

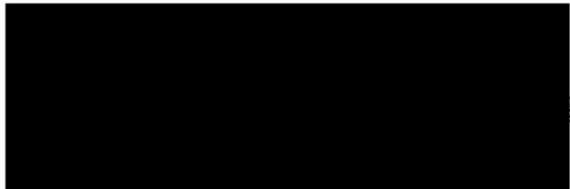
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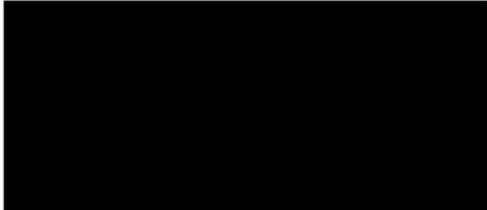


FILE: EAC 04 060 52096 Office: VERMONT SERVICE CENTER Date: **JUL 26 2006**

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:



**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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tailoring and alterations firm. It seeks to employ the beneficiary permanently in the United States as a custom tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, former counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 May 9, 2002. The proffered wage as stated on the Form ETA 750 is \$10.65 per hour, which amounts to \$22,152 per annum. On the Form ETA 750B, signed by the beneficiary on May 5, 2002, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed December 24, 2003, the petitioner claims to have been established in 1992, to have a gross annual income of \$100,000, a net annual income of \$25,000, and to currently employ two workers.

As the prospective U.S. employer, the petitioner must establish its own ability to pay the certified wage to the beneficiary. As a general partnership, the petitioner is structured as an entity in which the general partners participate fully in the profits, losses and management of the partnership and who are personally liable for its debts. *See Black's Law Dictionary 582 (5th Ed., West 1983)*. In support of its ability to pay the beneficiary's proposed wage offer of \$22,152 per year, the petitioner submitted a copy of its Form 1065, U.S. Return of Partnership Income for 2002. It reflects that the petitioner files its federal returns using a standard calendar year. It includes information as to the partnership's compiled income that may be derived from different sources and found at different locations on the return. In reviewing partnership returns, it is instructive to review the partnership's total earnings, which are reflected on Schedule K, Partners' Shares of Income, Credits, Deductions, etc. It includes the total of line(s) 22 of Form 1065, in addition to line(s) 2 through 7 of column B of Schedule K combined with the deduction of lines 8 through 11, 14a, 17g, and 18b of Schedule K. Here, the petitioner's 2002 partnership return indicates the following:

	2002
Ordinary Income (loss) from trade or business activities (page 1, line 22, Form 1065 & line 1, Sched. K)	\$15,011
Guaranteed Payments to partners (line 5, Sched. K)	\$ 6,552
Section 179 expense deduction (attach form 4562)(line 9, Sched. K)	- \$ 1,045
Other deductions (attach schedule)(line 11, Sched. K)	<u>-\$ 6,552</u>
Analysis of Net Income (page 4, line 1, Sched. K)	\$13,966

Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of the petitioner's liquidity and a possible readily available resource out of which a proffered wage could be paid. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>1</sup> A partnership's year-end current assets and current liabilities may be found on the balance sheet of Schedule L of the partnership return. Current assets would be reflected on line(s) 1(d) through 6(d) and current liabilities would be specified on line(s) 15(d) through 17(d). If a petitioner's year-end 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.

In this case, the petitioner's assets and liabilities are not disclosed on the Schedule L balance sheet. The return shows that the petitioner elected under pertinent Internal Revenue Service (IRS) rules not to submit a completed Schedule L. These provisions are noted on line 5 of Schedule B of the petitioner's 2002 partnership return. They do not require partnerships to complete Schedule L,<sup>2</sup> whose total receipts were less than \$250,000; who had total

<sup>1</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>2</sup> Partnerships who qualify under this rule are also not required to complete Schedule(s) M-1, M-2, item F on

assets less than \$600,000; and who filed Schedule(s) K-1 with the return and distributed it to the partners on or before the due date of the partnership return. The underlying record contains no other evidence, other than a copy of the 2002 partnership return, relating to the petitioner's net income or net current assets.

The director denied the petition on August 4, 2004, determining that the petitioner's reported ordinary income of \$15,011 as reported on the 2002 partnership return failed to demonstrate that the necessary funds were available to pay the proffered wage of \$22,152.

On appeal, former counsel resubmits a copy of the petitioner's 2002 partnership return and additionally provides a letter, dated August 24, 2004, from [REDACTED]. Counsel contends that the beneficiary's proposed wage offer should have been prorated to reflect only the petitioner's obligation to pay that portion of the wage for the approximately 34 weeks remaining in the 2002 calendar year, if the petitioner had employed her as of the priority date of May 9, 2002. Counsel offers [REDACTED] letter in support of this argument. [REDACTED] expresses his concurrence with this assertion in his letter and refers to an accompanying income statement showing net ordinary income of \$19,325. He adds that the petitioner has a healthy financial position with a "40:1 current assets to liabilities ratio, six thousand dollars in the bank, revenues in excess of seven thousand dollars per month, and minimal non-recurrent debt." In support of these contentions, a copy of (compiled) management report prepared by [REDACTED] is provided. It represents unaudited financial statements in the form of a compilation of the petitioner's financial information for 2002. A balance sheet and income statement are included.

Counsel's assertions are not persuasive. Regarding proration of the proposed wage offer, we reject a process whereby CIS prorates the proffered wage for the portion of the year that occurred after the priority date. We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains credible evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not at issue here.

Relevant to [REDACTED] assertions based on the financial statements offered on appeal, it must be noted that 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that have been provided on appeal are not persuasive evidence. As the accompanying document makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. 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, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a

salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner has employed the alien.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985. 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, rather than the petitioner's gross income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further 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 536.

As noted above, if an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets.

In this case, the petitioner's net income of \$13,966 could not cover the proffered wage of \$22,152. The only information relating to its net current assets was offered as part of an unaudited financial statement. Although the petitioner was not required to complete the Schedule L balance sheet of its 2002 partnership return, as noted

above, if it seeks to establish its ability to pay the proffered salary relying upon a financial statement of its current assets and current liabilities for a given period, the regulation at 8 C.F.R. § 204.5(g)(2) requires such a statement to be audited.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date of the petition.

**ORDER:** The appeal is dismissed