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20 Mass Ave., N.W., Rm. 3000
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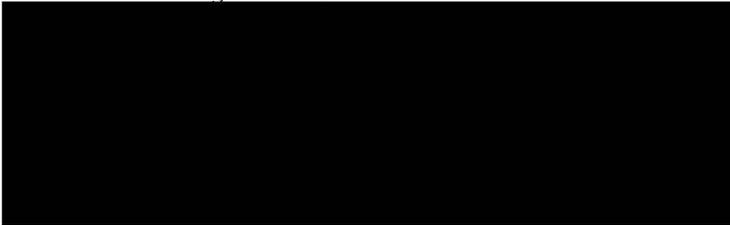
FILE: EAC 04 031 52352 Office: VERMONT SERVICE CENTER Date: JUL 27 2006

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, Chief
Administrative Appeals Office

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

The petitioner is a designs and installs fences. It seeks to employ the beneficiary permanently in the United States as a fence builder. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

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. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 per year. On Form ETA 750B, signed by the beneficiary on April 3, 2003 the beneficiary claims to have worked for the petitioner since March 2000.

On Part 5 of the preference petition, filed on November 13, 2003, the petitioner claims that it was established in 1987, has a gross annual income of \$371,814, an annual net income of \$11,510 and currently employs five workers.

In support of its ability to pay the proffered salary of \$31,200, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. They indicate that the petitioner files its taxes uses a standard calendar year and contain the following information:

2001

2002

Ordinary Income ¹	\$30,749	\$11,510
Current Assets	\$29,613	\$25,469
Current Liabilities	\$ 6,690	\$ 5,575
Net Current Assets	\$22,923	\$19,894

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage.² Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation'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.

On June 21, 2004, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage and evidence related to the beneficiary's qualifying work experience. Relevant to the petitioner's ability to pay the proffered wage, the director requested a copy of the petitioner's 2003 federal tax return, and advised the petitioner that it could provide additional documentary evidence that it considered pertinent.

In response, the petitioner, through counsel, supplied a copy of the petitioner's corporate tax return for 2003. It reflects that the petitioner reported \$22,439 in ordinary income in that year. Schedule L shows that the petitioner had \$17,544 in current assets and \$4,640 in current liabilities, yielding \$12,904 in net current assets.

The petitioner also provided copies of its bank statements covering 2001 (omitting Oct.) through June 2004, as well as a letter, dated September 8, 2004, from [REDACTED] counsel's legal partner. [REDACTED] affirms the petitioner's ability to pay the proffered wage, emphasizing the value of the petitioner's real assets, depreciation, and the officer compensation of \$10,000 in 2001 and \$25,000 in 2002, which [REDACTED] states was taken to reduce tax liability.

On October 14, 2004, the director denied the petition, concluding that neither the petitioner's reported net income nor cash funds shown on Schedule L of the tax returns provided sufficient monies to pay the proffered wage. The director declined to add back the depreciation claimed or credit the reported officer compensation.

On appeal, counsel asserts that CIS should apply *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in recognizing that considerations other than tax returns may apply to a situation where a petitioner could be found to have reasonable expectations of future profits despite temporary financial setbacks. Counsel resubmits copies of the petitioner's tax returns. He also provides an additional memorandum, dated November 15, 2004, from [REDACTED]

¹ For the purpose of this review, ordinary income will be treated as net income.

² 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.

[REDACTED] reiterates the previous assertions made to the underlying record relevant to the petitioner's assets available to pay the proffered wage, including real estate, inventories, depreciation, and officer compensation.

Additionally, counsel provides a "certification" from the petitioner's president, [REDACTED], states that he has owned the petitioning company since 1987. He states that he has taken officer compensation of \$10,000 in 2001; \$25,000 in 2002; and \$35,000 in 2003. He adds that "the reason for the round numbers was the fact that these amounts were taken by me randomly, to reduce the taxable income of the Corporation. I certify that these amounts were available in each year to pay additional salaries, if needed."

In determining a petitioner's ability to pay a certified wage, CIS will first examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, although the evidence indicates that the petitioner employed and paid wages to the beneficiary, the director did not specifically request, nor did the petitioner provide any documentation, such as Wage and Tax Statements (W-2s) or Form 1099s (Miscellaneous Income), to measure compensation paid to the beneficiary.

If the evidence fails to show that the petitioner has already established its ability to pay the proffered wage through compensation paid to the beneficiary, CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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*, 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 court specifically rejected the argument that the Service should have considered income before expenses were paid, rather than net income. With regard to depreciation as a reflection of the systematic allocation of the cost of a tangible long-term asset, it is noted that depreciation is taken to represent the diminution in value of buildings and equipment, or to 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 is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. 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.

If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, as stated above, CIS will review a petitioner's net current assets. We must reject, however, the assertion that this consideration should include such longer-term assets such as real property or 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. Rather, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. It is noted that items like the value of inventories and cash-on-hand are already included in the calculation of the petitioner's net current assets.

Similarly, with respect to the bank statements provided to the underlying record, it is noted that they 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," bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. As stated above, cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period.

That said, the petitioner's sole shareholder [REDACTED] has certified that he has taken random whole amounts as compensation in order to reduce the corporation's taxable income and that such funds could have been instead made available to pay salary expenses if necessary. This financial flexibility is represented as an expense category as explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. In some cases, where the evidence indicates that a reasonable portion of officer compensation may be considered as additional financial resource, it is appropriate to review such figures in addition to the net income of the business. Here, when the amounts of \$10,000 in 2001; \$25,000 in 2002; and \$35,000 in 2003, are considered as available to supplement to the net income in those respective years, the results indicate that the petitioner could cover the certified wage of \$31,200.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.