



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

OCT 26 2005

SRC 03 138 52521

IN RE:

Petitioner:

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, 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 food store. It seeks to employ the beneficiary permanently in the United States as a 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 statement.

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 February 8, 2002. The proffered wage as stated on the Form ETA 750 is \$21.71 per hour, which equals \$45,156.80 per year.

On the petition, the petitioner stated that it was established during 1999. The petitioner did not state the number of workers it employs in the space provided on the petition for that purpose. The petitioner also failed to state figures for its gross annual income and net annual income in the spaces 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 Lantana, Florida.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's ability to pay additional wages. Because no evidence was submitted to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Texas Service Center, on August 31, 2004, requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the

continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the 2002 and 2003 Form W-2 Wage and Tax Statements issued to each of the petitioner's employees and copies of the petitioner's Form 941 Quarterly Federal Tax Returns for all four quarters of 2004.

In response, counsel submitted (1) copies of the petitioner's 2000, 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) an unaudited income statement for 2002, (3) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002, (4) a copy of the petitioner's 2002 Form 940-EZ transmittal, (5) copies of 2001 W-2 forms the petitioner issued to two of its employees, (6) partially legible copies of IRS printouts of amounts from the petitioner's 2000 and 2001 tax returns, (7) copies of monthly statements pertinent to the petitioner's bank account, (8) a financial analysis, dated November 22, 2004, prepared by the petitioner's accountant, and (9) counsel's cover letter, dated October 6, 2004.

The petitioner did not submit the Form 941 Quarterly returns for 2004, as the Service Center had specifically requested in its Request for Evidence. The petitioner did not submit copies of any 2002 or 2003 W-2 forms, although the Service Center specifically requested them in its Request for Evidence.

The petitioner's tax returns show that it is a corporation, that it incorporated on November 5, 1999, and that it reports taxes pursuant to the calendar year.

The 2000 income tax return shows that the petitioner declared ordinary income of \$22,114 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$36,184 and current liabilities of \$1,280, which yields net current assets of \$34,904. Because the priority date is February 8, 2002, however, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 income tax return shows that the petitioner declared ordinary income of \$23,934 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$43,110 and current liabilities of \$1,186, which yields net current assets of \$41,924. Again, however, because the priority date falls within 2002, evidence pertinent to the petitioner's finances during 2001 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2002 income tax return shows that the petitioner declared ordinary income of \$42,112 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities. That return also states that it is the petitioner's final return, indicating that either the petitioner had ceased operations or had changed its form of ownership such that it did not expect to file a Form 1120S, U.S. Income Tax Return for an S Corporation during 2003.

The petitioner's 2002 quarterly returns show that it paid out no wages during the first, third, and fourth quarters of that year. The return for the second quarter shows that the petitioner paid total wages of \$3,000 during that quarter. The petitioner's 2002 Form 940-EZ confirms that the petitioner paid total wages of \$3,000 during that year.

The 2001 W-2 forms submitted show that the petitioner paid two employees \$1,000 each for work performed during 2001. Whether the petitioner had any additional employees during that year is unknown to this office.

The accountant's November 22, 2004 financial analysis purports to determine the funds the petitioner had available to pay additional wages. The accountant first defined net income as including the petitioner's depreciation and amortization deductions, stating that the total "more correctly restates [sic] the cash flow available to meet the proffered wage." The accountant then determines the petitioner's net current assets and states that those two totals, net income, as defined by the accountant, and net current assets, may be added together to determine the total amount available to the petitioner during a given year to pay additional wages.

Counsel's cover letter stated "Due to Presidential Disaster Declaration the Corporate Income Tax Return for the year 2003 is due by December 31, 2004."

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 December 14, 2004, denied the petition.

On appeal, counsel submits additional copies of the evidence previously submitted. In argument, counsel relies upon the accountant's financial analysis to demonstrate that the financial evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The accountant's analysis relies, in part, on adding the amounts of the petitioner's depreciation and amortization deductions to its net income. The accountant states that the adjusted figure is a better index of the funds available to pay the proffered wage.

The accountant 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.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists to permit

the petitioner to add the amount it claimed as amortization expense back into its profits or to permit its reallocation to other years.

The accountant also urges that the petitioner's net income and its net current assets should be added together to show the funds available to pay the proffered wage. An analysis of the computation of net current assets and the use of that statistic as an index of a petitioner's ability to pay the proffered wage appears below.

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.¹ 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 reliance on unaudited financial records is similarly 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.

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 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,

¹ 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.

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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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.

Because of the nature of net current assets, however, 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 2002 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2002 out of its income. Net current assets at the end of 2002 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. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$45,156.80 per year. The priority date is February 8, 2002.

During 2002 the petitioner declared ordinary income of \$42,112. That amount is insufficient to pay the proffered wage. The petitioner finished the year with no net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner 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.

The Request for Evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date was issued on August 31, 2004. On that date, the petitioner's 2003 tax return should, ordinarily, have been available. Counsel stated, in his letter of October 6, 2004, that the due date of that return had been

delayed by a presidential declaration. Counsel, however, provided no evidence in support of that assertion. Moreover doubt exists as to the petitioner's continued existence, as will be discussed below.

The assertions of counsel on appeal are not evidence and thus 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); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. The petitioner's failure to provide the requested evidence is not excused by counsel's unsupported assertion. The petitioner failed to demonstrate 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 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that ground.

Additional issues exist in this case that were not noted in the decision of denial. The petitioner's 2002 tax return stated that it was the petitioner's final return. This could mean that the petitioner has ceased operations or it could mean that the petitioner has changed its mode of ownership.

If the petitioner has ceased operations, it is no longer a U.S. employer within the meaning of 8 C.F.R. §204.5(l), and the petition may not be approved. If the petitioner has changed its mode of ownership, then the substituted petitioner, the new entity, must show that it is entitled to rely on the Form ETA 750 approved for use by the original petitioner. In order to rely on that approved Form ETA 750 the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

Further, the petitioner failed to submit its 2002 and 2003 W-2 forms and its Form 941 Quarterly returns for 2004, although the Service Center specifically requested them in its Request for Evidence. The petitioner failed to provide any explanation of those omissions. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional ground.

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.