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U.S. Citizenship and Immigration Services

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FILE: EAC 03 064 53555 Office: VERMONT SERVICE CENTER Date: JUL 13 2005

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, Director
Administrative Appeals Office

Jul1305-18B6203

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

The petitioner is an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 letter from an accountant and renews his contention presented in his November 12, 2003, letter to the record that the petitioner's depreciation expense should be added back to the petitioner's net income.

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) provides:

> *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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 22, 2001. The proffered wage as stated on the Form ETA 750 is $21.70 per hour, which amounts to $45,136 per annum. On the Form ETA 750B, signed by the beneficiary on February 13, 2001, the beneficiary claims to have worked for the petitioner since 1996.

On Part 5 of the visa petition, filed December 20, 2002, the petitioner claims to have been established in 1982 and to currently employ twelve workers, and to generate a gross annual income of $999,034. In support of its

continuing financial ability to pay the proposed wage offer, the petitioner initially provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It indicates that the petitioner files its taxes using a standard calendar year. The 2001 return reveals that the petitioner reported -$3,432 in net taxable income before the net operating loss (NOL) deduction. Schedule L of the return indicates that the petitioner had $42,841 in current assets and $62,101 in current liabilities, resulting in -$19,260 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of demonstrating a petitioner's financial ability to pay the proposed wage offer. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation's year-end 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.

The petitioner also provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 2000 and 2001. They show that the petitioner paid the beneficiary $35,240 in 2000 and $36,920 in 2001.

The director issued a request for additional evidence on October 29, 2003. In accordance with 8 C.F.R. § 204.5(g)(2), she advised the petitioner that it must demonstrate the ability to pay the proffered wage as of the visa priority date. The director specifically requested that the petitioner supply a copy of its 2002 federal tax return, as well as a copy of the beneficiary's W-2 for 2002.

In response, the petitioner, through counsel, submitted a copy of the petitioner's 2002 corporate income tax return, as well as a copy of the beneficiary's W-2 for 2002. The 2002 tax return reveals that the petitioner declared -$2,959 in net taxable income before the NOL deduction. Schedule L shows that the petitioner had $60,677 in current assets and $63,559 in current liabilities, yielding -$2,882 in net current assets.

The W-2 shows that the petitioner paid $40,320 in wages to the beneficiary during 2002.

Counsel contends in his transmittal letter, dated November 12, 2003, that the petitioner's ability to pay the certified wage of $45,136 is established if the petitioner's depreciation expense deduction, taken on the corporate tax returns, were added back to net income for the 2001 and 2002 tax year.

The director reviewed the petitioner's net income and net current assets as shown on its 2001 and 2002 corporate tax returns, as well as the wages paid to the beneficiary during these years, and concluded that the evidence failed to establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of February 22, 2001. The director found that there was no support in the record to add the petitioner's depreciation expense back to net income and determined that neither the petitioner's net income, nor its net current assets could cover the difference between the proffered wage and the actual wages paid to the beneficiary.

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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.

As stated above, the contention set forth in counsel's November 12, 2003, letter that the petitioner's depreciation expense should be added back to net income, is adopted as the basis for the appeal of the director's denial of the petition. Counsel also submits a letter, dated January 22, 2004, from William Angelo, Jr., C.P.A, in support of this assertion. [redacted] asserts that the 2001 and 2002 depreciation expense deduction taken represents available funds to pay the proffered wage.

Counsel's assertion is contrary to current legal authority and is not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the facts reveal that the petitioner employed the beneficiary in 2000, 2001 and 2002. As noted by the director, the data financial information relating to 2000 will not be considered as it relates to a period preceding the priority date. As shown above the beneficiary's wages in 2001 were $8,216 less than the proffered salary. In 2002, he was paid $4,816 less than the proffered wage of $45,136.

CIS will also examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as asserted here by counsel. 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. Noting that the depreciation, or decreased value of the assets of a business to be a relevant factor in reviewing the financial viability in a business, the court in *Chi-Feng Chang v. Thornburgh, supra* at 536, further stated:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request 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 *net income figures* in determining petitioner's ability to pay.

In this case, as set forth on the petitioner's 2001 corporate tax return, neither the -$3,432 in net taxable income, nor the net current assets of -$19,260, could pay the $8,216 shortfall resulting from a comparison of the compensation paid to the beneficiary and the proffered wage.

Similarly, in 2002, neither the petitioner's net taxable income of -$2,959, nor its net current assets of -$2,882 were sufficient to pay the $4,816 difference between the certified wage and the actual wages paid the beneficiary.

As stated above, neither the petitioner's net taxable income, nor its net current assets was sufficient to cover the shortfall resulting from a comparison of the actual wages paid to the beneficiary and the proffered wage in either 2001 or 2002. Based on a review of the evidence contained in the record and the evidence and argument presented on appeal, the AAO concludes that the petitioner has failed to convincingly demonstrate its continuing financial ability to pay the proffered as of the priority date of the petition.

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.