65. The petitioner's quarterly wage reports show that the petitioner paid its employees \$40,315.52 \$51,348.05, \$79,226.50, and \$77,524.27 during the first, second, third, and fourth quarters of 2001, \$44,596.77 and \$68,542.46 \$28,788.78 during the first, second, and fourth quarters of 2002, respectively.

The payroll statement shows that during the weekending December 21, 2001 the petitioner paid the beneficiary \$388.50 for 37 hours of work at \$10.50 per hour. That statement also shows that as of that date the petitioner had paid the beneficiary a year-to-date total of \$19,288.50.

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 May 14, 2004, denied the petition.

On appeal, counsel asserts that the evidence submitted demonstrates the petitioner's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). Counsel also submits a letter, dated June 11, 2004, from the petitioner's accountant. The accountant's letter states the amount the petitioner earned in net income and the amount of its depreciation deduction for each year from 1998 to 2002, but provides no additional evidence to support those asserted numbers. The accountant adds the petitioner's net income and its depreciation deduction for each of the salient years to show an amount the accountant asserts was available to pay additional wages during those years.

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.²

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing

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.

The submission of documents showing the total amount of the petitioner's annual wage expense does not demonstrate the petitioner's ability to pay the proffered wage. Showing that the petitioner paid wages in excess of the proffered wage, or far in excess of the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states that copies of annual reports, federal tax returns, or audited financial statements must be provided to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The accountant's letter is insufficient evidence of the petitioner's net income.

Further, the implicit assertion that the petitioner's depreciation deduction should be added to its net income in determining the petitioner's ability to pay the proffered wage is unconvincing. 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.

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.

³ 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.

⁴ 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although the accountant urges that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

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 Service Center requested the 2001 and 2002 W-2 forms showing wages the petitioner paid to the beneficiary. Those forms were not provided, nor was an explanation for that omission. Under these circumstances this office will not consider the 2001 payroll statement to be reliable evidence that the petitioner employed and paid the beneficiary.

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).

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, the petitioner's year-end cash and those assets expected to be consumed or 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 \$32,741.80 per year. The priority date is April 19, 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. As was previously noted the petitioner provided no income tax returns. The petitioner

also failed to provide any annual reports or audited financial statements. The petitioner failed to provide reliable evidence pertinent to its ability to pay the proffered wage during 2001 and 2002.⁵

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 and the petition was correctly denied on that basis.

Another issue appears in the record that was not addressed in the decision of denial. In the January 12, 2004 Request for Evidence the Service Center requested copies of the petitioner's 2001 and 2002 tax returns and copies of the 2001 and 2002 W-2 forms showing wages the petitioner paid to the beneficiary. The Request for Evidence also requested that the petitioner states the date it was established, the number of workers it employs, its gross annual income, and its net annual income. The petitioner did not provide those requested documents or that requested information.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied for this additional reason. Because this issue was not raised in the decision of denial, however, it does not form the basis, even in part, for today's decision. Should the petitioner attempt to overcome today's decision on motion, however, this issue should be addressed. If, on the motion, the petitioner should opt to provide the requested documents and information, or to explain their unavailability, it should brief the issue of whether that submission should be considered a timely response to the January 12, 2004 Request for Evidence.

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.

⁵ The Request for Evidence in this matter was issued on January 12, 2004. On that date the petitioner's 2003 tax return was likely unavailable. The petitioner is therefore excused from providing evidence of its ability to pay the proffered wage during 2003 and subsequent years.