



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 04 171 54702

Office: VERMONT SERVICE CENTER

Date: APR 04 2006

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 on appeal. The appeal will be dismissed.

The petitioner is a concrete and excavation corporation. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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, 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 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 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, 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 June 2, 2003. The proffered wage as stated on the Form ETA 750 is \$25.00 per hour (\$52,000.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on September 27, 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.

On appeal, counsel asserts that the beneficiary worked as an independent contractor in 2001 and was paid \$15,000.00; that the petitioner's 2001 tax return states \$44,263.00 in depreciation; that the "Combined total of income" is \$59,263.00; total assets are \$159,000.00 of which \$7,705.00 is in cash; that the 2002 tax return shows "Cross [sic] Receipts" in excess of \$1,400,000.00; and, that the petitioner stated depreciation in the amount of \$70,750.00. Counsel states that all of the above is evidence of the ability to pay.

Counsel has submitted the following documents to accompany the appeal statement: a Form MISC-1099 statement, and, the 2001 and 2002 U.S. federal tax returns of petitioner.

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. In 2001, the petitioner paid the beneficiary \$15,456.00.¹

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); *Ubada 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. Counsel assertion that gross receipts is evidence of the ability to pay the proffered wage is not supported by case precedent, and, it is in error. The court specifically rejected the argument that 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.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,000.00 per year from the priority date of June 2, 2003:

- In 2001, the Form 1120S stated taxable income loss of <\$15,562.00>.²
- In 2002, the Form 1120S stated taxable income \$25,447.00.

¹ Since the priority date is June 2, 2003, financial data offered for time periods before the priority date (i.e. 2001 and 2002) is not probative evidence of the ability to pay the proffered wage as of the priority date. However, in this case, the petitioner's 2003 tax return was due prior to submission of the Form 1120. Nevertheless, the 2001 and 2002 tax returns will be reviewed. In any future proceeding, the petitioner should submit tax returns and other required documents as of the priority date and thereafter.

² 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.

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 2001, the petitioner paid the beneficiary \$15,456.00. In 2001, the Form 1120S stated taxable income loss of <\$15,562.00>. The sum of these two figures is less than the proffered wage of \$52,000.00 per year.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the 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.³ 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 1120S 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 Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$7,705.00 and \$156,619.00 in current liabilities. Therefore, the petitioner had <\$148,914.00> in net current assets. Since the proffered wage is \$52,000.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$383.00 and \$109,459.00 in current liabilities. Therefore, the petitioner had <\$109,076.00>⁴ in net current assets. Since the proffered wage is \$52,000.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 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 net 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. According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁴ 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.

⁵ 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 to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, 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 also includes in the above contention income and cash. Correlating the amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Neither were sufficient to pay the proffered wage.

We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the two corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.