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U.S. Citizenship and Immigration Services

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AUG 1 8 2005

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 03 008 50543

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, Director
Administrative Appeals Office

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

The petitioner is an excavation contractor. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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 submits a brief.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $24.62 per hour, which equals $51,209.60 per year.

On the petition, the petitioner stated that it was established on June 1, 1984 and that it employs four workers. The petition states that the petitioner's gross annual income is $858,844 and that its net annual income is $8,955. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1997. The petition indicates that the petitioner will employ the beneficiary in Ridgefield, Connecticut.

In support of the petition, the petitioner's previous counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and a letter, dated September 3, 2002, from its owner.

The petitioner's 2001 income tax return shows that the petitioner is a corporation and that it reports taxes pursuant to the calendar year. The tax return further shows that during 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of $8,955. The corresponding Schedule L

shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The owner's letter states that, based on that return, the petitioner has the ability to pay the proffered wage.

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 July 2, 2003, requested additional evidence pertinent to that ability. The Service Center also specifically requested that the petitioner provide Form W-2 Wage and Tax Statements showing any amounts it paid to the beneficiary during 2001 and 2002.

A questionnaire included in that Request for Evidence asked whether the proffered position is a newly created position. The answer "No" was written in the space provided. The questionnaire further inquired what wage the incumbent of the proffered position had been receiving. The answer "$25,585 was entered in the space provided. That questionnaire requested that the petitioner identify the incumbent employee, submit evidence of the salary paid to the incumbent, evidence that the position was vacated, and Form 941 Quarterly Wage Reports for the period in question. The petitioner did not respond to those requests.

The petitioner provided a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $6,731 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted 2001 and 2002 Form 1099 miscellaneous income statements and a 2002 Form W-2 Wage and Tax Statement. The 2001 Form 1099 shows that the petitioner paid the beneficiary $19,096.50 during that year. The 2002 W-2 form shows that the petitioner paid the beneficiary $17,265 and the Form 1099 shows that the petitioner paid the beneficiary an additional $8,320.

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 November 14, 2003, denied the petition.

On appeal, the petitioner's current counsel of record provides a copy of a 2001 W-2 form purporting to show wages the petitioner paid to the beneficiary during that year. This office notes that the Request for Evidence specifically requested that, if the petitioner employed the beneficiary during 2001, it provide the W-2 form showing wages the petitioner paid to the beneficiary during that year. The petitioner did not provide the 2001 W-2 form in response to that request, but now seeks to have it considered on appeal.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office will not consider the 2001 W-2 form for any purpose.

Counsel also provides a copy of a letter, dated December 12, 2003, from the petitioner's owner and a letter, dated December 12, 2003, from the petitioner's bank.

The petitioner's owner's letter states that the petitioner's depreciation deductions do not represent actual expenses to the business during the years taken. The letter from the bank states that the petitioner has maintained an account since January 23, 1997 with a moderate five-figure balance and that it has a credit line of $40,000.

In the brief, counsel argues that depreciation is not an actual expense but is only computed on the tax return for accounting purposes. Counsel urges that the petitioner's depreciation deduction should, therefore, have been added back into the petitioner's profits, and observes that the resulting figure would have exceeded the annual amount of the proffered wage. Counsel asserts that the failure to add depreciation to profit belies an inability to read corporate tax returns and an inability to understand the concept of depreciation.

Counsel states that Citizenship and Immigration Services (CIS) "is in the habit of requesting *a separate statement from the employer, stating that the Depreciation did not represent an actual expense to the company in the year shown.*" (Emphasis in the original.) Counsel urges that such a statement should be unnecessary because depreciation, by its very nature, is not an actual expense. Counsel argues, though, that if CIS is going to request such a statement from employers, then CIS was remiss in not requesting such a statement in this case. Counsel argues that, in failing to specify that it would not consider the petitioner's depreciation as a fund available to pay the proffered wage, CIS treated the petitioner differently from other similarly situated petitioners.

Counsel further asserts that the amount of the proffered wage during 2001 should have been prorated from the priority date to the end of the calendar year.

Finally, counsel states that the petitioner was placed at a severe disadvantage in responding to CIS because his previous counsel was indefinitely suspended from the practice of law in the state of Connecticut, and the petitioner was unable, therefore, to obtain a copy of his file and was unable to assist current counsel in preparing the appeal in this matter.

This office is unaware of the existence of any policy of asking a petitioner for a statement that its depreciation does not represent a real expense. That policy would be inappropriate not because, as counsel suggests, depreciation is not a real expense, but because, as the very nature of depreciation suggests, depreciation is, in fact, a real expense.

Counsel 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. But 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.

Counsel's reliance on the petitioner's line of credit is misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel's reliance on the statement in the December 12, 2003 bank letter pertinent to the petitioner's account balance is similarly misplaced. First, bank statements or other evidence of an account's balance are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, such evidence shows the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[1] Third, no evidence was submitted to demonstrate that the funds reported somehow reflect additional available funds that were not reported on its tax returns.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel states that the petitioner's previous counsel has been indefinitely suspended, but provides no evidence in support of that assertion. Counsel states that the petitioner was therefore unable to obtain a copy of his file and was therefore unable to assist counsel in preparing a defense. This office does not understand how it follows from previous counsel's suspension that the petitioner would be unable to obtain those documents, and counsel does not elaborate. Counsel does not explicitly state any possible cure for the disadvantage allegedly occasioned by counsel's alleged suspension, but appears to imply that the petition should therefore be approved.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned

[1] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Counsel has not met any one of those three conjunctive tests and the assertion that the petitioner was prejudiced by counsel's suspension will not be considered for any purpose.

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 established that it paid the beneficiary $19,096.50 during 2001 and $25,585[2] during 2002. Those amounts are less than the annual amount of the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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 total 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 petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, 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 assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $51,209.60 per year. The priority date is April 30, 2001.

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[2] That figure is the total of the $17,265 shown on the 2002 W-2 form and the $8,320 shown on the 2002 Form 1099.

Having demonstrated that it paid the beneficiary $19,096.50 during 2001 the petitioner is obliged to demonstrate the ability to pay the $32,113 balance of the annual amount of the proffered wage. During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of $8,955. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had no net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it 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.

Having demonstrated that it paid the beneficiary $25,585 during 2002 the petitioner is obliged to demonstrate the ability to pay the $25,624.60 balance of the annual amount of the proffered wage. During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of $6,731. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had no net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.