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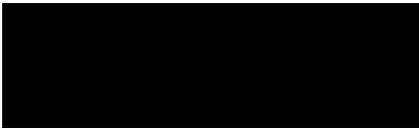
Date: SEP 20 2005

IN RE: Petitioner:  
Beneficiary



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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a car/truck repair business. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits 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 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 regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 3, 1999. The proffered wage as stated on the Form ETA 750 is \$21.01 per hour (\$43,700.80 per year). The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 1999, the beneficiary's proof of wages for 1999, and, copies of documentation concerning the beneficiary's qualifications.

- In 1999, the Form 1120 stated taxable income of \$9,109.00.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on May 22, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$43,700.80 as of May 3, 1999, the date of filing and continuing to the present.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel did not submit additional documentation. Counsel in a letter of response asserted that the beneficiary "... had filled the position for the past five years, pre-dating the filing for Alien Employment Certification in 1999." There was no evidence submitted of the beneficiary's wages during that period. Counsel also contended that the petitioner demonstrated the ability to pay through its deduction for depreciation of \$1,651.00 that according to counsel was only a "paper loss" on the return, through its retained earnings found on that tax return that amounted to \$63,898.00 by end of year 1999 and, by the value of its inventories. Counsel then continued through that tax return pointing out an item for loans to shareholders.

Counsel contended here as follows:

The next item, which was not referred to is loans to shareholders, as also shown on Page Four of the tax return. Please note that loans to shareholders have decreased ... Obviously, the corporation has paid back loans to shareholders, hence reducing the amount of the loan and paying that money off from income ...

The director denied the petition on March 2, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

After a request from the AAO made to counsel on August 15, 2005 directing attention to counsel's prior intent to submit a brief and/or evidence in the matter, counsel submits additional evidence which is five of beneficiary's W-2 Wage and Tax Statements: for 1999 in the amount of \$10,400.00; for 2000 in the amount of \$11,500.00; for 2001 in the amount of \$12,000.00; for 2002 in the amount of \$25,110.00; and, for 2003 in the amount of \$36,750.00.

Counsel also submitted four cancelled checks paid to the order of the beneficiary in 2004, nine pages of check and deposits banking transactions without explanation, and tax return Forms 1120 for tax years 2000 and 2001 as well as a state tax return.

- In 2000, the Form 1120 stated taxable income of \$3,343.00.
- In 2001, the Form 1120 stated taxable income loss of <\$1,852.00><sup>1</sup>.

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<sup>1</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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.

Evidence was submitted to show that the petitioner employed the beneficiary. As already stated beneficiary's W-2 Wage and Tax Statement demonstrated the following wage payments: 1999 in the amount of \$10,400.00; for 2000 in the amount of \$11,500.00; for 2001 in the amount of \$12,000.00; for 2002 in the amount of \$25,110.00; and, for 2003 in the amount of \$36,750.00. Since the proffered wage as stated on the Form ETA 750 is 43,700.80.00 per year, the petitioner has not paid the proffered wage for the years examined from the priority date.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

- In 1999, the Form 1120 stated taxable income of \$9,109.00. The beneficiary's W-2 Wage and Tax Statement stated in year 1999 wages in the amount of \$10,400.00. Since the proffered wage is \$43,700.80 per year, the sum of the taxable income and wages paid is less than the proffered wage.
- In 2000, the Form 1120 stated taxable income of \$3,343.00. The beneficiary's W-2 Wage and Tax Statement stated in year 2000 wages in the amount of \$11,500.00. Since the proffered wage is \$43,700.80 per year, the sum of the taxable income and wages paid is less than the proffered wage.
- In 2001, the Form 1120 stated taxable income loss of <\$1,852.00>. The beneficiary's W-2 Wage and Tax Statement stated in year 2001 wages in the amount of \$12,000.00. Since the proffered wage is \$43,700.80 per year, the sum of the taxable income and wages paid is less than the proffered wage.

There were no tax returns submitted for years 2002 or 2003. The wages paid to the beneficiary were less than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient

pay the proffered wage at any time between the years 1999 through 2001 for which petitioner's tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the three Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120 return stated current assets of \$55,936.00 and \$37,089.00 in current liabilities. Therefore, the petitioner had \$18,847.00 in net current assets for 2001. Since the proffered wage was \$43,700.80 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of \$41,947.00 and \$21,257.00 in current liabilities. Therefore, the petitioner had a \$20,690.00 in net current assets for 2000. Since the proffered wage was \$43,700.80 per year, this sum is less than the proffered wage.
- In 1999, petitioner's Form 1120 return stated current assets of a \$25,327.00 and \$15,152.00 in current liabilities. Therefore, the petitioner had a \$10,175.00 in net current assets for 1999. Since the proffered wage was \$43,700.80 per year, this sum is less than the proffered wage.

Therefore, for the period 1999 through 2001 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. The common elements of this additive calculation are, according to counsel, the depreciation deduction taken by the petitioner viewed as an asset, retained earnings, the value of inventories available to produce future income, and, loans to shareholders. Counsel also pointed to the wages already received by the beneficiary as evidence of the ability to pay, but as was examined above, none of the disclosed yearly wages equated to the proffered wage alone or in combination with the petitioner's taxable yearly income. It is unclear from counsel's submission of the bank statements if he is asserting that monies evidenced in petitioner's bank account is also evidence of the ability to pay, or, if the nine pages of statements were offered for another purpose. No cover letter to explain this contention or brief was submitted with the additional evidence upon appeal. Counsel cites no legal precedent for the assertions mentioned above, and, according to regulation,<sup>3</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>3</sup> 8 C.F.R. § 204.5(g)(2).

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns mentioned above to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. 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 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.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel offers the retained earnings of the corporation as evidence of the ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, a clear and convincing index of a company's ability to pay additional wages.

Despite counsel's unsupported assertions, loans to shareholder and/or their "draw down" proceeds, or liabilities for that matter, cannot be evidence of the ability to pay by their very nature. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The fact that the shareholders reduced their personal liabilities for debt owed to the petitioner is not relevant to the matter at hand, that is the ability of the petitioner from its taxable income of net current assets to pay the proffered wage.

The value of inventories owned by the petitioner and their ability available to produce future income cannot be evidence of the ability to pay. Counsel maintains that the inventories' potential to increase the petitioner's

revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. Insofar as the revenue generated is expressed ultimately on the tax returns as taxable income, counsel is attempting to duplicate the petitioner's income producing potential without considering the offsetting cost of operations. The petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank account is misplaced if counsel intended to submit those for the money balances stated on the returns as proof of the ability to pay. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.