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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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Bt



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: DEC 18 2006
SRC 04 124 50368

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and alteration business. It seeks to employ the beneficiary permanently in the United States as a garment fitter. 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.

According to the petition, the petitioner's business was established in 2002, and, at the time the petition was prepared, employed one individual.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. See 8 C.F.R. § 204.5(d). 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 April 11, 2003. The proffered wage as stated on the Form ETA 750 is \$23,130.00 per year. The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

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, and, a compiled financial statement as of December 31, 2003, as well as documentation concerning the beneficiary's qualifications.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on January 28, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence, inter alia, in the form of copies of annual reports, U.S. federal tax returns, and audited financial statements.

Supplementary evidence was also requested to the above. The director indicated profit/loss statements, bank account records or personnel records would be additional evidence of the ability to pay the proffered wage.

The petitioner failed to respond to the director's request in a timely fashion (within 12 weeks, that is by April 8, 2005) so on April 29, 2005, according to the regulation at 8 Code of Federal Regulations, § 103.2(b)(13), the director denied the petition due to abandonment since the initial evidence and the additional evidence that were requested were not submitted by the required date.

On April 28, 2005, counsel for the petitioner submitted the following copies of documents: an explanatory letter dated April 25, 2005; the request for evidence dated January 28, 2005; U.S. federal tax returns Form 1120S for years 2003 and 2004, and, transactions documents for the purchase by the petitioner of the business then known as [REDACTED] located at two locations in Georgia on or about December 24, 2002.

The director denied the petition on May 16, 2005, 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 submits a statement in which there are a several pages of arithmetical computations that counsel contends according to his method of calculations are evidence of the petitioner's ability to pay the proffered wage. Other than tax returns submitted found in the record of proceeding, and, the transaction documents for the purchase by the petitioner of the business then known as [REDACTED] located at two locations in Georgia on or about December 24, 2002, no other documentary evidence was provided. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel has provided no case precedent that would permit the various arithmetical computations proposed by counsel to be accepted into evidence, other, than to acknowledge that

CIS follows the case precedent of *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); that does not allow the petitioner to "add back to net cash the depreciation expense charged for the year."

Counsel is combining tax return line items from the tax return, page one (i.e. gross receipts, compensation of officers and net income), and Schedule L, the balance sheet for the return.

In addition, counsel contends that the total assets (including the value of the petitioner's building and intangible assets) of the petitioner reflected in the purchase price of \$350,000.00 is the "most accurate method to value the property," and, that the net asset value including the realty and intangible assets of the petitioner's business exceeds the proffered wage.

With reference to the 2003 tax return, counsel includes depreciation, that he refers to as "net depreciation," as an element of what he terms "net cash flow" that he contends is \$42,097.00 under one computation. Under another computation of cash flow, the net cash flow is computed by counsel to be \$23,382.00. Counsel makes similar additive computations based upon line items from the 2004 income tax return submitted and Schedule L.

Counsel also contends that the capital stock value and the paid-in capital value, Schedule L, lines 22 and 23 are evidence of the ability to pay the proffered wage.

Counsel has submitted copies of the following documents to accompany the appeal statement: a statement of arithmetic computations; the notice of decision dated May 16, 2005; the transactions documents for the purchase by the petitioner of the business then known as [REDACTED] located at two locations in Georgia on or about December 24, 2002; the U.S. federal tax returns Form 1040 for the owner(s) of petitioner for years 2003 and 2004; and, a U.S. federal tax return Form 1040 for the beneficiary for tax year 2004 with W-2 statement.

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 2004 the petitioner paid the beneficiary \$8,500.00.

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. *Id.* at 1084. 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* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,130.00 per year from the priority date of April 11, 2003:

- In 2003, the Form 1120S stated net income¹ of \$11,382.00.
- In 2004, the Form 1120S stated a loss of <\$38,412.00>².

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 net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, at any time between the years 2003 through 2004 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 2003, petitioner's Form 1120S return stated current assets of \$5,630.00 and \$6,110.00 in current liabilities. Therefore, the petitioner had <\$480.00> in net current assets. Since the proffered wage is \$23,130.00 per year, this sum is less than the proffered wage.
- In 2004, petitioner's Form 1120S return stated current assets of <\$3,861.00> and \$3,802.00 in current liabilities. Therefore, the petitioner had <\$7,663.00> in net current assets. Since the proffered wage is \$23,130.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2003 through 2004 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,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

¹ Internal Revenue Service IRS Form 1120S, Line 21 that states the petitioner's ordinary business income or loss referred to herein as net income or loss.

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.

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 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 his contentions on appeal net income and equity items such as realty. 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 items 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. To do otherwise would be duplicative of the petitioner's finances.

As stated, counsel is combining tax return line items from the tax return, page one (i.e. gross receipts, compensation of officers and net income), and Schedule L from the return. 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.

Counsel has made several additive computations to arrive at the cash flow or net cash flow of the petitioner which includes the non-cash item of depreciation which is a deduction on the tax return. In generally accepted accounting principles (GAAP) based cash flow statement, the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. Depreciation is not one of these items. A cash flow statement, used with the balance sheet and income statement, presents an analysis of the financial health of a business. Cash flow is an indicator of financial health not a source of revenue. According to the two tax returns submitted by the petitioner for the business, net income for the two years examined was \$11,382.00 and <\$38,412.00> respectively. Net current assets for that two year period were <\$480.00> and <\$7,663.00>

respectively. By the information submitted the petitioner could not pay the proffered wage by an examination of its tax records.

As stated, counsel also contends that the capital stock value and the paid-in capital value, Schedule L, lines 22 and 23 are evidence of the ability to pay the proffered wage. Capital stock and paid-in capital are not current asset items but rather the equity of the corporation and, as such, they are unavailable 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 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.