



U.S. Citizenship
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Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: NOV 10 2005

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:

[REDACTED]

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, Nebraska 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 custom machine designer. It seeks to employ the beneficiary permanently in the United States as a machine setter. 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27,000 per year.

On the petition, the petitioner stated that it was established during 1993 and that it employs eight workers. The petition states that the petitioner's gross annual income is \$307,948.08 and that its net annual income is \$10,421.18. On the Form ETA 750B, signed by the beneficiary on April 11, 2001, 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 [REDACTED]

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation and unaudited financial statements for 2002.

The tax returns show that the petitioner is a corporation, that it incorporated on May 17, 1993, and that it reports taxes based on accrual and pursuant to the calendar year.

The 2001 tax return shows that the petitioner declared a loss of \$167,807 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.

The 2002 tax return shows that the petitioner declared a loss of \$2,244 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.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on September 4, 2003, requested, *inter alia*, additional evidence pertinent to that ability.

In response, counsel submitted a letter, dated November 24, 2003, from the petitioner's accountant. That letter suggests that the petitioner's ordinary income should be adjusted by adding the amount of its depreciation deduction and the amount of its "bad debt" to yield an "Adjusted Income" to use as an index of the petitioner's ability to pay additional wages. Initially, this office notes that, even pursuant to the accountant's figures and adjustments, the petitioner still suffered a loss of \$101,955 during 2001.

The accountant also states that the petitioner had bad years during 2000 and 2001 because of the poor economic conditions and the incidents of September 11, 2001. The accountant provided no evidence, however, that the petitioner's industry in Wisconsin was substantially affected by the events of September 11, 2001. Further, this office observes that those incidents occurred late during 2001. They should not have affected the petitioner's 2001 performance much and could not have affected the petitioner's 2000 performance at all.

Further, the petitioner's accountant submitted no evidence that the petitioner's losses during 2001 and 2002 were related to a recession in the general economy and that the petitioner's performance would otherwise have been better. The accountant submitted no evidence, for instance, that the petitioner's performance prior to 2000 was superior to ensuing years.

Finally, this office notes that the accountant used the petitioner's "Profit before adjustments" as stated on the accountant's analysis does not correspond with its ordinary income, but apparently with figures taken from its financial statements. The petitioner's unaudited financial statements are not reliable evidence for reasons detailed below.

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 May 21, 2004, denied the petition. The director correctly noted that the record as then constituted did not indicate that the beneficiary had ever worked for the petitioner.

On appeal, counsel submits (1) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary \$12,480 during 2001, \$12,357 during 2001, and \$12,566.52 during 2003, (3) the petitioner's unaudited

financial statements for October through December of 2001, all of 2002, and for October through December 2003, and (4) a letter, dated June 17, 2004, from an accounting service.

The petitioner's 2003 tax return shows that the petitioner declared ordinary income of \$21,138 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The June 17, 2004 letter observes that the beneficiary did work for the petitioner during 2001, 2002, and 2003. That letter further urges adjustment of the petitioner's net income during 2001 and 2002 by the amounts of its depreciation deductions, the increases in its accounts payable, the increase in the petitioner's trade receivables, and the cash payments for acquisition of equipment, to yield a "Net cash flow." The accountant further urges consideration of the ratio between the petitioner's plant assets and its long-term liabilities as an index of its long-term stability. The accountant also urges consideration of the petitioner's unaudited financial statements.

Reliance on the unaudited financial statements in the record is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. No figures from the petitioner's unaudited financial statements will be considered in the determination of the petitioner's ability to pay the proffered wage.

The long-term stability of the petitioner is not directly at issue. The petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The ratio of the petitioner's plant assets to its long-term liabilities is not directly related to its ability to pay additional wages, and is not a consideration in today's decision.

The petitioner's tax returns were prepared pursuant to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. This office would, in the alternative, have accepted tax returns prepared pursuant to cash convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not pursuant to the accountant's adjustments.

The assertion by the accountant and counsel 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 tangible 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.

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 establish that it employed the beneficiary during 2001, 2002, and 2003, and paid him \$12,480, \$12,357, and \$12,566.52 during those years, respectively. The petitioner is obliged to show the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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 \$27,000 per year. The priority date is April 30, 2001.

During 2001 the petitioner paid the beneficiary \$12,480. The petitioner is obliged to show the ability to pay the remaining \$14,520 balance of the proffered wage. During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay the proffered wage out of its profits during that year. 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 demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary \$12,357. The petitioner is obliged to show the ability to pay the remaining \$14,643 balance of the proffered wage. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay the proffered wage out of its profits during that year. 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 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$12,566.52. The petitioner is obliged to show the ability to pay the remaining \$14,433.48 balance of the proffered wage. During 2003 the petitioner declared ordinary income of \$21,138. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the 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 and the petition was correctly denied on that ground.

An additional issue exists in this case that was not previously addressed. In the Form ETA 750, Part B, the beneficiary, who signed that form on April 11, 2001, did not list employment for the petitioner in his work history.¹ On appeal, counsel submits W-2 forms purporting to show that the petitioner employed the beneficiary during 2001, 2002, and 2003. These facts might be reconciled if the petitioner hired the beneficiary sometime during 2001 but after April 11 of that year. The three W-2 forms, however, all show roughly the same annual income, although the petitioner presumably employed the beneficiary during all of 2002 and 2003. This discrepancy has never previously been raised, and the petitioner has not been accorded

¹ The instructions on that form request that a beneficiary, "List all jobs held during the last three years. Also, list any other jobs related to [the proffered position.] If the beneficiary were working for the petitioner when he signed that form he should, for both reasons, have listed his employment for the petitioner on that form.

an opportunity to address it. Therefore, it forms no part of the basis for today's decision. If the petitioner seeks to overcome the basis of today's decision on a motion, however, it should also address this apparent discrepancy.

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.