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20 Mass, N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 03 217 51427 Office: NEBRASKA SERVICE CENTER Date: FEB 03 2006

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:

SELF-REPRESENTED

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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation that is a provider of machining services to customers on a custom basis. It seeks to employ the beneficiary permanently in the United States as a precision machinist. 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, petitioner 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 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 March 29, 2000. The proffered wage as stated on the Form ETA 750 is \$20.53 per hour (\$42,702.40 per year). The Form ETA 750 states that the position requires four years experience.

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

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 pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner's U.S. federal tax returns for 2000,

2001 and 2003 as well as the beneficiary's W-2 Wage and Tax Statements for 2000, 2001, 2002 and 2003 and tax returns for the same years (including the beneficiary's pay voucher).

The director also requested the petitioner's latest annual reports with audited financial statements.

Supplementary evidence was also requested: the petitioner's annual balance sheets through December 31st for years 2002 and 2003 identifying net income and losses; and, petitioner's monthly balance sheets through April 30, 2004. The director indicated profit/loss statements, bank account records or personnel records would be additional evidence of the ability to pay the proffered wage.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted a definition of depreciation; a State of Illinois Form report UI-3/40 listing petitioner's employees; a Form 941 "Employer's Quarterly Federal Tax Return;" a compiled financial statement; and, the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2002 and 2003.

The director denied the petition on July 26, 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, petitioner submits two income statements for the first two quarters of 2004 that were part of an accountant's compiled financial report.

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. No evidence was submitted to show that the petitioner employed the beneficiary.

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 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 \$42,702.40 per year from the priority date of March 29, 2000:

- In 2000, the Form 1120-A dated June 17, 2004 stated a taxable income loss¹ of <\$41,441.00>.²
- In 2001, the Form 1120 dated August 1, 2002, stated taxable income³ of <\$22,538.00>.
- In 2002, the Form 1120 dated May 30, 2003 stated taxable income of \$704.00.
- In 2002, the Form 1120 dated August 13, 2003 stated taxable income of <\$1,011.00>.
- In 2003, the Form 1120 stated taxable income of \$52,556.00.

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 2000 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, and, Part III. Those schedules are included with, as in this instance, the petitioner's filing of Form 1120 and 1120-A federal tax returns. 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 1120 and 1120-A U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2000, petitioner's Form 1120-A return stated current assets of <\$8,753.00> and \$0.00 in current liabilities. Therefore, the petitioner had <\$8,753.00> in net current assets. Since the proffered wage was \$42,702.40 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of <\$13,306.00> and \$0.00 in current liabilities. Therefore, the petitioner had <\$13,306.00> in net current assets. Since the proffered wage was \$42,702.40 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return dated May 30, 2003 stated current assets of <\$5,745.00> and \$0.00 in current liabilities. Therefore, the petitioner had <\$5,745.00> in net current assets. Since the proffered wage was \$42,702.40 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return dated August 13, 2003 stated current assets of <\$5,745.00> and \$0.00 in current liabilities. Therefore, the petitioner had <\$5,745.00> in net current assets. Since the proffered wage was \$42,702.40 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$4,572.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$4,572.00 in net current assets. Since the proffered wage was \$42,702.40 per year, this sum is less than the proffered wage.

¹ IRS Form 1120-A, Line 26.

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 IRS Form 1120, Line 28.

⁴ 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.

Therefore, for the period 2000 through 2003 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.

Petitioner asserts that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

Petitioner's petitioner 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 1120 and 1120-A, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against petitioner'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.

Petitioner has submitted compiled financial statements for the business to show the ability to pay the proffered wage. Petitioner cites no legal precedent for the admissibility of the compiled financial statement, and, 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.

A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The statements presented were not audited.

The accounting service that prepared the financial statement in a cover letter dated June 17, 2004, to that report qualified the financial statement as follows:

⁵ 8 C.F.R. § 204.5(g)(2).

Management has elected to omit the statement of changes in financial position by generally accepted accounting principles. If omitted disclosures were included in these financial statements, they might influence the user's conclusions about the company's financial position, results of operations. Accordingly, these financial statements are not designated for those who are not informed about such matters.

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

Petitioner'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 through tax year 2002.

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.