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MAY 03 2005



FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC-04-251-50603

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the Vermont Service Center, and, it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty salon. It has three employees. Petitioner seeks to permanently employ the beneficiary in the United States as a hair stylist according to the petitioner's alien labor certification at a prevailing wage of \$17.98 per hour or \$37,398.40 calculated annually. As required by statute, an approved Form ETA 750, entitled Application for Alien Employment Certification (the "Alien Employment Certification") accompanied the petition. The priority date of the Alien Employment Certification is April 30, 2001. It is the date it was accepted for processing by the U.S. Department of Labor. In her decision, the director requested proof that the beneficiary was licensed to practice cosmetology in the State of New York prior to the priority date. Upon review, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

In support of the appeal and to the request for proof of licensure, petitioner's submits evidence of its ability to pay the proffered wage as follows: a letter affirming that the beneficiary was employed by the petitioner since January 2001; the petitioner's Form 1120-A federal tax returns for 2001, 2002 and 2003; various New York State and City tax returns¹; the beneficiary's W-2 Wage and Tax Statements for years 2001, 2002, and 2003; a letter from The Bank of East Asia (U.S.A.) N.A. affirming as of the date of the letter that the beneficiary was maintaining a checking and savings account at the institution; the beneficiary's New York State license to practice cosmetology dated 02/12/2001 to 07/19/2005; and, an excerpt from an accounting handbook on the depreciation deduction and working capital definition.

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 petitioner is petitioning for the permanent employment of a skilled worker.

The applicable regulation at Title 8, Code of Federal Regulations, Part 204.5(g)(2) states in pertinent part the following:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant who 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 annual reports, federal tax returns, or audited financial reports.

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. That date is called the priority date. The proffered wage as stated on the Form ETA 750 is

¹ New York State Department of Taxation and Finance Return Form CT-4 for years 2001 and 2002; New York State Department of Taxation and Finance Return Form CT-3M/4M for years 2001 and 2002; New York City Corporate Tax Return 4S for years 2001 and 2002; New York State and Local Quarterly Sales and Use Tax Return Form ST-100 for tax periods 03/01/2003 to 02/29/2004, 3/01/2004 to 05/31/2004, 06/01/2004 to 08/31/2004; and, New York State Tax Form NYS-45 for January to March 31, 2004.

\$17.98 per hour or \$37,398.40 per year. On the Form ETA 750B signed by the beneficiary, the beneficiary stated she worked for the petitioner since January 2001.

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. As demonstrated below, the petitioner did not employ the beneficiary at a salary equal to or greater than the proffered wage stated in the Alien Employment Certification for two out of three years for which evidence was provided.

Alternately, 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. *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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service, now called U. S. 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 on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

Reviewing the petitioner's federal tax returns, the petitioner stated its taxable income as \$16,226.00 in 2001, \$3,543.00 in 2002, and, \$14,047.00² in 2003. Since the petitioner employed the beneficiary during those tax years, the beneficiary's wages added to the petitioner's net income for 2001 through 2003 may be used to determine petitioner's ability to pay the proffered wage. The beneficiary's wages were \$21,930.00 in 2001, \$22,620.00 in 2002, and \$22,360.00 in 2003. In 2001, the petitioner made sufficient taxable income to pay beneficiary's proffered wage of \$37,398.40. In 2002 the deficiency was \$11,235.40, and in 2003, the shortfall was \$991.40.

For 2002 and 2003, Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Counsel asserts that depreciation is a component of working capital to be added to the petitioner's taxable income. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120-A, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention. In a similar case, the court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) 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

² The director made an inadvertent error in determining the taxable income from petitioner's business for 2003.

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 537.

Counsel for petitioner points out that the beauty salon as a going concern is investing in itself through the purchase of tangible assets that were \$12,759.00 in 2002 and \$4,420.00 in 2003.³ In explanation of the decline in petitioner's taxable income for tax years 2002 and 2003, counsel for petitioner in his brief explains that in those two years the beauty salon business purchased tangible assets resulting in increased depreciation deductions for tax years 2002 and 2003.

Looking at the petitioner's burden of proving its ability to pay in another way, in 2001 petitioner's taxable income plus the wage paid to the beneficiary equaled \$38,156.00 that was over the amount of the proffered wage of \$37,398.40. After two years of purchases of tangible assets for its business resulting in a depreciation deduction in tax years 2002 and 2003, petitioner's taxable income plus the wage paid to the beneficiary for those two years were under the amount of the proffered wage.

Counsel asserts that the petitioner could have paid the proffered wage during the pertinent years. The petitioner's net income fell below the necessary amount because of the purchase of, and subsequent depreciation deductions for, tangible assets during the years 2002 and 2003, respectively. The AAO does not find counsel's contention persuasive. First, in his brief submitted on appeal counsel refers to these purchases as part of the "normal process of doing business" and therefore, such purchases cannot be characterized as unusual expenditures. Second, funds already expended cannot normally be shown to have been available to pay the wage. Finally, as stated above, CIS relies on the petitioner's net income without consideration of any depreciation deductions.

It is clear that the above case law is against counsel's contention that depreciation should either be ignored or not deducted from petitioner's gross income. The director relied upon taxable (i.e., net income) as stated in petitioner's income tax returns to determine that petitioner did not have the continuing ability to pay the proffered wage for years 2002 and 2003.

Based upon the above discussion, the petitioner has not met its burden of proof to show it does have the continuing ability to pay the proffered wage. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ Department of the Treasury Internal Revenue Service Form 4562 "Depreciation and Amortization (Including Information on Listed Property)" filed by petitioner for tax years 2002 and 2003.