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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 0 9 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.

for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholesale dry cleaner. It seeks to employ the beneficiary permanently in the United States as a shirt department manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 claims that the depreciation expense should be added back to the petitioner's available funds to pay the proffered wage.

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 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 February 21, 2001. The proffered wage as stated on the Form ETA 750 is $30.10 per hour, which amounts to $62,608 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since September 2000.

On the petition, the petitioner claims to have been established in 1995, to have a gross annual income of approximately $953,000, and an annual net income of $64,394. The petitioner also states that it currently employs seven workers.

In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. This tax return reflects that the petitioner files its taxes using a standard calendar year. It shows that the petitioner's net income before the net operating loss deduction (NOL) was $15,034. Schedule L of the tax return indicates that the petitioner had $155,333 in current assets and $243,531 in current liabilities, resulting in -$88,198 in net current assets. Net current assets are the difference

between the petitioner's current assets and current liabilities.[1] Besides reviewing a petitioner's net income during a given period, CIS will also examine a petitioner's net current assets as an alternative means of determining a petitioner's ability to pay a beneficiary's proposed wage. A corporation's year-end current assets and current liabilities are shown on Schedule L. If a corporation's end-of-year 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. In the instant matter, the petitioner also submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It shows that the petitioner paid the beneficiary $18,000 in wages during that year, which is $44,608 less than the proffered wage.

Because the director deemed the initial evidence submitted with the petition insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 16, 2003, the director requested additional evidence pertinent to that ability. The director advised the petitioner that it must demonstrate this ability to pay the beneficiary's wage offer as of the priority date of February 20, 2001 and continuing until the present. The director specifically requested that the petitioner provide copies of the beneficiary's W-2s for 2000 and 2002, if it employed the beneficiary during these periods.

In response, the petitioner, through counsel, submitted copies of the petitioner's corporate tax returns for 2000 and 2002, as well as resubmitting a copy of its 2001 corporate tax return. The 2000 corporate tax return shows that the petitioner's net income, before taking the NOL deduction, was $7,328. Schedule L shows that it had $133,981 in current assets and $134,578 in current liabilities, yielding -$597 in net current assets.

More relevant to the determination of the petitioner's ability to pay the alien's proposed wage offer of $62,608 are the 2001 and 2002 tax returns because they cover the period beginning and subsequent to the priority date of February 21, 2001. The 2002 tax return reflects that the petitioner reported $15,452 in net income, before taking the NOL deduction. Schedule L shows that its current assets were $102,199 and current liabilities were $204,016, which amounts to -$101,817 in net current assets. The petitioner also submitted a copy of the beneficiary's 2002 W-2 and a copy of a Form 1099, Miscellaneous Income, both issued by the petitioner to the beneficiary, showing that it paid him $3,200 in wages and further compensated him $27,000. The beneficiary's individual tax return, submitted to the record, shows that he reported the $27,000 as business income. It is unclear from the evidence, whether the $27,000 was paid to the beneficiary in return for services performed as a shirt department manager or for some other service.

On February 2, 2004, the director denied the petition, citing the petitioner's lack of necessary funds to cover the proffered wage as shown on its corporate tax returns.

On appeal, counsel simply asserts that the petitioner's non-cash depreciation/amortization deductions taken on the tax returns should be added back to the petitioner's available resources to pay the proffered wage. Counsel

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[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.

submits a brief letter from an accountant reiterating the assertion that the depreciation expense represents available funds.

Counsel's claim that the petitioner's depreciation/amortization expenses should be added back to the equation is rejected. In reviewing a petitioner's ability to pay a proffered wage, Citizenship and Immigration Services (CIS) will 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). 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 the Service should have considered income before expenses were paid rather than net income.

Consideration of actual wages paid to the beneficiary is also part of the evaluation of a petitioner's ability to pay the proposed wage offer. CIS reviews whether the petitioner may have actually employed and paid the beneficiary during any of the relevant period beginning as of the petition's priority date. 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. To the extent that the petitioner paid wages to the beneficiary, credit will be given to these amounts, if credibly documented, in reviewing the petitioner's ability to pay the proffered wage. In the instant case, as noted above, the petitioner paid the beneficiary $44,608 less than the proffered wage in 2001. This shortfall could not be covered by either its net income of $15,034 or its net current assets of -$88,198. Similarly, even assuming the $27,000 paid to the beneficiary in 2002 could be considered to be the equivalent of a $27,000 salary for services rendered as a shirt department manager, the total compensation paid by the petitioner to the beneficiary in 2002 was $32,408 less than the proffered wage of $62,608. It could not be paid out of either the petitioner's net income of $15,452 or net current assets of -$101,817 that year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the continuing ability to pay the proffered wage be established as of the visa priority date. The petitioner's corporate tax returns fail to establish that it could cover the shortfall between the actual wages paid to the beneficiary and the proffered wage in either 2001 or 2002. Therefore, the petitioner has not demonstrated that it has had the continuing financial ability to pay the proffered salary as of the visa 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 not met that burden.

ORDER: The appeal is dismissed.