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**U.S. Citizenship
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FILE: EAC 04 130 52906 Office: VERMONT SERVICE CENTER Date: **MAR 21 2006**

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

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscaping, construction, and related services company. 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 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 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 C.F.R. § 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 \$13 per hour, which amounts to \$27,040 annually.

On the petition, the petitioner indicated it was established on March 9, 2001, has five employees, a gross annual income of \$325,641 and a net annual income of \$209,800. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the tax years 2001 and 2002, as well as state income tax documentation from the state of Massachusetts. The federal income tax returns indicated that the petitioner has taxable income before NOL deductions of -\$17,138 in 2001, and taxable income before NOL deductions of \$42,583 in 2002. In addition, the petitioner submitted a letter written by [REDACTED] General Director, Premier Gems Construction, [REDACTED], Minas Gerais, Brazil. This letter stated that the beneficiary had worked for the company as an integral stoneworker from July 10, 1994 to August 3, 2000.

On August 31, 2004, the director denied the petition. The director stated that although the petitioner's 2002 income tax return indicates a net income greater than the proffered wage, in the 2001 priority year, the petitioner's income tax return indicated that the petitioner experienced a loss of taxable income of \$17,138. The director also

stated that the petitioner's Schedule L for tax year 2001 showed no current assets available to pay the proffered wage. The director then determined that the petitioner had not established that it had the ability to pay the proffered wage as of 2001 priority date and continuing to the present.

On appeal, counsel refers to three unpublished AAO decisions in which previous denials were reversed based on the examination of petitioners' depreciation deductions or retained earnings, and the respective petitioner's net profits or income. Counsel submits a copy of a May 2004 memorandum written by William R. Yates¹ and states that an exception should be made in cases where a petitioner demonstrated that during the period of time in question, it paid the beneficiary a wage greater than or equal to the proffered wage. Counsel further asserts the petitioner has employed the beneficiary since 2000, and that this circumstance should provide an exception based on the Yates memo. Counsel then states that the petitioner cannot provide evidence of wages paid to the beneficiary, as the beneficiary was never placed on the petitioner's payroll because he lacked a valid social security number. Counsel further states that it would be consistent with *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966) to treat the petitioner's statements in the instant petition with regard to its employment of the beneficiary as acceptable secondary evidence when the petitioner has established that primary evidence is not available.

Counsel also notes that it is unfair to require the petitioner to provide evidence of its ability to pay the proffered wage for the entire tax year of 2001 when the priority date of the petition is clearly established in the second quarter of 2001. Counsel further states that the Vermont Service Center director has indicated that a line of credit may in some instances be favorably considered when determining a petitioner's ability to pay the proffered wage. Counsel submits the Vermont Service Center's written answers to American Immigration Lawyers Association (AILA) questions dated July 10, 2003, as found on the AILA website. Counsel states that a line of credit in the amount of \$77,000 which was available to the petitioner during the period of time in question, qualifies as additional evidence of the petitioner's ability to pay the proffered wage. Counsel states that the director ignored the evidence of the petitioner's available line of credit in her decision.

Counsel finally states that the petitioner submitted several immigrant visa petitions in the past year with identical sets of documentation to support its ability to pay the proffered wage. Counsel contends that it is incomprehensible that the director approved the other decisions based on the same set of facts, and states that the director is now being inconsistent in denying the instant petition. Counsel also submits bank statements for the petitioner's business checking account from May 2001 to January 2002, as well as a copy of an AAO decision dated June 19, 2003. The AAO decision concerns the dismissal of a visa petition in which the petitioner's bank statements are found to be insufficient evidence, and the petitioner's unsupported statement with regard to the beneficiary's employment is also determined to be insufficient to sustain the petitioner's appeal.

On appeal, counsel submits the petitioner's bank statements for May 2001 to January 2002. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage.

¹ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statement for May 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return.

On appeal, counsel also refers to evidence with regard to the petitioner’s line of credit. Counsel’s assertions are not viewed as persuasive for two reasons. First, the record contains no evidence with regard to the petitioner’s line of credit, or this evidence is not clearly identified in the record. As stated previously, with the petition, the petitioner submitted its federal income tax returns for tax years 2001 and 2002, along with state of Massachusetts tax documents. Furthermore, counsel did not submit any such evidence on appeal.

Second, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner’s net income or net current assets by adding in the corporation’s credit limits, bank lines, or lines of credit. A “bank line” or “line of credit” is a bank’s unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron’s Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner’s existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

On appeal, counsel also refers to three AAO decisions as evidence that the AAO will consider such items as depreciation or retained earnings when it examines the petitioner’s ability to pay the proffered wage. Counsel also submits a copy of an AAO decision to the record. Counsel does not provide the published citations from the three AAO decisions to which she refers, or to the AAO decision submitted to the record. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Finally, it is noted that the findings of the AAO decision submitted by counsel to the record do not support the sustain of the appeal of the director’s decision, but rather its denial.

Furthermore, contrary to counsel's assertions, the AAO does not consider the petitioner's depreciation deductions or retained earnings when examining the petitioner's net income, or net current assets. With regard to depreciation deductions, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that 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 the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

With regard to retained earnings, retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from 2000, before the petitioner's incorporation in March of 2001, to the present, the petitioner has provided no employment records, such as W-2 forms, or Forms 1099-MISC, or payroll records to reflect the beneficiary's employment. Counsel on appeal refers to the Yates memo and contends that since the petitioner cannot provide any evidentiary documentation with regard to the beneficiary's employment, CIS should accept the petitioner's statement with regard to the beneficiary's employment. Counsel's assertion is not viewed as persuasive. It is noted that the Yates memo clearly states that to establish the petitioner's ability to pay the proffered wage, the record contain credible verifiable evidence that the petitioner is both employing the beneficiary and also has paid or is currently paying the proffered wage. The petitioner has not provided any credible verifiable evidence with regard to the beneficiary's employment. The non-existence or other unavailability of required evidence creates a presumption

of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Counsel's reference to *Matter of Brantigan* is also not viewed as persuasive. This decision concerned the provision of sufficient evidence to establish the validity of a beneficiary's marriage in the context of a citizenship petition. The overall finding in the decision was that the responsibility for establishing eligibility for a benefit sought rests with the petitioner. The decision in no way stands for the proposition that the petitioner does not have to present evidentiary documentation. As stated previously, the petitioner has not presented credible, verifiable documentation as to the beneficiary's previous and current employment. Therefore, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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, CIS will next 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner is structured as a corporation. The petitioner's taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return. For the tax years 2001 and 2002, the petitioner's taxable income is -\$17,138, and \$42,583. Therefore, the petitioner has established in tax year 2002 that it has sufficient taxable income to pay the proffered wage of \$27,040. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner still needs to establish that it has the ability to pay the proffered wage as of the 2001 priority date.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

² 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

are shown on lines 16 through 18. 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. The tax returns reflect the following information for the following years:

	2001
Taxable income ³	\$ -17,138
Current Assets	\$ 0
Current Liabilities	\$ 0
Net current assets	\$ -17,138

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$17,138, and negative net current assets of \$17,138, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. As previously stated, the petitioner had the ability to pay the proffered wage during 2002; however, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present.

On appeal, counsel refers to previous AAO decisions that examined the use of depreciation and retained earnings to establish the petitioner's ability to pay the proffered wage; however, as stated previously, these neither depreciation nor retained earnings are now viewed as additional funds that can be used to pay the proffered wage. Counsel also asserts that the petitioner's line of credit can be used to establish its ability to pay the proffered wage. As previously stated, the record reflects no evidence of the petitioner's line of credit, and in addition, lines of credit are not viewed as sources of additional funds to pay the proffered wage.

Counsel also asserts that the petitioner should not be held responsible for establishing the entire proffered wage in a petition in which the priority date is established in the second quarter of the tax year. In the instant petition, the priority date is April 30, 2001. Counsel requests that CIS prorate the proffered wage 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 lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual 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), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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.

³ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

Finally counsel on appeal states that CIS approved other immigrant petitions with identical documentation that had been previously filed on behalf of other employees. The director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.