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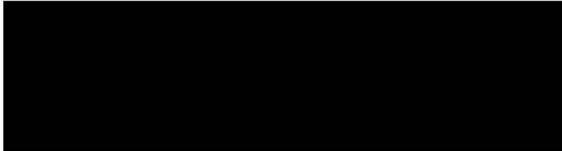
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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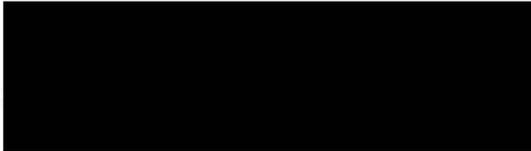
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FILE: WAC 04 214 50580 Office: CALIFORNIA SERVICE CENTER Date: **NOV 09 2008**

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 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 clothing and merchandise distributor. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 submitted a brief and 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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 22, 2001. The proffered wage as stated on the Form ETA 750 is \$29.13 per hour, which equals \$60,590.40 per year.

The Form I-140 petition in this matter was submitted on July 29, 2004. On the petition, the petitioner stated that it was established on October 14, 1998 and that it employs one worker. The petition states that the petitioner's gross annual income is \$124,050 and that its net annual income is \$48,307. On the Form ETA 750, Part B, signed by the beneficiary on March 21, 2001, the beneficiary claimed to have worked for the petitioner since June 2000. The Form ETA 750 indicates that the petitioner would employ the beneficiary in

North Hollywood, California. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Sylmar, California.¹

In support of the petition, counsel submitted the 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. The tax returns show that the petitioner's owner had one dependent during each of those years. Each of the tax returns submitted includes a corresponding Schedule C Profit or Loss from Business, showing that the petitioner's owner held the petitioner as a sole proprietorship during those years.

The 2001 return shows that the petitioner returned a net profit of \$26,595 during that year. The petitioner's owner declared adjusted gross income of \$25,279 during that year, including the petitioner's profit offset by deductions.

The 2002 return shows that the petitioner returned a net profit of \$13,114 during that year. The petitioner's owner declared adjusted gross income of \$12,254 during that year, including the petitioner's profit offset by deductions.

The 2003 return shows that the petitioner returned a net profit of \$48,307 during that year. The petitioner's owner declared adjusted gross income of \$44,980 during that year, including the petitioner's profit offset by deductions.

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 February 24, 2005, 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 the petitioner's California Form DE-6 quarterly wage reports for the previous four quarters. Finally, noting that the petitioner is a sole proprietorship, the service center requested a statement of the petitioner's owner's recurring monthly expenses.

In response, counsel submitted (1) Form W-2 Wage and Tax Statements, (2) Form DE-6 reports for all four quarters of 2004, (3) a statement of the petitioner's owner's recurring monthly personal expenses, (4) the annual statement for the petitioner's owner's IRA investment account, (5) a letter dated March 10, 2005 from a realtor, and (6) counsel's own letter dated May 3, 2005.

The W-2 forms submitted show that the petitioner paid the beneficiary \$4,837.24, \$14,617.25, and \$15,045 during 2001, 2002, and 2003, respectively.

The Form DE-6 reports submitted show that the petitioner had no employees other than the beneficiary during the four quarters of 2004 and paid her \$4,620, \$5,340, \$4,440, and \$3,960 during those four quarters, respectively, for a total of \$18,360 during 2004.

¹ Because Hollywood and Sylmar are both in Los Angeles County, California the Form ETA 750 labor certification approved for employment in Hollywood is valid for employment in Sylmar.

The petitioner's owner's monthly budget shows that the petitioner's owner requires \$2,722.45 per month, or \$32,669.40 annually, to support her household. The petitioner's owner's annual investment account statement shows that she had a balance of \$3,746.99 at the beginning of 2003 and \$4,194.34 at the end of 2004.

The realtor's March 10, 2005 letter states that the realtor estimates the value of the petitioner's owner's home to be \$740,000, and calculates that the current mortgage loan balance is \$295,000, which yields equity of \$445,000.

In his May 3, 2005 letter counsel refers to a May 4, 2004 memorandum from the Associate Director of Operations of CIS and the minutes of a November 16, 1994 liaison teleconference between the Director, Vermont Service Center and representatives of an immigration lawyers' association. Counsel states that the petitioner had demonstrated its ability to pay the proffered wage pursuant to the tests laid out in that memorandum and that teleconference.

Counsel asserts that the petitioner's owner's assets, including her investment account balance and the equity in her home, should be considered to be available to pay the proffered wage.

In that letter counsel misidentified the petitioner's gross income as its net income and stated that amount shows the petitioner's ability to pay the proffered wage during each of the salient years. Counsel also stated, relying on the minutes of the teleconference described above, that the ratio of the petitioner's assets to its liabilities shows its ability to pay the proffered wage.

Finally, counsel cited BALCA decisions and non-precedent decisions of this office and the service centers in support of various calculations he urges.

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 May 20, 2005, denied the petition.

On appeal, counsel submitted a brief and a conditional approval of a \$200,000 line of credit extended to the petitioner's owner by an institutional lender.

In the brief counsel urged that the petitioner's net current assets are greater than the proffered wage, that the ratio of its current assets to its current liabilities shows its ability to pay the proffered wage, that the beneficiary's ability to contribute to the petitioner's profits should be considered, and that the petitioner's depreciation deduction should be added to its net income in determining its ability to pay the proffered wage.

Counsel stated that the petitioner's average net income during the three years for which figures were provided was about \$60,000. Counsel again cited BALCA cases and non-precedent decisions of this office and the service centers.

Counsel asserted, but provided no evidence to demonstrate, that the petitioner's owner has an equity line available of \$445,000. Counsel also stated that the conditional approval letter provided shows that the

petitioner's owner was recently granted a \$200,000 line of credit and urged consideration of that amount in determining the petitioner's ability to pay the proffered wage. Counsel argued that the \$200,000 credit line shows that the equity in the petitioner's owner's house is easily convertible to cash. Counsel further argues that because the value of real estate is included in the Form I-864 Affidavit of Support the failure to consider it in the instant context is inconsistent.

The petitioner's net income is shown on Line 31, Net profit or (loss) in the Schedules C provided. The petitioner's net profit, as was noted above, was \$26,595 during 2001, \$13,114 during 2002, and \$48,307 during 2003. In listing other figures as the petitioner's net profit during those years counsel has apparently misidentified the petitioner's gross income, shown on Line 7 of Schedule C, as its net profit.

Counsel submitted two non-precedent decisions; the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Similarly, 8 C.F.R. § 103.9(a) does not indicate that BALCA decisions are binding on this office. Again, counsel is free to urge extension of the reasoning in BALCA cases, but their citation alone is of no effect.

Counsel urges that the petitioner's net current assets are greater than the proffered wage.² End-of-year net current assets are a corporate taxpayer or partnership's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets and current liabilities are shown on Schedule L in column D. Current assets are those assets above and including "Other Current Assets." Current liabilities are those liabilities above and including "Other Current Liabilities."

If a corporation or partnership'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. No evidence from which the current assets, the current liabilities, or the net current assets of the petitioner, a sole proprietorship, can be extracted, such as audited financial statements, has been provided.

Counsel further asserts, citing the minutes of the teleconference liaison described above, that the ratio of a petitioner's assets to its liabilities can demonstrate its ability to pay the proffered wage. In the November 16, 1994 transcript the Director, Vermont Service Center, stated that a sufficiently favorable current ratio, the ratio of current assets to current liabilities, would lead the Service Center to the assumption that the petitioner is able to pay a proffered wage. Initially, this office notes that the teleconference minutes refer to **current** assets, rather than total assets. The difference is described above. This office further notes that, as was stated above, no evidence pertinent to the petitioner's current assets and current liabilities is in the record.

² Counsel appears to have misidentified the petitioner's owner's total assets with the petitioner's net current assets.

Further, this office is not convinced by the assertion the petitioner's current ratio, the ratio of its current assets to its current liabilities, shows the petitioner's ability to pay the proffered wage.³ The current ratio is a measure of a taxpayer's ability to cover its existing debts with its existing liquidity. It is not a measure of the ability to absorb additional expenses. Unlike a taxpayer's current ratio, its net current assets, that is, the difference between the taxpayer's current assets and its current liabilities is an index of the ability to absorb additional expenses, such as additional wages.

This office considers net current assets greater than the annual amount of the proffered wage to be a valid indicator of a petitioner's ability to pay the proffered wage during a given year, as is explained in detail below. This office will not, however, consider a petitioner's current ratio.

Counsel also cites the teleconference minutes for the proposition that the beneficiary's ability to contribute to the petitioner's profits should be considered. This office is willing to consider any such projected profits if they are shown to be reliable. In this case, no such projection was provided.⁴

The Realtor's letter alleges that the petitioner's owner is also the owner of a real property. The letter does not state how the salesperson determined that the petitioner's owner owns that property.⁵ The salesperson also provides an estimate of value for that property that is apparently the salesperson's own estimate, otherwise unsupported. The letter does not describe the process by which the value estimate was reached except to state that it is based on the price per square foot, presumably of improvements, in the area. Further, that letter does not state whether the salesperson is competent and licensed to provide disinterested value estimates.⁶ Finally, the salesperson states the amount of the mortgages by which the property is allegedly encumbered. The salesperson did not state how she determined the amount of that encumbrance or demonstrate that the properties are otherwise unencumbered.⁷

The evidence provided pertinent to the petitioner's alleged real estate holdings is unconvincing. Not only are the ownership of the property, its value, and the amount by which it is encumbered poorly supported, as was detailed above, but even if the information were demonstrated to be correct, it would be insufficient to render the petition approvable.

A petitioner's, or petitioner's owner's, equity in real estate is not generally a net current asset. Current assets, or short-term assets are, as was explained above, those assets of a business that are expected to be converted

³ This office is not bound by the opinion of the Director, Vermont Service Center.

⁴ The assertion that, if the petitioner were permitted to hire the beneficiary its profits would rise is especially unconvincing in cases in which the petitioner is already employing the beneficiary, such as the instant case.

⁵ The salesperson does not indicate, for instance, that she is qualified to perform title searches and that she performed such a search.

⁶ 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.

⁷ The amount of any encumbrances would also typically be determined by a professional title search.

to cash or cash equivalent within a short period, generally one year. The value of the petitioner's owner's equity in real estate is not expected to be realized in cash or cash equivalent within the coming year. Further, real estate, or equity in real estate, is not the sort of liquid asset generally available to pay wages.

Counsel states, however, that the petitioner's owner has available a \$445,000 equity line and currently has a \$200,000 line of credit. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit 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. For all of the reasons listed, the petitioner's owner's alleged equity in real estate will not be considered.

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. This office is aware 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 are actual expenses of doing business, whether they are 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 implied that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁸ 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 to pay additional wages. Such a scenario is unacceptable.

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 established that it employed and paid the beneficiary \$4,837.24, \$14,617.25, and \$15,045 during 2001, 2002, and 2003, respectively. The petitioner must demonstrate its ability to pay the balance of the proffered wage during each of those years.

⁸ Counsel did 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, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

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, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 corporate 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of her own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that she could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, she must show that she could still have sustained herself and her dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$60,590.40 per year. The priority date is March 22, 2001.

Having demonstrated that the petitioner paid the beneficiary \$4,837.24 during 2001 the petitioner's owner is obliged to show that she could have paid the \$55,735.16 balance of the proffered wage and the \$32,669.40 she requires to support her family for a year, for a total of \$88,422.56. The 2001 return shows that the petitioner's owner declared adjusted gross income of \$25,279 during that year, including the petitioner's profit. That amount is insufficient to pay the balance of the proffered wage and the petitioner's owner's annual household expenses. The petitioner has not provided any reliable evidence to show that any other funds were available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that the petitioner paid the beneficiary \$14,617.25 during 2002 the petitioner's owner is obliged to show that she could have paid the \$45,973.15 balance of the proffered wage and the \$32,669.40 she requires to support her household for a year, for a total of \$78,642.55. The 2002 return shows that the petitioner's owner declared adjusted gross income of \$12,254 during that year, including the petitioner's profit. That amount is insufficient to pay the balance of the proffered wage and the petitioner's owner's annual household expenses. The petitioner has not provided any reliable evidence to show that any other funds were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Having demonstrated that the petitioner paid the beneficiary \$15,045 during 2003 the petitioner's owner is obliged to show that she could have paid the \$45,545.40 balance of the proffered wage and the \$32,669.40 she requires to support her family for a year, for a total of \$78,214.80. The petitioner's owner's investment account shows that she had an additional \$3,746.99 at the beginning of 2003. If that amount had been used to pay a portion of the proffered wage and the petitioner's owner's living expenses the petitioner's owner would still have required the remaining \$74,467.81 balance. The 2003 return shows that the petitioner's owner declared adjusted gross income of \$44,980 during that year, including the petitioner's profit. That amount is insufficient to pay the balance of the proffered wage and the petitioner's owner's annual household expenses. The petitioner has not provided any reliable evidence to show that any other funds were available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner provided Form DE-6 quarterly returns showing that it paid the beneficiary \$18,360 during 2004. Ordinarily the petitioner's owner would be obliged to demonstrate the ability to pay the balance of the proffered wage and her own household expenses during that year. However, the petition in this matter was submitted on July 29, 2004. On that date the petitioner's 2004 tax return was unavailable. The request for evidence in this case was issued on February 24, 2005. On that date the petitioner's 2004 tax return may still have been unavailable. The petitioner is excused from the obligation of showing its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 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.