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

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: WAC 02 276 50564 Office: CALIFORNIA SERVICE CENTER Date: NOV 18 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:

SELF-REPRESENTED

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is an auto body repair shop. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a automobile painter.[1] The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a statement and additional evidence.

The regulation at 8 C.F.R. § 103.5(a)(2) states. In pertinent part:

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

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

[1] Although Auto Painter is the job title shown on the petition and the Form ETA 750, the job description on the Form ETA 750 also includes both supervisory and auto body repair duties.

> 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 either 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. Here, the Form ETA 750 was accepted for processing on July 27, 2000. The proffered wage as stated on the Form ETA 750 is $15 per hour, which equals $31,200 per year.

With the petition the petitioner submitted a copy of its 2001 Form 1065 U.S. Return of Partnership Income. That return shows that the petitioner declared $367 in ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities. A Schedule K-1 indicates that the petitioner was held as a limited liability company during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on January 2, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center requested that the evidence cover the years from 2000 through the date of the request. The Service Center noted that the petitioner had employed the beneficiary from 1997 through 2000 and requested a copy of the Form W-2 Wage and Tax Statement showing wages the petitioner paid to the beneficiary during 2000.

In response, the petitioner submitted a 2000 W-2 form showing that National Auto Body, of [redacted] in San Diego, California, paid the beneficiary $13,210 during that year. The petitioner also submitted W-2 forms for 1997, 1998, and 1999. This office notes that because the priority date is July 27, 2000, evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner provided the 2000 Form 1040 U.S. Personal Income Tax Return of the petitioner's owner and his wife. A Schedule C provided with that return shows that the petitioner was then held as a sole proprietorship. The petitioner returned a profit of $15,829. The Form 1040 shows that couple declared an adjusted gross income of $14,710 during that year, including the petitioner's entire profit offset by deductions.

The petitioner also provided the 2001 and 2002 Form 1040 U.S. Personal Income Tax Returns of that same couple, showing that they were then the two shareholders in the petitioning corporation. Those returns show that the shareholders declared adjusted gross income of $21,586 and $33,563 during those years, respectively.

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 March 12, 2003, denied the petition.

On appeal, the petitioner submitted its compiled 2000, 2001, and 2002 financial statements. The petitioner asked that they be accepted as evidence of its ability to pay the proffered wage.

Counsel's reliance on unaudited financial records was misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The Director, AAO found that the petitioner had not demonstrated its ability to pay the proffered wage and dismissed the appeal on September 15, 2003.

With the motion, the petitioner submits a letter, dated October 15, 2003, from its accountant. The accountant states that a correct calculation of the petitioner's net income during various years would include adding back in the amount of its depreciation deduction.

The accountant is correct that 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 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. 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.

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 submitted a 2000 W-2 form showing that National Auto Body, o[redacted] in San Diego, California, paid wages to the beneficiary during that year. The record contains no evidence to demonstrate that National Auto Body is related to the petitioner. The petitioner did not establish that it employed and paid the beneficiary during any of the salient years.

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, the AAO will, in addition, 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*, 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 CIS should have considered income before expenses were paid rather than net income.

The priority date is July 27, 2000. The proffered wage is $31,200 per year

During 2000, the petitioner's was a sole proprietorship and returned a profit of $15,829. That amount is insufficient to pay the proffered wage. Because the petitioner's sole proprietor/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 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 proffered wage out of his adjusted gross income and supported himself on the amount remaining. The petitioner's owner's adjusted gross income during that year, however, was $14,710, which amount includes the petitioner's profit, reduced by various deductions. That amount is also insufficient to pay the proffered wage. The petitioner failed to show the ability to pay the proffered wage during 2000.

During 2001, the petitioner was a limited liability company. The owners of a limited liability corporation are not obliged to pay the debts and obligations of the company out of their own income and assets. Therefore, the income and assets of the petitioner's owners is not correctly a part of the determination of the petitioner's ability to pay the proffered wage during that year. The petitioner declared ordinary income of $367 during that year. That amount is insufficient to pay the proffered wage. The petitioner ended the year with no net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner did not submit its partnership return for 2002. It did, however, submit the 2002 joint personal return of its partners. That return shows that the partners, a husband and wife, declared adjusted gross income of $33,563 during that year. Although that amount exceeds the proffered wage, if the petitioner's owners had been obliged to pay the proffered wage out of their adjusted gross income, they would have been left with a balance of only $2,363 upon which to support themselves and their three dependents during that year. To expect that a family of five can live on that amount is manifestly unreasonable. No evidence was submitted that any other funds were available to the petitioners or its owners during 2002 with which to pay the proffered wage or to support the petitioner's owners' family. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 2000, 2001, or 2002. Therefore, the objection of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of September 15, 2003 is affirmed. The petition is denied.