U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 17 2005

EAC 02 192 52861

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.

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 on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and tailoring shop. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 February 13, 2001. The proffered wage as stated on the Form ETA 750 is $11.47 per hour, which equals $23,857.60 per year.

On the petition, the petitioner stated that it was established on January 2, 1997 and that it employs two workers. The petition states that the petitioner's gross annual income is $185,201 and that its net annual income is $34,150. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Martinsville, New Jersey.

The petition was submitted on May 16, 2002. In support of the petition, counsel submitted a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary wages of $11,040 during that year. Counsel also submitted a Schedule C, Profit or Loss from Business, from the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return. The remainder of that return was not then submitted. The Schedule C shows that the petitioner is a sole proprietorship and that during 2001 it returned a net profit of $34,150 to its owner.

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 October 16, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center 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 a complete copy of the petitioner's owner's 2001 tax return.

In response, counsel submitted a complete copy of the petitioner's owner's 2001 tax return as requested. That return shows that during 2001 the petitioner's owner had one dependent and declared adjusted gross income of $31,812, including the petitioner's entire profit, offset by deductions.

Counsel provided a letter, dated November 5, 2002, from an accountant. That letter notes that during 2001 the petitioner took a depreciation deduction of $11,982, which amount the accountant states was available to pay additional wages. The accountant also stated that the wages the petitioner paid to the beneficiary during 2001 were compensation for five months of work, but provided no documentation in support of that assertion. Finally, the accountant stated that the petitioner's business has increased steadily since 1996 and that the business has no foreseeable financial problems.

On February 28, 2003, the Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, a list of the petitioner's owner's recurring monthly expenses. In response, counsel submitted a budget showing that the petitioner's owner's family has monthly expenses of $2,636 per month, which equals $31,632 per year.

The Acting 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 October 14, 2003, denied the petition.

On appeal, counsel argues that the petitioner's owner's depreciation deduction and the amount of its self-employment tax are "paper deductions," rather than real expenses. Counsel states that the petitioner's owner retains the amounts so deducted. Counsel urges that they should, therefore, be included in the determination of the funds the petitioner had available to pay wages during 2001. Counsel notes that, given the inclusion of those amounts in the calculations, the petitioner would be able to demonstrate the ability to pay the proffered wage during 2001.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. 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 argument that the amount of the petitioner's self-employment tax should be considered a fund available to pay additional wages is similarly unconvincing. The self-employment tax is charged to self-employed people in lieu of the 7.5% Social Security and Medicare tax deducted from other workers' wages and the matching 7.5% paid by their employers. The self-employment tax is not a phantom expense in any sense. It is an amount charged self-employed people toward maintenance of the Social Security and Medicare systems. The amount thus charged is not in any sense illusory, but is a specific cash expenditure during the year claimed. The amount may not correctly be added back to the petitioner's owner's adjusted gross income in calculating the funds he had available 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 during 2001 and paid the beneficiary $11,040 during that year.[1] Although that amount is less than the annual amount of the proffered wage, it does show the ability to pay a portion of the proffered wage. The petitioner is obliged to demonstrate the ability to pay the balance.

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 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.

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[1] Counsel and the accountant have both stated that the wages the petitioner paid to the beneficiary during 2001 were for part of that year, rather than all of it. Counsel's assertion is not evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The assertion of the accountant, although it is evidence, is of insufficient weight to demonstrate, without contemporaneously created evidence, such as pay stubs, to support it, that the wages were paid to the beneficiary during some portion of 2001, rather than during the entire year.

The petitioner, however, is a sole proprietorship. Because the petitioner's 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 petitioner's existing business expenses an still paid the proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is $23,857.60 per year. The priority date is February 13, 2001.

During 2001 the petitioner paid the beneficiary $11,040. The petitioner must demonstrate the ability to pay the remaining $12,817.60 balance of the proffered wage.

During 2001 the petitioner's owner declared adjusted gross income, including the petitioner's profit, of $31,812. Counsel submitted a budget showing that the petitioner's owner's family's living expenses are $31,632 per year. After paying those expenses, the petitioner's owner would have had $180 remaining. That amount is less than the annual amount of the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 2001 with which it could have paid the balance of the proffered wage. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2001.

The petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The appeal in this case was submitted on November 3, 2003. On that date the petitioner's owner's 2002 income tax return should have been available. That return was not submitted and neither was an explanation of its absence, nor copies of the petitioner's copies or audited financial statements for that year. 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.