

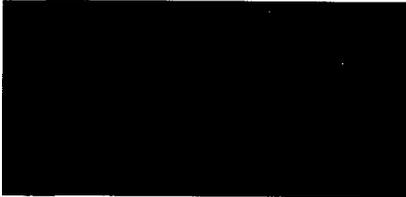
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U.S. Citizenship
and Immigration
Services

B6



FILE: WAC-03-188-53567 Office: CALIFORNIA SERVICE CENTER

Date: DEC 22 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:



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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner designs and manufactures custom cabinets. It seeks to employ the beneficiary permanently in the United States as a market analyst. 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 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 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 May 24, 2001. The proffered wage as stated on the Form ETA 750 is \$57,481.65. On the Form ETA 750B, signed by the beneficiary in May 2001, the beneficiary claimed to work for the petitioner since January 1998.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$250,000, and to employ three employees. In support of the petition, the petitioner submitted a letter from its attorney who stated that the petitioner "does not show a net profit on the business. However, [the petitioner] is a partnership. Mr. [REDACTED] [(Mr. [REDACTED] the partner/manager of day to day affairs of [the petitioner], has signed the [petition]." Counsel explained that Mr. [REDACTED] partner, [REDACTED] (Mr. [REDACTED] owns Finish [REDACTED] California, which pays Mr. [REDACTED] significant salaries in 2000, 2001, and 2002, and thus Mr. [REDACTED]' income, as a partner of the petitioner, illustrates sufficient funds to pay the proffered wage. The petitioner submitted copies of wage and tax information pertaining to Mr. [REDACTED]

Without issuing a request for additional evidence with a notice and opportunity for the petitioner to overcome the deficiencies in the evidence contained in the record of proceeding, 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 June 28, 2004, denied the petition. The director cited the failure of the petitioner to submit regulatory-prescribed evidence pertaining to itself since [REDACTED] was not the petitioner.

On appeal, the petitioner submits its partnership tax returns. Counsel asserts the following:

The petitioner . . . is a [p]artnership, 80% owned by [REDACTED], who signed the [petition], and 20% owned by [REDACTED] - who owns 100% of Finish Rite).

IRS Forms 1065 "U.S. Return of Partnership [sic] Income" are enclosed along with Schedule K's showing the partnership link. The minority partner, [REDACTED] earns over \$3 million a year on average.

Because Finish Rite files 1120S, [Mr. [REDACTED] takes a salary yearly averaging between \$300,000 to \$500,000. Even though [the petitioner] does not earn a net profit nor has significant assets, the [p]artner does have sufficient funds to pay the foreign worker. Copies of pertinent tax returns are attached.

The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$7,424	-\$5,255
Gross receipts	\$218,878	\$178,784
Salaries and wages	\$0	\$0
Cost of labor	\$0	\$49,255
Current Assets	\$5,464	\$29
Current Liabilities	\$0	\$0
Net current assets	\$5,464	\$29

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year despite counsel submitting an approval notice that the beneficiary was approved for H-1B nonimmigrant status from January 27, 2001 through January 27, 2004 and the beneficiary's representation on the Form ETA 750B. The petitioner stated in a letter that the beneficiary "had an H-1 while working for [the petitioner] but family reasons back in Germany forced him to return there from the USA this past May," and explained that he would return when he had lawful permanent residence. The record of proceeding does not contain any evidence of wages actually earned by the beneficiary while it worked for the petitioner.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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

¹ Ordinary income (loss) from trade or business activities as reported on Line 22.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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.

(Emphasis in original.) *Chi-Feng* at 537.

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.² A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a partnership'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.

² 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001 or 2002. In both years, the petitioner's net income and net current assets are less than the proffered wage, and it has not therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 or 2002.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

There are additional considerations for general partnerships, however. A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment.

The record of proceeding establishes that M [REDACTED] is an 80% general partner and [REDACTED] is a 20% general partner. [REDACTED] is an S corporation 100% owned by [REDACTED]. The record of proceeding contains both the corporate returns of Kapital Millworks and [REDACTED] individual income tax returns for 2001 and 2002. Those returns clearly show the profitability of Kapital Millworks, which grosses approximately \$3 million yearly, with a net income of approximately \$150,000 in 2002 and \$40,000 in 2001, and pays substantial compensation to its officers and employees. Mr. Barnes' individual income tax returns reflect that his adjusted gross income was \$722,499 in 2001 and \$1.1 million in 2000. The partner of the petitioner has sufficient income and assets to pay the proffered wage.

The evidence submitted establishes that the petitioner has the continuing ability to pay the proffered wage beginning on 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.