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U.S. Citizenship
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Services

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FILE: EAC 03 054 51000 Office: VERMONT SERVICE CENTER Date: JUL 20 2005

IN RE: Petitioner:
Beneficiary:



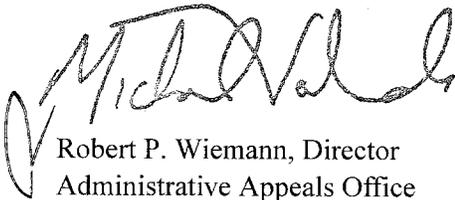
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a diamond jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a diamond setter. 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 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 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 December 8, 1998. The proffered wage as stated on the Form ETA 750 is \$18.48 per hour, which equals \$38,438.40 per year.

On the petition, the petitioner stated that it was established during 1977 and that it employs five workers. The petition states that the petitioner's gross annual income is \$566,985 and that its net annual income is \$233,370.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

¹ Those figures were subsequently discovered to be the petitioner's gross receipts and its total income, not net income, from its 2001 tax return.

In support of the petition, counsel submitted the petitioner's 1998, 1999, 2000, and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner reports taxes pursuant to the calendar year.

The 1998 return shows that during that year the petitioner reported ordinary income of \$5,800. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return shows that during that year the petitioner reported ordinary income of \$22,841. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$119,103 and current liabilities of \$102,936, which yields net current assets of \$16,167.

The 2000 return shows that during that year the petitioner reported ordinary income of \$5,413. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that during that year the petitioner reported ordinary income of \$1,976. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 10, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested annual reports and Forms W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary, if such documentation was available.

In response, counsel submitted a copy of the petitioner's 2002 income tax return. That return shows that the petitioner declared ordinary income of \$3,352 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$30,803 and current liabilities of \$144, which yields net current assets of \$30,659.

Counsel also submitted a letter, dated October 28, 2003. In that letter, counsel stated that the beneficiary has never worked for the petitioner. Counsel further states that the petitioner was able to pay the proffered wage during each of the salient years because its 1998, 1999, 2000, 2001 and 2002 current assets were \$97,507, \$132,936, \$103,878, 150,118, and 131,944, respectively.² The computation of current assets is discussed below. Counsel also emphasized the petitioner's Compensation of Officers during each of the salient years as an index of its ability to pay the proffered wage.

² In fact, the petitioner's year-end total assets, as shown on Page 1, Line E of the petitioner's tax returns for each of the salient years, equaled the numbers counsel stated as its current assets. The difference between total assets and current assets is discussed below.

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 February 9, 2004, denied the petition.

On appeal, counsel asserts the petitioner's current liabilities as stated in the decision of denial were incorrect.³ Counsel asserts that total current liabilities are shown on Line 18 of the Schedule L. The computation of current liabilities is discussed below. Counsel further urged that the petitioner's total assets should be compared to its current liabilities in calculating the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The reason that the petitioner's total assets are not properly included in the determination of the petitioner's ability to pay the proffered wage is discussed below.⁴

Counsel also emphasizes the petitioner's depreciation deductions, loans to shareholders, and compensation to officers as funds available to pay the proffered wage. Counsel urges that various combinations⁵ of the sums of those figures, along with the petitioner's ordinary income, show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Finally, counsel notes that the petitioner has been in business since 1977 and met its financial obligations since that time.

Counsel's assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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 value lost as equipment and buildings 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.

³ Counsel asserts that an accountant told him that Line 18 of the Schedule L, Other Current Liabilities, equals the petitioner's total current liabilities. Counsel provided no evidence in support of that assertion and no authority for the accountant's alleged statement. Counsel is reminded that his statements on appeal are not evidence and are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

⁴ On appeal, counsel correctly referred to the petitioner's total assets, rather than mislabeling them the petitioner's current assets.

⁵ Counsel apparently urges each of the various combinations of figures in the alternative, offering no justification for the use of any one of them over another as an index of the petitioner's ability to pay the proffered wage during a given year.

Counsel urges that the petitioner's Form 1120S, Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. Counsel provides no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Finally, counsel states that the petitioner has always paid its just debts and obligations in the past, though he provides no evidence in support of that assertion.⁶ Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate, with copies of annual reports, federal tax returns, or audited financial statements, that it has had the continuing ability to pay the proffered wage beginning on the priority date. That the petitioner paid its other expenses does not address its ability to pay the proffered wage.

Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁷ or otherwise increased its net income,⁸ 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. On a Form 1120S, U.S. Income Tax Return for an S Corporation, that remainder is the petitioner's Line 21, Ordinary Income.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded 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 Citizenship and Immigration Services (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.

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 petitioner did not establish that it 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 that 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);

⁶ Counsel is again reminded that his assertions on appeal are not evidence and are entitled to no evidentiary weight. *INS v. Phinpathya*, *supra*; *Matter of Ramirez-Sanchez*, *supra*.

⁷ 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.

⁸ The petitioner might be able to demonstrate that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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), *affd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, *supra*, 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 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, those expected to be converted into cash within a year, may be considered. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d).

A petitioner's Loans to Shareholders, listed at Line 7 on Schedule L, are not a current asset. The tax return contains no indication that they will be repaid within a year. No indication exists, therefore, that they represent a fund available to pay wages.

Even the petitioner's current assets, however, cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities due to be paid within a year. A corporation's year-end current liabilities are shown on lines 15(d) through 18(d).

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. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

This office emphasizes, however, that because of the nature of net current assets, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. A petitioner's net income may not correctly be added to its net current assets in determining the petitioner's ability to pay the proffered wage.

The proffered wage is \$38,438.40 per year. The priority date is December 8, 1998.

During 1998 the petitioner reported ordinary income of \$5,800. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets.

The petitioner has submitted no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner reported ordinary income of \$22,841. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$16,167. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner reported ordinary income of \$5,413. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner reported ordinary income of \$1,976. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner reported ordinary income of \$3,352. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$30,659. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 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.

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.