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File:

EAC-04-027-51422

Office: VERMONT SERVICE CENTER

Date: FEB 07 2008

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 Director, Vermont Service Center (director), denied the immigrant visa petition based on the petitioner's failure to document its ability to pay the proffered wage from the time of the priority date onward. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO affirmed the director's decision that the petitioner had not demonstrated its ability to pay the beneficiary the proffered wage. The petitioner filed a Motion to Reconsider the AAO decision. Upon reconsideration, the AAO affirms its prior decision, and the appeal remains dismissed.

The petitioner is a construction and restoration company, and seeks to employ the beneficiary permanently in the United States as a bricklayer. The petition filed was submitted with a copy of Form ETA 750A, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the AAO director's November 3, 2005 decision, the petition was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

On November 29, 2005, the petitioner filed a Motion to Reopen and Reconsider the denied appeal.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

The petitioner has provided new and relevant evidence to the matter at hand. We will reopen the petition and reconsider the matter.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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).

The regulation 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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 16, 2001. The proffered wage as stated on Form ETA 750 is \$36.22 per hour based on a 35 hour work week, which is equivalent to an annual salary of \$65,920.40. The labor certification was approved on March 28, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on November 4, 2003. The petitioner listed the following information: established: May 3, 1999; gross annual income: not listed; net annual income: not listed; and current number of employees: not listed.

On January 13, 2004, the director issued an RFE for the petitioner to submit additional evidence of its ability to pay the proffered wage, as the initial W-2 evidence and federal tax returns did not demonstrate the petitioner's ability to pay.

On July 1, 2004, the director denied the petition on the basis that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner appealed.

On appeal, the petitioner resubmitted its 2000, 2001, and 2002 tax returns, as well as copies of contracts for jobs to be completed. The petitioner additionally resubmitted its bank statements.

On November 3, 2005, the AAO determined that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage. On that basis, the AAO affirmed the director's decision and dismissed the appeal. The petitioner then filed a Motion to Reopen and Reconsider the decision, and submitted new evidence in the form of its 2003 and 2004 federal tax returns, as well as additional bank statements.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary listed that he has been employed from July 1999 to the present (date of signature). The petitioner submitted the following evidence of payment to the beneficiary:

<u>Year</u>	<u>W-2 Wages</u>
2004 ¹	\$53,474.25
2003	not submitted
2002	\$11,400
2001	\$13,800
2000 ²	\$13,350

¹ The petitioner submitted the beneficiary's 2004 W-2 Form and information related to the beneficiary's 2005 pay with its Motion to Reopen and Reconsider the AAO's decision. The petitioner did not submit the beneficiary's 2003 W-2, but instead submitted two copies of the beneficiary's 2004 W-2, which may have been in error.

² As the priority date is April 14, 2001, the petitioner's wages paid to the beneficiary in 1999 and 2000 are

1999 \$2,750

The petitioner additionally submitted copies of the beneficiary's 2005 paystubs, which exhibited payment to the beneficiary of \$33,861.12 for the year-to-date as of November 9, 2005, and regular weekly earnings of \$1,058.16 per week.

The wages paid to the beneficiary in each year are less than the proffered wage, and accordingly, the petitioner cannot establish its ability to pay the beneficiary the proffered wage based on prior wage payment alone. The petitioner must show that it can pay the difference between the wages paid and the proffered wage for each year from 2001 onward.

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. 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*, 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.

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 petitioner's tax returns reflect that it is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004 ^{3,4}	\$52,533
2003	\$8,490
2002	\$2,967
2001	\$2,014
2000	-\$16,425

not relevant to the petitioner's ability to pay from the priority date onward, however, the wages paid will be considered generally.

³ The petitioner submitted its 2003, and 2004 federal tax returns with its Motion to Reopen and Reconsider the AAO decision.

⁴ The petitioner files its taxes on a tax year basis from May 1 to April 30, so that the petitioner's 2004 tax return was filed for the time period May 1, 2004 to April 30, 2005.

Based on the petitioner's net income, it is unable to demonstrate its ability to pay the proffered wage in any of the above years. However, the petitioner could demonstrate its ability to pay the proffered wage in 2004 based on the combination of the petitioner's net income and wages paid to the beneficiary. The petitioner could not, however, demonstrate its ability to pay the proffered wage in the other years, even if the wages paid to the beneficiary were added to the petitioner's net income.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. 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. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets are as follows:

<u>Tax Year</u>	<u>Net Current Assets</u>
2004	\$26,106
2003	-\$35,427
2002	-\$5,553
2001	-\$6,410
2000	-\$6,820

The petitioner's net current assets would not reflect its ability to pay the proffered wage in any of the foregoing years. Further, the petitioner would not be able to demonstrate its ability to pay for the years 2001, 2002, or 2003 even if the wages paid to the beneficiary were added to the petitioner's net current assets.

The petitioner had previously submitted bank statements for the time period April 6, 2001 to February 6, 2004. The petitioner submitted additional bank statements for the time period April 7, 2004 to November 7, 2005⁶ with its Motion to Reopen and Reconsider.

Generally, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. If we were to examine the statements specifically, the balances range from a low balance of \$271.37 in March 2003 to a high balance of \$110,735.53 in February 2005.

The AAO decision specifically considered the wages paid to the beneficiary, and that if the petitioner were to pay the full proffered wage in 2001, the petitioner would have need to raise the beneficiary's wage by \$4,300

⁵According 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 The statements submitted did not include the petitioner's January, May or June 2005 statements.

per month. If the wage increase were paid through the petitioner's funds in its bank account, the AAO decision provides that the petitioner's bank account would have been exhausted by November 2001. Accordingly, the petitioner cannot establish its ability to pay the proffered wage through its bank statements.

In the petitioner's Motion to Reopen, counsel provides three reasons where he asserts that both the director and the AAO erred in determining the petitioner's ability to pay in not considering: (1) deductions for depreciation; (2) the petitioner's large bank balances; and (3) that the petitioner has demonstrated its on-going business and contracts for work, which would establish its ability to pay. We will consider each argument respectively.

Counsel provides that failing to consider allowed deductions, which would reduce the petitioner's taxable income was an "improper decision by both [CIS] and on appeal." Counsel provides that the Internal Revenue Code allows for deductions and the failure to consider the same is "an arbitrary abuse of discretion." Specifically, counsel provides that Congress allowed a deduction for depreciation "as an incentive for businesses to expand their operations and make capital investments; thereby increasing productivity and increasing hiring, hence greater employment opportunities for our citizenry."

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage whether considered individually, or combined with other factors.

Counsel provides that the AAO decision states that, "there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year." Counsel contends that there is also no precedent, which would disallow consideration of depreciation. As there is no precedent to disallow depreciation, counsel asserts that the concept should be discussed. Counsel provides that a capital improvement is deducted over the course of several years based on the type of asset, and, therefore, depreciation is a "paper expense" and not an actual expenditure for the particular tax year.

As noted above, the courts have considered the depreciation argument before and dismissed it. *See Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537. Counsel does not state how the IRS Code is binding in these proceedings. 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. The IRS Code is not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also provides that the petitioner's bank statements would exhibit its ability to pay, and has submitted additional statements with its Motion to Reopen and Reconsider, which show monthly balances ranging from \$11,000 to \$110,000.

As noted above, the petitioner has not demonstrated that the funds listed on its bank statements represent additional assets that were not listed on its Form 1120 Schedule L. The AAO decision specifically raised this point in its decision. The petitioner failed to address this issue in its Motion to Reopen and Reconsider. Further, the AAO decision specifically noted that based on the deficiencies in the beneficiary's pay, the petitioner would exhaust the funds in its bank account by November 2001 if it used those funds to pay the remainder of the beneficiary's salary. The petitioner similarly failed to address this point as well in its Motion to Reopen and Reconsider. Therefore, the bank statements submitted have been properly considered based on the information that the petitioner has provided, and would not demonstrate the petitioner's ability to pay the proffered wage.

Counsel additionally asserts that the petitioner's business was established in May 1999, and its longevity should be considered. As the petitioner first incorporated in 1999, the company would need to attract business before it could become profitable, which counsel provides is a process that would take several years. Counsel provides that the petitioner's 2003 federal tax return showed a profit of \$8,490, while the petitioner's 2004 federal tax return showed a profit of \$52,533. Counsel provides that these figures, corroborated by the contracts the petitioner previously submitted and "discounted as meaningless by the [AAO], actually bore fruit --- hence the profit."

While it is important that the petitioner exhibits that it is able to conduct business on an on-going basis, the relevant inquiry is whether the petitioner can demonstrate its continuing ability to pay the proffered wage beginning on the priority date, not whether the petitioner can show on-going contracts. While the contracts would exhibit a stream of revenue, the income must be considered against the petitioner's costs and liabilities, an analysis encompassed in consideration of the petitioner's net income, and net current assets above. Therefore, the contracts, while not meaningless, have been considered through the analysis of the petitioner's net income and net current assets above.

The regulation at 8 C.F.R. § 204.5(g)(2) provides that the petitioner must demonstrate its ability to pay from the priority date, here, April 14, 2001. Accordingly, whether the petitioner's business was profitable in 1999, or if it took over a year to become profitable is not relevant, since we would measure the petitioner's ability to pay from April 2001 onward. While the petitioner's tax returns do reflect an increase in its gross receipts for each year, the petitioner must show that it can pay the proffered wage from April 2001 onward. Based on the documentation submitted, the petitioner can only demonstrate its ability to pay in one year, 2004, based on a combination of the petitioner's net income and wages paid to the beneficiary. The petitioner has failed to demonstrate its ability to pay in any of the other years, 2001, 2002, or 2003. In considering the petitioner's circumstances as a whole, we would not conclude that the petitioner has established its ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.