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FILE: [REDACTED]
EAC 04 231 53203

Office: VERMONT SERVICE CENTER

Date: JAN 30 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a gas/service station. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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.

According to the petition, the petitioner's business was established in 1998, and, at the time the petition was prepared, employed three individuals.

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 the granting of 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 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 C.F.R. § 204.5(d). 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 April 27, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$19.33 per hour (\$40,206.40 per year).

On appeal, counsel submits a legal brief.

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, and, a U.S. Internal Revenue Service Form 1120 tax return for 2000, 2001, and 2002.

The petitioner's tax year is from October 1 to September 30th of each year.

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 November 2, 2004, and on March 25, 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 U.S. federal tax returns for 2001, 2002, and 2003, or in the alternative annual statements with audited/reviewed financial statements for 2001, 2002, and 2003.

In response to the request for evidence, counsel submitted copies of the following documents: an explanatory letter dated March 31, 2005; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002; approximately 14 of the petitioner's bank statements from October 2003 to January 2004; and, approximately 13 pay stubs from December 2004 to present.

The director denied the petition on May 11, 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 the director did not consider the petitioner's assets of \$415,514.00 or \$385,915.00 for 2000 and 2001 respectively.

Further, according to counsel, the director failed to consider cash assets of \$2,311.00 and inventory of \$49,786.00 listed on Schedule L of the petitioner's 2001 tax return.

The petitioner's counsel goes on to also list the following items as evidence of the ability to pay the proffered wage, (by implication listed on the petitioner's 2001 tax return): the common stock of publicly traded companies; a note receivable from Cayman Petroleum; accumulated depreciation; and, accumulated amortization.

¹ It has been approximately five 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 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."

Similarly, the petitioner's counsel also lists for 2002 the following items as evidence of the ability to pay the proffered wage: assets of \$337,112.00; cash assets; publicly owned stocks; depreciation; and, accumulated amortization.

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 to show that the petitioner employed the beneficiary since December 2004.² As set forth below, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

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. 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*, 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. *Id.* 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* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,206.40 per year from the priority date of April 27, 2001:

- In 2000,³ the Form 1120 stated net income of \$55,382.00.⁴
- In 2001, the Form 1120 stated a loss of <\$7,259.00>.⁵
- In 2002, the Form 1120 stated a loss of <\$17,677.00>.

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. The petitioner had losses in years 2001 and 2002, and, it was unable to pay the proffered wage during that period.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered

² Although payroll evidence was submitted, it refers to an unidentified employee "157."

³ The petitioner's fiscal year overlaps the priority date.

⁴ Internal Revenue Service Form 1120, line 28, "Taxable income before net operating loss deduction and special deductions...."

⁵ 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.

wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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.

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 2000, petitioner's Form 1120 return stated current assets of \$57,139.00 and \$39,417.00 in current liabilities. Therefore, the petitioner had \$17,722.00 in net current assets. Since the proffered wage is \$40,206.40 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$53,584.00 and \$49,288.00 in current liabilities. Therefore, the petitioner had \$4,296.00 in net current assets. Since the proffered wage is \$40,206.40 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$66,142.00 and \$67,572.00 in current liabilities. Therefore, the petitioner had <\$1,432.00> in net current assets. Since the proffered wage is \$40,206.40 per year, this sum is less than the proffered wage.

Therefore, for the period 2000 through 2002 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 his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

Petitioner's counsel advocates the addition of depreciation and amortization⁷ taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that 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

⁶ 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.

⁷ Intangible assets on a balance sheet are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel also includes in the above contention "cash." Correlating the amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To do otherwise would be duplicative of the petitioner's finances.

We reject the petitioner's assertion that the petitioner's assets (depreciable assets and stocks⁸ held by the petitioner in its portfolio and the cost of their acquisition) should have been considered in the determination of the ability to pay the proffered wage. 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. The assets represent monies already expended by the corporation and, therefore, not an asset. 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.

It is unclear from counsel's submission of the bank statements if he is asserting that monies evidenced in petitioner's bank account is also evidence of the ability to pay, or, if the statements were offered for another purpose. No cover letter to explain this contention or brief was submitted with the additional evidence upon appeal. Counsel cites no legal precedent for the assertions mentioned above, and, according to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel offers approximately 13 pay stubs from December 17, 2004 to March 25, 2005 evidencing year to date earnings for an unidentified employee "157" in 2004 of \$9,413.80, and in 2005, \$9,336.00. Since the proffered wage is \$40,206.40 per year, no evidence was submitted that the petitioner paid the beneficiary the proffered wage.

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 corporate tax returns for 2001 and 2002 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.

⁸ The stock values were not stated on Schedule L, Lines 4, 5 and 6 and presumably are not current assets but long-term investments.

⁹ 8 C.F.R. § 204.5(g)(2).

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.