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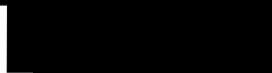


U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 14 2007

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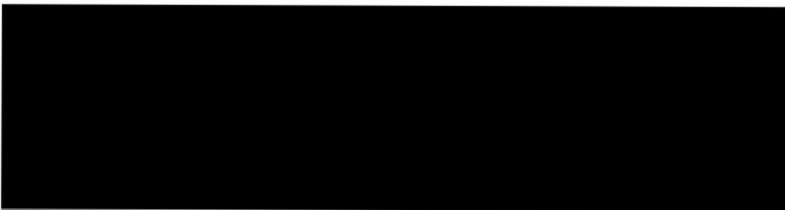
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a fitness center. It seeks to employ the beneficiary permanently in the United States as a maintenance technician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 other 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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 22, 2005. The proffered wage as stated on the ETA Form 9089 is \$8.00 per hour, which amounts to \$16,640 per annum. On the ETA Form 9089, signed by the beneficiary on March 21, 2006, the beneficiary claims to have worked for the petitioner since January 2001.

On Part 5 of the visa petition, filed on March 22, 2006, the petitioner claims to have been established in 1991, and to currently employ eight workers.

In support of the petitioner's ability to pay the proffered wage, the petitioner provided copies of its Form 1120, U.S. Corporation Income tax return for 2004 and 2005. As the priority date of the petition is December 22, 2005, the petitioner's 2005 return is more relevant. It indicates that the petitioner files its taxes using a standard calendar year. In 2005, the petitioner reported taxable income of -\$60,748 before the net operating loss (NOL) deduction, which is its net income for ability to pay purposes. Schedule L reflects that the petitioner had \$69,603 in current assets and \$85,108 in current liabilities, yielding -\$15,505 in net current assets.

Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 petitioner also submitted documents related to its employment of the beneficiary. A copy of the beneficiary's Colombian passport reflects that his complete name is [REDACTED]. Relevant to the payment of wages, the petitioner provided:

- 1) copies of two Wage and Tax Statements (W-2s) for 2004 and 2005 that the petitioner issued to [REDACTED]. The social security number listed for both W-2s is [REDACTED]. The 2004 W-2 reflects wages of \$20,817. The 2005 W-2 shows wages of \$24,145.38. Two additional W-2s issued by a related entity are also contained in the record. The 2005 W-2 reflects an additional \$114 paid to the beneficiary.
- 2) A copy of a check stub issued by the petitioner showing an employee file number of [REDACTED] a social security number of [REDACTED] reflecting year to date wages as of December 25, 2005 of \$24,145.38 paid to [REDACTED] at a rate of \$10.00 per hour.
- 3) A copy of a check stub from the petitioner to [REDACTED], employee file number [REDACTED] with social security number [REDACTED] showing year to date wages of \$927.50 paid at the rate of \$10.00 per hour as of the period ending January 8, 2006.
- 4) A copy of a check stub issued by the petitioner to "[REDACTED]" employee file number [REDACTED] with social security number [REDACTED], showing year to date wages of \$1,010 for the period beginning January 9, 2006 and ending January 22, 2006, paid at the rate of \$10.00 per hour.
- 5) Two copies of check stubs issued by the petitioner to [REDACTED], employee file number [REDACTED] with social security number [REDACTED] showing year to date wages of \$3,022.50 as of February 19, 2006.

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- 6) Three copies of check stubs issued in April and May 2006 by the petitioner to [REDACTED], employee file number [REDACTED] with social security number [REDACTED] showing year to date wages of \$9,957.50 as of May 28, 2006, paid at the rate of \$10.00 per hour.
- 7) An affidavit from [REDACTED] the petitioner's bookkeeper,² confirming that the identity of the petitioner's employee [REDACTED] who appears on the W-2 and pay stubs is the same person as [REDACTED] and that [REDACTED] and [REDACTED] are the same person. Another affidavit from [REDACTED] is submitted on appeal. She also states that she has been personally responsible for the payroll and that she can attest that [REDACTED] is the same person who was issued the paystubs and W-2s. [REDACTED] adds that the beneficiary has also been known as [REDACTED] and that is probably why it was listed on the payroll. Use of the last names of [REDACTED] or [REDACTED] was simply an error relating to the naming conventions employed in South America. [REDACTED] states that once legal advice was obtained related to the immigration petition, it was realized that a taxpayer identification number should be secured rather than using erroneous social security numbers. She states that when the records were updated from using name to [REDACTED] the payroll company "automatically issued a new employee file number."

Noting the discrepancies of social security numbers and employee file numbers, the director determined that the petitioner had not clearly established that the individuals using the different numbers were one and the same employees. The director further concluded that neither the petitioner's net income nor net current assets as shown on its 2005 tax return did not demonstrate the petitioner's ability to pay the proffered wage. The director denied the petition on July 12, 2006.

On appeal, counsel asserts that the depreciation deduction should have been added back to the petitioner's net income in determining the ability to pay the proffered wage. She also provides additional pay stubs for [REDACTED] showing that the petitioner has paid year to date wages of \$14,632.50 as of August 6, 2006 at the rate of \$10.00 per hour. The social security number listed on these stubs is [REDACTED] with employee file number [REDACTED]. Counsel also provides a copy of a letter from the Internal Revenue Service (IRS) confirming that [REDACTED] had a taxpayer identification number of [REDACTED].

Further submitted on appeal is a copy of an individual tax return for 2005 filed by [REDACTED] using the taxpayer identification number issued by the IRS. The reported wages are \$24,145.

CIS reviews the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080

² According to the preference petition, she is also the manager.

(S.D.N.Y. 1985)). 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 depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further 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 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 536.

In this matter, as indicated by the director, neither the petitioner's net income of -\$60,748 nor its net current assets of -\$15,505 was sufficient to cover the proffered wage of \$16,640 in 2005.

However, based on a review of the documents submitted to the underlying record and on appeal supporting the employment and payment of wages to the beneficiary, in this case, we find that the petitioner has submitted sufficient evidence to indicate that it has employed and paid the individual identified as the beneficiary by [REDACTED]. The payroll stubs and W-2s indicate that he was paid \$24,145 in 2005 and continues to be paid at \$10.00 per hour. As the annual proffered wage is less than this salary, it may be concluded that the petitioner has established its ability to pay the proposed wage offer as of the priority date of the petition.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.