

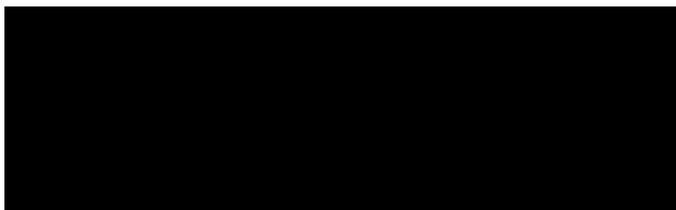
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20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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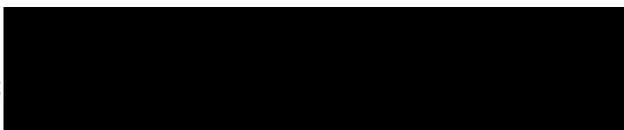
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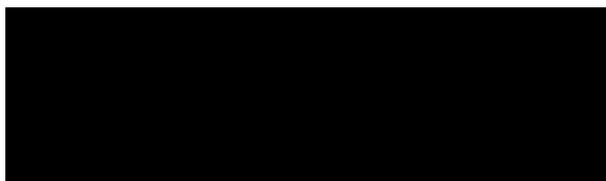
FILE: EAC 02 207 50270 Office: VERMONT SERVICE CENTER Date: **JUL 13 2005**

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

The petitioner is a landscaping contractor. It seeks to employ the beneficiary permanently in the United States as a landscape foreman. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 \$645.39 per week, which amounts to \$33,560.28 per annum. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary states that he has worked for the petitioner since March 2000.

On Part 5 of the visa petition, the petitioner claims to have been established in 1997, to currently employ three workers, to have a gross annual income of \$319,299 and a net annual income of \$45,565. In support of its ability to pay the beneficiary's proposed wage offer of \$33,560.28 per year, the petitioner initially provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It reflects that the petitioner files its federal

tax returns using a standard calendar year. It shows that the petitioner reported ordinary income of \$2,543 in 2001. Schedule L of the tax return reveals that the petitioner had \$24,014 in current assets and \$129,463 in current liabilities, resulting in -\$105,449 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 16 through 18. If a corporation's year-end 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On January 7, 2003, the director instructed the petitioner to provide additional evidence of its ability to pay the proffered salary as of the date of filing to the present. The director also requested that the petitioner submit copies of the beneficiary's Wage and Tax Statement (W-2) if it employed the beneficiary during 2001.

In response, the petitioner, through counsel, provided copies of the beneficiary's W-2 for 2001. It shows that he received \$17,079.47 in wages from the petitioner. Counsel additionally submitted a brochure illustrating the petitioner's available landscaping services.

The director reviewed the petitioner's financial data contained within its corporate tax return for 2001, as well as the wages paid to the beneficiary during the same period and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 30, 2001.

On appeal, counsel asserts that the petitioner's depreciation expense should be added back to the petitioner's net income. Counsel attaches a letter, dated August 3, 2004, from [REDACTED] CPA, [REDACTED] provides a copy of an Internal Revenue Service (IRS) publication instructing taxpayers how to depreciate their property. He additionally asserts that when the petitioner's depreciation expense of \$43,022 is added back to net income, it provides sufficient funds to pay the proffered wage.

Counsel's contention that depreciation should be added back to the petitioner's net income is not persuasive. 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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net

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

income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record shows that the petitioner paid the beneficiary \$17,079.47 in 2001, or \$16,480.81 less than the proffered wage of \$33,560.28.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. Similarly, showing that the petitioner paid wages in excess of the proffered wage. 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as noted above.

In this case, the petitioner's 2001 corporate tax return indicates that neither the petitioner's net taxable income of \$2,543, nor its net current assets of -\$105,449 was sufficient to pay the \$16,480.81 shortfall between the actual wages paid to the beneficiary and the proffered wage of \$33,560.28. As the evidence fails to establish that the petitioning company had the continuing ability to pay the proffered beginning on the visa priority date of April 30, 2001, the petition may not be approved.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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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.