

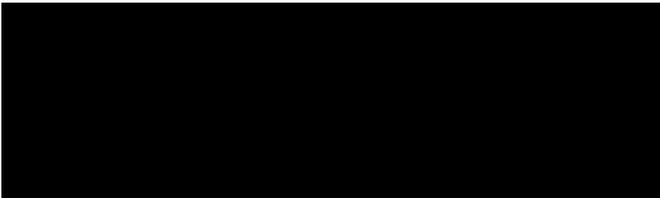
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U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services



Ble

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAY 25 2005**
WAC 03 035 55102

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 Director, California 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 care home. It seeks to employ the beneficiary permanently in the United States as a superintendent. 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 September 17, 1997. The proffered wage as stated on the Form ETA 750 is \$24,720 per year.

On the petition, the petitioner stated that it was established during 1991 and that it employs three workers. The petition states that the petitioner's gross annual income is \$162,093 but the petitioner did not state its net annual income in the space provided. 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 Northridge, California.

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

The 1998 return shows that the petitioner declared a loss of \$5,140 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner current liabilities exceeded its current assets.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,606 during that year. The corresponding Schedule L shows that at the end of that year the petitioner current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$296 during that year. The corresponding Schedule L shows that at the end of that year the petitioner 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 California Service Center, on January 22, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's 1997, 2001, and 2002 tax returns.

In response, counsel submitted IRS printouts showing figures from the petitioner's 1997 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Counsel stated that the petitioner's 2002 return had not yet been filed. The 1997 printout shows that the petitioner declared a loss of \$5,188 as its taxable income before net operating loss deduction and special deductions during that year. The 2001 printout shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$0. Those printouts contain no figures from which the petitioner's end-of-year net current assets can be calculated.

On June 24, 2003 the California Service Center issued another Request for Evidence in this matter. The Service Center requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters and copies of the petitioner's Form W-2 Wage and Tax Statements and W-3 transmittals for each year from 1998 through 2002.

In response, counsel submitted the petitioner's Form DE-6 quarterly reports for the last two quarters of 2002 and the first two quarters of 2003 and its W-2 and W-3 forms for 1998, 1999, 2000, 2001, and 2002.

The quarterly reports show that the petitioner had one employee during each of those quarters except the second quarter of 2003, when it had two employees. During each of those quarters the petitioner paid \$5,700 to one of its employees. During the second quarter of 2003 the petitioner paid \$1,000 to its other employee.

The W-2 forms show that the petitioner employed five workers during 1998, seven workers during 1999, four workers during 2000, four workers during 2001, and three workers during 2002. The W-3 transmittals show that the petitioner paid total wages of \$14,700, \$38,850, \$21,000, and \$38,430 during those years, respectively. None of the documentation submitted shows that the petitioner employed the beneficiary.

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 October 25, 2003, denied the petition.

On appeal, counsel asserts that the evidence demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date, emphasizing the amount of the petitioner's gross income and its various expenses in arguing that the petitioner could have curtailed expenses sufficiently to pay the proffered wage. Counsel also characterizes the petitioner's depreciation deduction as a "phantom expense," and implies that it represents a fund available to pay additional wages.

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. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income,² 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. That remainder is the petitioner's net income. 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.

26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses, states, in pertinent part,

(a) In general

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,

In claiming the various expenses shown on its income tax return, the petitioner asserted that those expenses were necessary to its business. Counsel now asserts that they could have been reduced in an amount sufficient to pay the proffered wage, but provides no evidence in support of that assertion. Having claimed those expenses as necessary, the petitioner shall not now prevail by asserting that it could have obviated them.

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 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.

¹ 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.

² The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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.

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); *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).

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 \$24,720. The priority date is September 17, 1997.

During 1997 the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its profits. The petitioner submitted no evidence from which its net current assets can be calculated. The petitioner has not, therefore, shown the ability to pay the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 1997 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1997.

During 1998 the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. 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 declared taxable income before net operating loss deduction and special deductions of \$1,606. 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 to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. 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 declared taxable income before net operating loss deduction and special deductions of \$296. 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 to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. 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 declared taxable income before net operating loss deduction and special deductions of \$0. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its profits. The petitioner submitted no evidence from which its net current assets can be calculated. The petitioner has not, therefore, shown the ability to pay 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.

The petitioner submitted no evidence pertinent to its ability to pay the proffered wage during 2002. In response to a specific request for the petitioner's 2002 tax return, in the Request for Evidence of January 22, 2003, counsel indicated that the return had not yet been filed. Although that return should have been filed by the time counsel submitted the appeal in this case, on November 26, 2003, counsel neither provided that return nor an explanation for its absence. The petitioner has failed to demonstrate 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 1997, 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.