

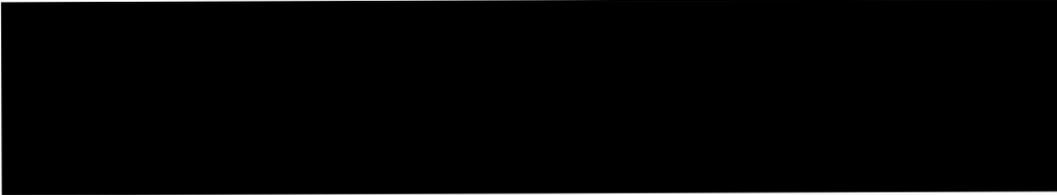


U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 04 037 52722 Office: NEBRASKA SERVICE CENTER Date: MAR 10 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, 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 (AAO) on appeal from a denial of counsel's motion to reopen or reconsider his decision. On June 24, 2004, the director denied the petition, finding the evidence did not establish the petitioner's ability to pay the proffered wage continuously from the priority date to the present. On July 23, 2004, counsel filed a motion to reopen or reconsider, which the director denied on September 13, 2004, affirming his prior decision. The appeal will be dismissed.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and does not supplement the evidence submitted previously.

The regulation 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. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.50 per hour (\$23,920 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$208,363, and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, counsel submitted the following documents pertinent to its ability to pay the proffered wage:

- Counsel's G-28;
- An original certified ETA 750; and,
- The petitioner's Form 1120S for 2001 and 2002.

On March 19, 2004, the director issued a Request for Evidence (RFE) seeking additional evidence pertinent to that ability.

In response, the petitioner submitted:

- The petitioner's profit & loss statement for 2003; and,
- An incomplete batch drawn from the petitioner's monthly business bank statements for February 1, 2002, to November 30, 2003.

The director denied the petition on June 24, 2004, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

With the motion to reopen or to reconsider, counsel submitted, pertinent to that ability:

- The petitioner's monthly bank statements covering February 1, 2002 to November 30, 2003;<sup>1</sup> and,
- An internally produced profit and loss statement for 2003.

On motion, counsel asserted that the bank statements submitted in response to the RFE reflect an average monthly balance of more than \$19,000, almost as much as the proffered wage (\$23,920). Further, counsel asserted that the petitioner's profit and loss statement for 2003 reflects a total [net] profit of \$50,201, which exceeds the yearly proffered wage. Counsel asserts that for 2002, the petitioner maintained a monthly cash balance of \$10,651, which is more than the monthly proffered wage of \$1,993.33.

The director granted the motion to reopen but affirmed his prior decision. The director noted the petitioner's net income from its Form 1120S for 2002 showed the petitioner's net income for 2002 was -\$19,644, "with a cash asset of \$2,366." The director found that the petitioner's monthly bank statements did indicate a monthly balance of approximately \$19,000, but that the statements were already reflected in Schedule L of the petitioner's tax returns, and the balances "appear to be the same funds brought forward from month to month."

On appeal, counsel asserts that the \$10,651 average monthly balance the petitioner maintained in its business bank account for 2002 would leave the petitioner \$8,657 had the petitioner paid the beneficiary \$1,993.33, which is the monthly proffered wage.

At the outset, this office notes that the profit-and-loss statement for 2003 that the petitioner submitted in response to the RFE is not an audited financial statement. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the representations of management. 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 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 has not established that it

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<sup>1</sup>It is noted the petitioner's monthly bank statements, when submitted with counsel's motions, included one for September 2002, but which is not among the batch submitted on appeal but that purports to cover the same period. The September 2002 statement lists an overdraft charge, the only one for the period.

employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003.

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 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*, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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. (Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,920 per year from the priority date.

In 2002, the Form 1120S stated net income<sup>2</sup> of -\$19,644.

In 2001, the Form 1120S stated net income of \$31,456.

Therefore, the petitioner had sufficient net income to pay the proffered wage for the year 2001. However, the petitioner did not have sufficient net income to pay the proffered wage for the year 2002.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage, which counsel appears to suggest from his assertions based upon the petitioner's unaudited profit and loss statement for 2003. 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. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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<sup>2</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year 2002 were \$6,021.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the average monthly balance the petitioner maintained in its business bank account for 2002 showed \$10,651, which is more than sufficient to pay the monthly proffered wage of \$1,993.33.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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<sup>3</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.