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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 14 2005
EAC 03 140 53068

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

The petitioner is a retirement home. It seeks to employ the beneficiary permanently in the United States as a cook. 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 statement 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is $503.60 per week, which equals $26,187.20 per year.

On the petition, the petitioner stated that it was established during 1927 and that it employs four workers. The petition states that the petitioner's gross annual income is $437,880. The space reserved for the petitioner to report its net income was left blank. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Newton, New Jersey.

In support of the petition, counsel submitted the compiled income statement and balance sheet of Happy Valley Manor, Incorporated trading as The Merriam House. The income statement covers the 2001 calendar year and the balance sheet shows the petitioner's assets as of the end of that year. Counsel also submitted a letter, dated February 14, 2003, from the petitioner's administrator. That letter states that 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 May 14, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2001, it submit a copy of the 2001 W-2 form showing wages it paid to the beneficiary.

In response, counsel submitted a copy of the 2001 Form 1120 U.S. Corporation Income Tax Return of Happy Valley Manor, Incorporated. That return shows that the petitioner reports taxes pursuant to the calendar year. During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of $9,071. At the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter, dated August 4, 2003, signed by the accountant who prepared the compiled financial statements described above. That letter states that the petitioner has the ability to pay the proffered wage.

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 September 18, 2003, denied the petition.

On appeal, counsel submitted another letter, dated October 14, 2003, from the petitioner's accountant. This letter stresses the amount of the petitioner's depreciation deduction in urging that the petitioner has the ability to pay the proffered wage. The accountant also states that the petitioner has been contracting for outside food preparation and will realize substantial savings by employing the beneficiary.

The accountant's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. 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. 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.

The accountant's assertion that the petitioner would realize substantial savings by hiring the beneficiary is insufficiently documented. The accountant states that the petitioner paid $38,986 and $43,576 to contractors

for food and food preparation during 2001 and 2002, respectively. Both the 2001 tax return and the 2001 financial statements confirm that the petitioner spent $38,986 on food and dietary expenses during that year.

The accountant urges that the petitioner would spend less if it were able to employ the beneficiary. If the accountant could demonstrate the validity of that assertion, then this office might consider the potential savings in its determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, pursuant to the reasoning of *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

The 2001 balance sheet, however, indicates that, of the $38,966 the accountant states that the petitioner paid for food and food preparation during that year, only $8,438 was paid to outside contractors. The remaining $30,548 was paid for food and dietary supplies. Employing the beneficiary would cost the petitioner $26,187.20 per year. The accountant neither alleged nor demonstrated what portion of the payments to outside contractors hiring the beneficiary would obviate but, in any event, even if hiring the beneficiary obviated all of the expense for outside food preparation it would save the petitioner only $8,438, far less than the annual amount of the proffered wage.

Whether hiring the beneficiary could, in some unstated and unknown way, obviate some of the expenditure for food and dietary supplies was also neither demonstrated nor even alleged. Absent any evidence of the amount of the petitioner's food and food preparation expenses that would be obviated by hiring the beneficiary, this office can include no such amount in its determination of the petitioner's ability to pay additional wages.

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 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 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 $26,187.20 per year. The priority date is April 16, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of $9,071. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has provided 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.

The Request for Evidence in this matter was issued on May 14, 2003. On that date the petitioner's 2002 tax return should have been available. The petitioner did not submit a copy of that tax return nor explain that omission. The petitioner did not submit copies of annual reports or audited financial statements to show 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.