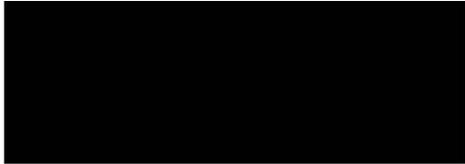


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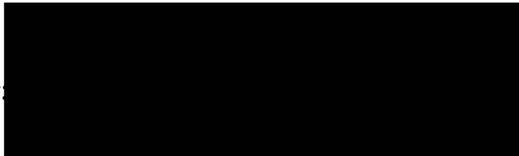
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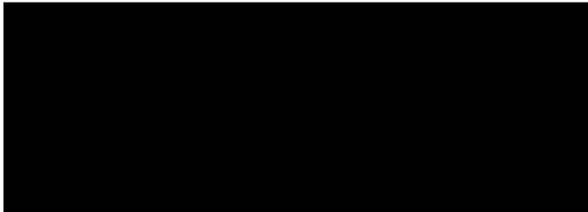
FILE: WAC 03 263 52268 Office: CALIFORNIA SERVICE CENTER Date: **JUN 21 2006**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker pursuant to § 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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor 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, counsel submits a brief.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 31, 2001. The proffered wage as stated on the Form ETA 750 is \$7 per hour, which equals \$14,560 per year.

On the petition, the petitioner stated that it was established during 1999 and that it employs three workers. The petition states that the petitioner's gross annual income is \$157,618 but does not state the petitioner's net annual income in the space provided for that purpose. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Tempe, Arizona.

In support of the petition, counsel submitted (1) the petitioner's owner and owner's spouse 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, (2) state wage reports for the second, third, and fourth quarters of 2001 and all four quarters of 2002, (3) 2001 and 2002 Form W-2 Wage and Tax Statements W-3 transmittals, (4) the petitioner's 2001 and 2002 payroll summaries, (5) a list of recent home sales, (6) an ownership information sheet pertinent to a property, (7) a photocopy of a mortgage statement, (8) a list of the petitioner's owner's monthly personal expenses, (9) a letter on the letterhead of a real estate company, (10) a statement pertinent to the 401(k) savings plan of the owner's spouse, and (11) counsel's own letter.

A Schedule C Profit or Loss from Business form accompanies each of the returns of the petitioner's owner and owner's spouse. Those forms show that the petitioner's owner held the petitioner as a sole proprietorship and had three dependents during those years.

During 2001 the petitioner returned a net profit of \$4,141. The petitioner's owner and owner's spouse declared adjusted gross income of \$28,003, including all of the petitioner's profit.

During 2002 the petitioner returned a net profit of \$6,006. The petitioner's owner and owner's spouse declared adjusted gross income of \$35,185, including all of the petitioner's profit.

The petitioner's 2001 and 2002 payroll summaries show that it paid \$28,000 and \$48,000 to two employees during those years, respectively, but that it did not employ the beneficiary.

The 2001 and 2002 W-2 and W-3 forms confirm that the petitioner paid \$28,000 and \$48,000 to its two employees during that year, but that it did not employ the beneficiary.

The petitioner's wage reports for the second, third, and fourth quarters of 2001 and all four quarters of 2002 show that the petitioner paid between \$4,000 and \$12,000 during those quarters to two employees, but that it did not employ the beneficiary.

The petitioner's owner's budget shows that her household requires \$2,446.06 per month, which equals \$29,352.72 annually.

The list of real estate sales shows the addresses, sizes, and sales prices of various homes in the neighborhood of the petitioner's owner's property. Nothing in that list indicates that the list is exhaustive.

The ownership information sheet provided shows information about the petitioner's owner's house. That sheet shows, among other things, that the property transferred on July 16, 1997 for \$139,000 and then had a first mortgage of \$132,050.

The date of the photocopied mortgage statement is not legible, but appears to be June 12, 2003. The mortgage statement shows that on the statement date the petitioner's owner owed \$115,158.89 to the same mortgage company that initially held the first mortgage on the petitioner's owner's house.

The real estate agents letter states that based on recent sales of similarly sized houses in the area the petitioner's owner's property is worth \$198,000 to \$204,000. No other description of the process used to reach that conclusion was provided. No evidence demonstrating that the houses used as comparables are otherwise similar the petitioner's owner's house was provided. No evidence was provided to show that the sales agent is qualified to render an accurate and impartial opinion of the value of the petitioner's owner's house. This office notes that the houses of very nearly the same size as the petitioner's owner's house sold for as little as \$159,000. The reason the sales agent selected the value range of between \$198,000 and \$204,000 was not explained and is unclear.

The owner's spouse's savings plan shows that on September 3, 2002 he had a \$7,904.74 balance in that account.

In his own letter counsel stated that the petitioner had previously petitioned for the beneficiary but the petition was denied based on the finding that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. Counsel stated that a more careful analysis demonstrates that the petitioner has, in fact, that ability. In support of that assertion counsel notes the amount of the petitioner's depreciation deductions during each of the salient years. Counsel also states that the petitioner's owner and owner's spouse equity in their home is approximately \$82,842 and cites that equity as another index of the petitioner's ability to pay the proffered wage. Finally, counsel cites the amount in the owner's spouse 401(k) savings plan.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 3, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also specifically requested that the petitioner provide its quarterly wage reports for the preceding four quarters.

In response, counsel submitted the 2003 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, the petitioner's quarterly wage reports for the all four quarters of 2004, and counsel's own letter dated July 21, 2004

The 2003 Schedule C shows that during that year the petitioner suffered a loss of \$3,790. The 2003 return of the petitioner's owner and owner's spouse shows that during that year they declared adjusted gross income of \$27,446. During that year the petitioner's owner and owner's spouse had two dependents.

The quarterly reports show that during each of the four quarters of 2003 the petitioner paid taxable wages of \$16,500 to three employees.

In her July 21, 2004 letter counsel stated "the petitioner was not issued any W-2s forms (sic) for 2001 through 2003 as any work performed was on a voluntary basis." Counsel also reiterated the argument that the evidence previously submitted was sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On August 12, 2004, the California Service Center issued an additional request for evidence. The service center requested that the petitioner submit the petitioner's owner's monthly budget. In response counsel sent a letter dated August 23, 2004 observing that the petitioner had already provided its owner's budget.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 30, 2004, denied the petition. In that decision the director stated that the petitioner's owner's equity in real property is insufficiently liquid to be used to pay wages.

On appeal, counsel argues that the evidence submitted demonstrates that the petitioner's owner could have paid the proffered wage and retained funds sufficient to support her family. Counsel again states that the petitioner's depreciation deductions during the salient years represent additional funds available to pay the proffered wage. Counsel also argues that the evidence pertinent to the petitioner's owner's assets shows additional funds available to pay wages. Counsel notes that the petitioner's owner could borrow against the equity in his home as necessary to pay the proffered wage and asserts that the equity is, therefore, sufficiently liquid to be used in paying wages.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be 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.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, she does not offer any alternative allocation of those costs.¹ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The evidence submitted does not demonstrate the value of the petitioner owner's equity in real estate. The letter from the real estate salesperson gives an estimate of the market value of the petitioner's home but the letter does not describe the process by which the value estimate was reached nor state whether the salesperson is licensed to provide disinterested value estimates.² Further, the mortgage statement submitted shows the amount by which a single mortgage encumbers the subject property but the record contains no evidence to demonstrate that the property is otherwise encumbered.³

¹ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

² A licensed real estate appraiser would ordinarily provide a disinterested estimate of value. Here, no evidence is in the record to demonstrate that the real estate salesperson who provided an opinion of value is either licensed or competent to perform such a valuation. Further, the salesperson's value estimate is neither alleged, demonstrated, nor assumed to be disinterested.

³ The amount of any encumbrances would typically be determined by a professional title search.

Even if the value estimate and the statement of the encumbrances were demonstrably correct, the petitioner's owner's equity in real estate would still not be available to pay wages. As was discussed in the decision of denial, equity in real estate is insufficiently liquid to be used to pay wages.

In this regard, counsel notes that the petitioner could borrow money secured by the real estate as necessary to pay additional wages. A potential equity line, second mortgage or refinance, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel is correct that the petitioner's owner's savings are funds available to pay wages. The amount of the petitioner's savings on September 3, 2002, \$7,904.74, will be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed

or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ shown on lines 16(d) through 18(d). If a corporation's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$14,560 per year. The priority date is March 31, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$28,003. If obliged to pay the proffered wage out of that amount the petitioner's owner would have been left with \$13,443 with which to support her family. The evidence shows that the petitioner's owner requires \$29,352.72 annually to pay family expenses. The petitioner's owner's adjusted gross income during 2001 was insufficient to pay the proffered wage and support the petitioner's owner's family. The petitioner has submitted no reliable evidence of any other assets available to the petitioner during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$35,185. The petitioner has demonstrated that its owner had an additional \$7,904.74 in savings during that year. The total of those two amounts is \$43,089.74. If obliged to pay the proffered wage out of that amount the petitioner's owner would have been left with \$28,529.74 with which to support her family. The evidence shows that the petitioner's owner requires \$29,352.72 annually to pay family expenses. The petitioner's owner's adjusted gross income during 2002 was insufficient to pay the proffered wage and support the petitioner's owner's family. The petitioner has submitted no reliable evidence of any other assets available to the petitioner during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$27,446.⁵ If obliged to pay the proffered wage out of that amount the petitioner's owner would have been left with \$12,886 with which to support her family. The evidence shows that the petitioner's owner requires \$29,352.72 annually to pay family expenses. The petitioner's owner's adjusted gross income during 2003 was insufficient to pay the proffered wage and support the petitioner's owner's family. The petitioner has submitted no reliable evidence of any other assets available to the petitioner during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁵ In the scenario contemplated during 2002, above, the petitioner's owner's savings would have been exhausted during that year, and would not have been available to pay wages during 2003.

The petitioner failed to demonstrate it had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.