U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 1 6 2004

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 sustained. The petition will be approved.

The petitioner is an automotive service station. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanies 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 a brief and additional evidence.

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 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 March 26, 2001. The proffered wage as stated on the Form ETA 750 is $39,748.80 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. That tax return shows that the petitioner reports taxes based on the calendar year. Because the priority date is March 26, 2001, information pertinent to the petitioner's finances during the 2000 calendar year are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner submitted no other information pertinent to its to pay the proffered wage with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 1, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2001 tax return. Finally, the Service Center requested, if the petitioner had employed the beneficiary during

2001, that it provide copies of the Form W-2 Wage and Tax Statement showing what it paid to the beneficiary during that year.

In response, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of $52,169 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $63,403 and current liabilities of $23,402, which yields net current assets of $40,001.

Counsel also submitted a letter, dated January 24, 2003, from the petitioner's owner. That letter cites the petitioner's gross receipts, payroll expenses, payroll taxes, and the amount of the petitioner's depreciation deduction as evidence of its ability to pay the proffered wage. The letter also notes that, "Couple of mechanics have left the job since then."

Counsel did not provide a W-2 form showing any wages the petitioner paid to the beneficiary.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 14, 2003, denied the petition.

On appeal, counsel submits a brief. In the brief counsel names three mechanics that he asserts have ceased to work for the petitioner since the petitioner filed its 2001 income tax return. Counsel submitted photocopies of three checks, one to each of those three alleged mechanics, but no other evidence in support of his assertion. Counsel further states that the petitioner has eight employees and cites the amount of the petitioner's gross receipts, its wage expense, and its payroll taxes as evidence of the petitioner's ability to pay the proffered wage.

Further, counsel submits a letter, dated June 12, 2003, from the petitioner's owner citing the amount of the petitioner's gross receipts, its wage expense and payroll taxes, and its depreciation deduction as evidence of the petitioner's ability to pay the proffered wage.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income, 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 the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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

[1] The petitioner might demonstrate this, for instance, by demonstrating, rather than merely alleging, that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. 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. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (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.

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 paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will 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, supra* (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh, supra*; *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. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

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, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is March 26, 2001. The proffered wage is $39,748.80 per year.

During 2001, the petitioner declared a loss. The petitioner was unable to pay any portion of the proffered wage out of its income. The petitioner did not demonstrate that it paid any wages to the beneficiary during that year. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage by that method.

However, the petitioner had net current assets of $40,001 at the end of 2001. That amount is greater than the amount of the proffered wage. The petitioner was able to pay the proffered wage out of its net current assets during 2001. The petitioner demonstrated its ability to pay the proffered wage during the only salient year.

Therefore, the petitioner has sufficiently demonstrated its ability to pay the proffered wage beginning on the priority date.

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.