

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE:

[REDACTED]
SRC 03 252 50809

Office: TEXAS SERVICE CENTER

Date:

MAY 09 2007

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

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:

[REDACTED]

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, Texas Service Center, denied the instant preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction general contractor. It seeks to employ the beneficiary permanently in the United States as a construction supervisor. As required by statute, a Form ETA 750, Application for Alien 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.

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 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.

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 granting 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 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 DOL. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$30,869 per year.

The Form I-140 petition in this matter was submitted on September 11, 2003. On the petition, the petitioner stated that it was established during 1996 and that it employs "12 – 16" workers. The petition states that the

petitioner's gross annual income is \$620,986. The petitioner did not state its net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary on April 10, 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 Cleveland, North Carolina.

The AAO reviews *de novo* issues raised in decisions challenged 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 the petitioner's owner's 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns and an undated letter from a CPA. 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.

The petitioner's owner's tax returns show that he and his spouse filed jointly during each of the salient years. During 2001 they had one dependent. During 2002, 2003, and 2004 they had no dependents. Corresponding Schedules C Profit or Loss from Business show that the petitioner's owner holds the petitioner as a sole proprietorship and that the petitioner reports taxes pursuant to cash convention accounting.

During 2001 the petitioner returned a profit of \$48,851. The petitioner's owner declared adjusted gross income of \$45,400 during that year, including the petitioner's profit offset by deductions.

During 2002 the petitioner returned a profit of \$62,618. The petitioner's owner declared adjusted gross income of \$58,204 during that year, including the petitioner's profit offset by deductions.

During 2003 the petitioner returned a profit of \$17,618. The petitioner's owner declared adjusted gross income of \$12,533 during that year, including the petitioner's profit offset by deductions.

During 2004 the petitioner returned a profit of \$43,679. The petitioner's owner declared adjusted gross income of \$38,793 during that year, including the petitioner's profit offset by deductions.

The CPA's undated letter stated that in calculating cash flow to show ability to pay the proffered wage it is appropriate to add a taxpayer's depreciation deduction back to its net profit, as it does not represent or require a cash outlay during the year taken.

The director denied the petition on December 13, 2005. In that decision the director stated that the petitioner had demonstrated the ability to pay the proffered wage during 2001, 2002, and 2004, because its profits during those years exceeded the annual amount of the proffered wage, but that it had failed to show the ability

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).

to pay the proffered wage during 2003. This office reiterates that as per *Dor v. INS*, 891 F.2d 997 it performs a *de novo* review based on all of the evidence in the record. It is not bound by the findings below.

On appeal, counsel asserted that the CPA's letter demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel further stated that if the DOL had approved the labor certification more quickly the petitioner would not have been required to demonstrate its ability to pay the proffered wage during 2003, but only during previous more profitable years.

This office is unpersuaded by counsel's implication that the petitioner should not have to show the ability to pay the proffered wage during 2003 because the labor certification should have been approved earlier. The petitioner is not only obliged to show the ability to pay the proffered wage until the anticipated date of approval of the labor certification, nor even just until its actual approval. Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to show the ability to pay the proffered wage from the priority date, through approval of the labor certification, through approval of the Form I-140 petition, and through the approval of the Form I-485 Application for Adjustment of Status. That the procedure took longer than two years is not unusual and is in no way mitigating.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is similarly 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 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.

This 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. *See 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 asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.² 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.

² 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.

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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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).

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of 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 he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that she could still have sustained himself and his 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 \$30,869 per year. The priority date is April 12, 2001

During 2001 the petitioner's owner declared adjusted gross income of \$45,400. If he had been obliged to pay the proffered wage out of that amount he would have been left with \$14,531 with which to support his household. No evidence pertinent to the petitioner's owner's recurring monthly expenses was requested or provided. To expect that the petitioner's owner could support his family of three for an entire year on \$14,531, however, is unreasonable. The petitioner submitted no reliable evidence of any other funds at its disposal 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.

During 2002 the petitioner's owner declared adjusted gross income of \$58,204. If he had been obliged to pay the proffered wage out of that amount he would have been left with \$27,355 with which to support his household. Although that seems to be a very small amount with which to support a family of two for an entire year, this office is not prepared to say that the petitioner's owner could not do so. The petitioner has sufficiently demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$12,533. The petitioner would have been unable to pay the proffered wage out of that amount. The petitioner submitted no reliable evidence of any other funds at its disposal 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.

During 2004 the petitioner's owner declared adjusted gross income of \$38,793. If he had been obliged to pay the proffered wage out of that amount he would have been left with \$7,924 with which to support his household. To expect that the petitioner's owner could support his family of two for an entire year on that amount, however, is unreasonable. The petitioner submitted no reliable evidence of any other funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 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 petition was correctly denied on this basis, which has not been overcome on appeal.

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.