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U.S. Citizenship and Immigration Services

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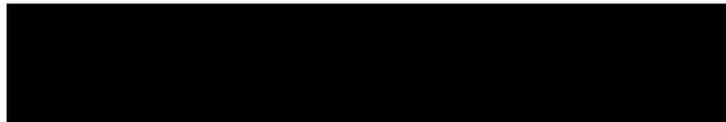


FILE: [REDACTED]
LIN 04 147 50861

Office: NEBRASKA SERVICE CENTER

Date: AUG 06 2007

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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$600 per week, which equals \$31,200 per year.

The Form I-140 petition in this matter was submitted on April 21, 2004. On the petition, the petitioner stated that it was established during 1993 and that it employs ten workers. The petition states that the petitioner's gross annual income is "\$1,000,000+." The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on April 21, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Chicago, Illinois.

The AAO reviews *de novo* issues raised on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the petitioner's Illinois quarterly Contribution and Wage Report for the third quarter of 2005, (3) the petitioner's unaudited balance sheet as of March 31, 2005, and (4) two checks the petitioner issued to the beneficiary. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.²

The petitioner's tax returns show that it is a corporation, that it incorporated on September 30, 1993, and that it reports taxes pursuant to the calendar year.

During 2001 the petitioner declared a loss of \$22,905 as its Schedule K, Line 23 income. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared Schedule K, Line 23 income of \$27,334. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared a loss of \$2,095 as its Schedule K, Line 23 income. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared Schedule K, Line 23 income of \$755. At the end of that year the petitioner's current liabilities exceeded its current assets.

The two checks provided show that the petitioner paid the beneficiary \$735.57 on both November 10, 2004 and November 24, 2004 for a total of \$1,471.14.

The quarterly wage report provided shows that during the third quarter of 2005 the petitioner paid total wages of \$43,305.21 to its 15 employees. Of that amount, it paid \$5,600 to the beneficiary.

The acting director denied the petition on March 3, 2006.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The record contains considerable documentation pertinent to the beneficiary's income and taxes. Other than what is listed above, that evidence is not apparently pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. That evidence includes pay statements issued to the beneficiary by an unidentified employer between December 8, 2004 and November 23, 2005. If those pay statements show wages paid by the petitioner to the beneficiary, then it would be relevant to the petitioner's ability to pay the proffered wage. Absent any evidence in support of that proposition, however, this office will make no such presumption.

On appeal, counsel asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date, citing the petitioner's gross receipts, total wage expense, depreciation, amortization, and Section 179 deductions. Counsel also stated that the petitioner currently employs the beneficiary and that it employs several other cooks.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1049, 1054, 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.

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. 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. The unaudited financial statements will not be considered.

Counsel indicated that the petitioner's depreciation and amortization deductions and its section 179 expenses should be added to its profit in the analysis of the funds available to the petitioner to pay the proffered wage. Counsel's argument is unconvincing.

This office is aware that depreciation and amortization deductions do not require or represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or a sinking fund necessary to replace buildings and equipment at the end of their useful life. But the cost or other basis of assets 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.

A depreciation deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. 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.

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient to its present purpose.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.⁵ Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel's assertion that the cost of items expensed pursuant to IRS Code Section 179 should be included as funds available to pay the proffered wage is even less convincing. Section 179 is a code provision that allows a company to charge to expense in the current tax year an expenditure that would otherwise be capitalized and subject to depreciation over a number of future periods.

Items expensed pursuant to section 179 do, in fact, represent cash outlays during the year taken. Counsel asserts that they should not be considered, in the analysis pursuant to the petitioner's ability to pay the proffered wage, during the year they were incurred and claimed but, again, offers no alternative allocation of that expense.

Counsel's arguments pertinent to depreciation and section 179 expenses, taken together, make clear that counsel is urging that the cost of tangible long-term assets should never be considered for the purpose of determining a petitioner's ability to pay the proffered wage. Counsel implies that the real expense of those tangible assets should be allocated to no years at all, a position this office does not accept.

Counsel asserted that the petitioner employs the beneficiary and several other cooks in the proffered position. That the petitioner employs the beneficiary is certainly relevant. If the petitioner can demonstrate that it paid some portion of the proffered wage to the beneficiary during a given year, then it has demonstrated the ability to pay that portion of the proffered wage to the beneficiary during that year. In the instant case, for instance, the petitioner showed that it paid some wages to the beneficiary during 2004 and 2005. Those amounts will be considered in the analysis of the petitioner's ability to pay the proffered wage.

⁵ 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.

The thrust of counsel's assertion that the petitioner employs other cooks in the proffered position is unknown to this office. Counsel did not assert that the petitioner would replace any of those other cooks with the beneficiary. In that event, the wages the petitioner paid to the other cooks was not available to pay additional wages to the beneficiary.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 paid the beneficiary \$1,471.14 and \$5,600 during 2004 and 2005, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years. The petitioner would ordinarily be obliged to show the ability to pay the balance of the proffered wage during those 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).

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 minus 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 typically⁶ 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 \$31,200 per year. The priority date is April 26, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner had not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared Schedule K, Line 23 income of \$27,334. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner had not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner had not demonstrated the ability to pay the proffered wage during 2003.

The petitioner has demonstrated that it paid the beneficiary \$1,471.14 during 2004 and is obliged to show the ability to pay the remaining \$29,728.86 balance of the proffered wage. During 2004 the petitioner declared Schedule K, Line 23 income of \$755. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year.

The petitioner paid the beneficiary \$5,600 during 2005 and would ordinarily be obliged to show the ability to pay the remaining \$25,600 balance of the proffered wage. However, the petition in this matter was submitted on April 21, 2004. On that date the petitioner's 2005 tax return was unavailable. On September 12, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. 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.