

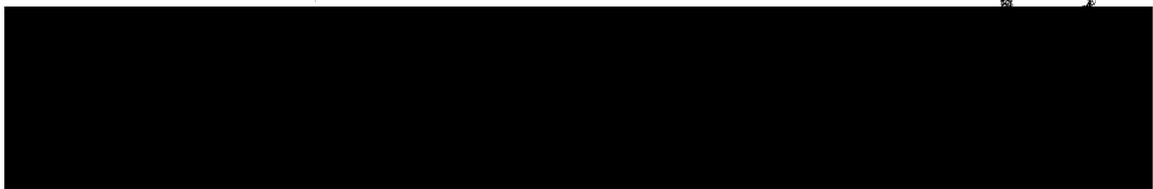
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U.S. Citizenship  
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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 13 2005  
SRC 03 067 50169

IN RE: Petitioner: [redacted]  
Beneficiary [redacted]

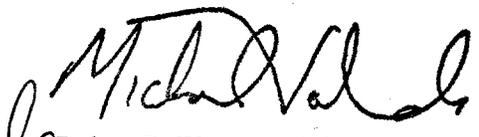
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, Texas 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a kitchen manager. 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.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.80 per hour, which equals \$26,624 per year.

On the petition, the petitioner stated that it was established on October 26, 1993 and that it employs approximately 15 workers. The petition states that the petitioner's gross annual income is \$726,500 and that its net annual income is \$276. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1993. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Franklin, Tennessee.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes pursuant to the calendar year. During 2001 the petitioner declared ordinary income of \$276. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a copy of a monthly statement of a bank account belonging to the beneficiary. The proposition that bank statement was submitted to support is unknown to this office.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on September 16, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center specifically requested (1) a copy of the petitioner's 2002 tax return, (2) copies of the Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 2001 and 2002, (3) copies of the petitioner's bank statements from April 2001 to "the present," and (4) any additional documents that support the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, 2001 and 2002 W-2 forms showing that the petitioner paid the beneficiary \$12,480 during each of those years, and the requested bank accounts.

The petitioner's 2002 tax return shows that the petitioner declared a loss of \$29,872 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a 2001 W-2 form showing wages the petitioner paid to its owner, [REDACTED] the 2001 Form 1040 U.S. Individual Income Tax Return of [REDACTED] and his wife, and copies of unpublished decisions of this office.

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 January 26, 2004, denied the petition. In that decision the director noted that the petitioner had recently filed four other petitions, of which two had been approved and two of which had been denied. The director noted that, in order to demonstrate the ability to pay the proffered wage in the instant case, the petitioner is also obliged to show the ability to pay the proffered wage in the two recently approved petitions.

On appeal, counsel argues that the compensation the petitioner paid to its owner, its net current assets, and the cash shown on its bank statements shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also asserted that the director had improperly considered the other petitions recently filed by the petitioner.

Counsel urges that the petitioner's Line 7, Compensation of Officers, and/or the wages it paid to its owner, could have been reduced as necessary to pay the proffered wage. Counsel provides no evidence, however, to support the supposition that the owner was able and willing to forego compensation, in whole or in part, to pay the proffered wage.

In a brief filed to supplement the appeal counsel again stated that the petitioner's owner was able to forego a portion of the compensation paid to him by the petitioner in order to pay the proffered wage. Counsel specifically stated that the petitioner's owner could have declined to accept \$25,000 of the \$50,000 the petitioner paid to him during 2001, for instance. The record contains no evidence, however, to demonstrate

that the petitioner's owner is willing and able to forego compensation, in whole or in part. The compensation that the petitioner paid to its owner has not, therefore, been shown to be available to pay wages.<sup>1</sup>

Counsel also urged that, in addition to the amounts previously cited as showing the petitioner's ability to pay the proffered wage, the petitioner's depreciation deduction should be considered in the determination of that ability. Counsel cites unpublished decisions of this office for support of the proposition that the amount of the petitioner's depreciation deductions and its bank balances should be considered.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel also cited *Davila-Bardales v. INS*, 27 F.3d 1 (1<sup>st</sup> Cir. 1994) for the proposition that CIS may not arbitrarily decide contemporary cases with similar facts in contradictory ways, absent an explanation. To the extent that our decision today may differ from previous but recent decisions in its treatment of bank balances and depreciation deductions, then, this office is obliged to explain its current policy.

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.<sup>2</sup> 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.

Counsel's argument 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 in implying 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.

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<sup>1</sup> In addition, as was noted above, the petitioner has had two other employment-based petitions approved recently. Even if counsel demonstrated that the petitioner's owner was willing and able to forego some or all of his compensation, counsel would still be obliged to show that the amount the petitioner's owner is willing and able to forego would be sufficient to pay the wage proffered in those other two cases, as well as the wage proffered in the instant case.

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

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.

Counsel is correct that the beneficiary's net current assets may be considered in the determination of the ability to pay the proffered wage. During both of the years for which counsel submitted tax returns, however, the petitioner had negative net current assets.

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 established that it employed the beneficiary during 2001 and 2002 and paid him \$12,480 during both of those years. That amount is less than the annual amount of the proffered wage.

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); *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net 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. 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 \$26,624 per year. The priority date is April 30, 2001.

Having demonstrated that it paid the beneficiary \$12,480 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$14,144 balance of the proffered wage during that year. During 2001 petitioner declared ordinary income of \$276. 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 demonstrate 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 demonstrated the ability to pay the balance of the proffered wage during 2001.

Having demonstrated that it paid the beneficiary \$12,480 during 2002 the petitioner is obliged to demonstrate the ability to pay the \$14,144 balance of the proffered wage during that year. During 2002 petitioner declared a loss as its ordinary income. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage during that year out of its profits. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate 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 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the entire 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.

Counsel argues that the director incorrectly considered other alien worker petitions filed by the instant petitioner. In order to prove the ability to pay the proffered wage in the instant case, the petitioner would also be obliged to demonstrate the ability to pay the wages of the beneficiaries of any pending or recently approved petitions. The proffered wage in the instant case is \$26,624. If the beneficiary has no other cases pending, but has recently had two other petitions approved, and the proffered wage in those other cases was the same, then in order to show that the petition is approvable, the petitioner would be obliged to demonstrate the ability to pay three times the proffered wage in this case, or \$79,872 in additional wages.

Thus, even if the petitioner had demonstrated the ability to pay the proffered wage in the instant case, given the assertion that the petitioner has other recently approved petitions, this office would remand for evidence of the amount of the wages proffered in the other cases, and of the petitioner's continuing ability to pay the aggregated proffered wages of the instant beneficiary, the wages of the beneficiaries of recently approved cases, and wages of the beneficiaries of any pending cases.

Because the petitioner has failed to demonstrate the ability to pay the proffered wage of even the instant beneficiary, however, without reference to additional beneficiaries, this office need not dwell on the wages due the beneficiaries of other petitions and the petitioner's ability to pay them, and no such remand is necessary.

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.