

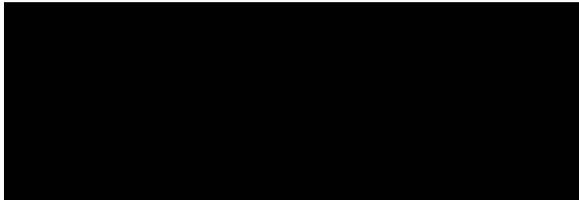
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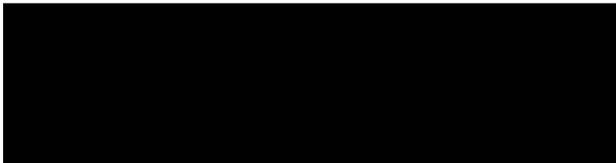
FILE: LIN 05 087 51916 Office: NEBRASKA SERVICE CENTER Date: **SEP 25 2006**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled 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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a tire retread business.¹ It seeks to employ the beneficiary permanently in the United States as a tire recapper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

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 the granting of 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 3, 2002.² The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000.00 per year). The Form ETA 750 states that the position requires three months of experience.

¹ According to the 2004 tax return submitted, the petitioner has moved to the Cottage Grove, Oregon location noted on the front sheet that is its current address.

² It has been approximately four years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a support letter from the petitioner; an index of exhibits; a U.S. Internal Revenue Service Form tax return; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 3, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements for 2002 and 2004.

In response to the request for evidence, counsel submitted copies of the following documents: the beneficiary's the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2002, 2003 and 2004 as well as a financial statement.

The director denied the petition on September 21, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that because a company's liabilities are greater than its assets is not evidence of an inability to pay the proffered wage.

Further, counsel contends that the company's gross income exceeds the proffered wage, and, the beneficiary has received a salary, both that are evidence, counsel contends, of the ability to pay the proffered wage.

Counsel asserts that the petitioner's net income is "not indicative of ...[its] ability to pay employee salaries, but a result of the petitioner's "tax decision."

Counsel has submitted the following documents to accompany the appeal statement: a legal brief; an internally generated payroll summary for the beneficiary; and, two cases involving the ability to pay.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted on appeal to show that the petitioner employed the beneficiary. An internally generated payroll summary for the beneficiary was submitted stating wage pay payments from the petitioner to the beneficiary from January 1, 2002, and October 18, 2005. Counsel contends that the beneficiary has received a salary that is evidence of the ability to pay the proffered wage. No objective, independent evidence was submitted evidencing the wage payments. No W-2 Wage and Tax statements, 1099-MISC compensation paid form statements, personal U.S. tax returns for the beneficiary,

employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

weekly or monthly bank deposits by the beneficiary, the petitioner's bank checking statements, pay stubs, pay statements as paid, or cancelled pay checks were submitted into evidence evidencing wage statements. The AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Counsel asserts that the petitioner's net income is "not indicative of ...[its] ability to pay employee salaries, but a result of the petitioner's "tax decision." 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).

Counsel contends that the company's gross income exceeds the proffered wage and that is evidence of the ability to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,000.00 from the priority date of January 3, 2002:

- In 2002, the Form 1120 stated a taxable income³ loss of <\$12,512.00>⁴.
- In 2003, the Form 1120 stated taxable income of \$11,093.00.
- In 2004, the Form 1120 stated a taxable income loss of <\$29,667.00>.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

³ IRS Form 1120, Line 28.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁵ 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, petitioner's Form 1120 return stated current assets of \$121,239.00 and \$119,577.00 in current liabilities. Therefore, the petitioner had \$1,662.00 in net current assets. Since the proffered wage is \$26,000.00, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$153,321.00 and \$177,144.00 in current liabilities. Therefore, the petitioner had <\$23,823.00>⁶ in net current assets. Since the proffered wage is \$26,000.00, this sum is less than the proffered wage.
- In 2004, petitioner's Form 1120 return stated current assets of \$168,013.00 and \$218,515.00 in current liabilities. Therefore, the petitioner had <\$50,502.00> in net current assets. Since the proffered wage is \$26,000.00, this sum is less than the proffered wage.

Therefore, for the period 2002 through 2004 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in her brief accompanying the appeal that two unpublished cases of the AAO may be relied upon to support counsel's contentions on appeal stated above. The two cases are not published case precedent (as is stated on one of the case cover sheets). Counsel cites no legal precedent for her contentions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO reviews appeals on a de novo basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Each of counsel's contentions has been discussed. Each case must be reviewed upon its own merits, and by definition, each case has its own particular fact situation that may result, and often does, in differing legal analysis and applicable of regulation.

Counsel submitted unaudited financial statements as evidence of the petitioner's ability to pay the proffered wage despite the director's request for audited financial statements. Counsel cites no legal precedent for the admissibility of the unaudited financial statement, and, according to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements the means by which petitioner's ability to pay is determined.

Financial statements may be compiled, reviewed or audited. A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁷ 8 C.F.R. § 204.5(g)(2).

statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The statements presented were not audited.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.