



U.S. Citizenship
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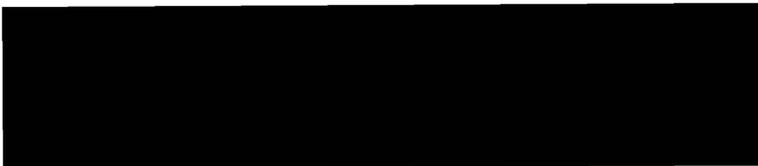
FILE: SRC 04 042 50278 Office: TEXAS SERVICE CENTER Date: JUL 16 2007

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, Chief
Administrative Appeals Office

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

The petitioner is an engraving business. It seeks to employ the beneficiary permanently in the United States as a soft metal engraver. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which equals \$20,800 per year.

The Form I-140 petition in this matter was submitted on November 26, 2003. On the petition, the petitioner stated that it was established on April 15, 1977 and that it has no employees. The petition states that the petitioner's gross annual income is \$241,363. The petitioner left blank the space reserved for it to report its net annual income. On the Form ETA 750, Part B, signed by the beneficiary on January 14, 2003, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

The AAO reviews *de novo* issues raised on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) 2001, 2002, and 2003 Form 1120-A U.S. Corporation Short-Form Income Tax Returns, (2) monthly statements pertinent to the petitioner's bank accounts, (3) a letter from a bank dated September 28, 2004, (4) a letter dated June 12, 2002 and monthly statements pertinent to the petitioner's credit line with a commercial lender, (5) unaudited 2001 and 2002 balance sheets, (6) photocopies of checks the petitioner drew to the beneficiary's order during 2003 and 2004, and (7) the beneficiary's 2003 and 2004 Form 1040 U.S. Individual Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on July 17, 1997, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$21,960. At the end of that of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner reported taxable income before net operating loss deduction and special deductions of \$27,535. At the end of that of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner reported taxable income before net operating loss deduction and special deductions of \$35,314. At the end of that of that year the petitioner had current assets of \$38,320 and current liabilities of \$31,733, which yields net current assets of \$6,587.

The bank's September 28, 2004 letter states that the petitioner has maintained a bank account with it since August 12, 1999 and states its current balance and average year-to-date balance.

The photocopied checks show that the petitioner paid the beneficiary a total of \$9,200 during 2003 and \$18,300 during 2004.² A Schedule C attached to the beneficiary's 2004 tax return confirms that he was paid \$9,200 during that year working as a self-employed engraver. A Schedule C attached to the beneficiary's 2004 tax return confirms that he was paid \$18,301 during that year working as a self-employed engraver.

The director denied the petition on November 22, 2004.

On appeal, counsel asserted that the petitioner's bank balances are an index of its ability to pay the proffered wage.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Although the checks show that the petitioner paid the beneficiary exactly \$18,300 during 2004 the beneficiary stated on the Schedule C that he received gross receipts of \$18,301. Although the reason for this minor discrepancy is unknown to this office it is not deemed significant.

In a previous letter dated October 14, 2004 counsel asserted that the petitioner's cash flow equals its taxable income plus the amount of its depreciation deduction, and that, "Cash flow is a fair and useful indicator used to determine the financial stability of a corporation." Counsel also cited the petitioner's credit line and its total assets as an index of its ability to pay additional wages. Counsel further noted that the petitioner had suffered no losses during 2002 and 2003, which is a significant improvement over its previous performance, and therefore the petitioner has demonstrated a reasonable expectation of improved performance as per *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's reliance on the bank's September 28, 2004 letter and the bank statements in this case is misplaced. First, those documents 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, the bank letter and statements show the amount in an account on given dates, and cannot show the sustainable ability to pay a proffered wage.³ Third, no evidence was submitted to demonstrate that the funds in the petitioner's accounts somehow reflect additional available funds that were not reported on its tax returns.

Counsel's reliance on the petitioner's line of credit to show its ability to pay the proffered wage is similarly 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.

Further still, counsel's reliance on the petitioner's unaudited financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel sought to add the petitioner's depreciation to its taxable income, which sum counsel referred to as the petitioner's cash flow. Counsel's implication that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

³ 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 during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

This office is aware that depreciation does not require or represent a specific cash outlay during the year deducted. It is a systematic allocation of the cost of a tangible 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 cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁴ Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 \$9,200 during 2003 and \$18,300 during 2004. The petitioner must show the ability to pay the balance of the proffered wage during those years.

⁴ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years. Among the flaws in labeling the petitioner's taxable income plus its depreciation deduction during a given year its "cash flow," this excludes the purchase of depreciable assets during that year.

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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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.

In his consideration of the petitioner's corporate tax returns counsel considered the petitioner's taxable income as analogous to its net income. This office believes that counsel's approach was too conservative. This office views a subchapter C corporation's taxable income before net operating loss deduction and special deductions as the most appropriate figure from its Form 1120, U.S. Corporation Income Tax Return to be considered as its net income. A taxpayer's taxable income may, as was the case on the petitioner's 2002 and 2003 returns, have resulted from subtraction of net operating loss deductions. A net operating loss deduction represents the carryover of losses from previous years, rather than an expense appropriately attributed to the current year. This office will consider the petitioner's taxable income before net operating loss deduction and special deductions to be its 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$20,800 per year. The priority date is April 5, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner's 2001 tax return is insufficient, in itself, to demonstrate its ability to pay the proffered wage during that year.

During 2002 the petitioner reported taxable income before net operating loss deduction and special deductions of \$27,535. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$9,200 during 2003 and must demonstrate the ability to pay the \$11,600 balance of the proffered wage during that year. During 2003 the petitioner reported taxable income before net operating loss deduction and special deductions of \$35,314. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner paid the beneficiary \$18,300 during 2004 and would ordinarily be obliged to show the ability to pay the \$2,500 balance of the proffered wage. The petition in this matter was submitted on November 26, 2003. On that date the petitioner's 2004 tax return was unavailable. On September 17, 2004 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2004 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2004 and later years.

Counsel's cited *Matter of Sonogawa*, 12 I&N Dec. at 612, for the proposition that, notwithstanding the petitioner's loss during 2001, the petition in this matter may be approved. The petitioner in *Sonogawa* filed during an uncharacteristically unprofitable year. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business. In *Sonogawa*, the Regional Commissioner determined, based on the specific facts of that case, that the petitioner's prospects for a resumption of successful business operations were well established.

In the instant case, the petitioner suffered a loss during 2001. Although the cause of that bad year is not documented in the record, the petitioner had considerably more financial success during 2002 and 2003. Further, although the record does not contain the petitioner's 2004 tax return, the petitioner paid the greater part of the proffered wage to the beneficiary during 2004. The record demonstrates that the petitioner reasonably expects to be able to continue to pay the proffered wage to the beneficiary. The petitioner has demonstrated the continuing ability to pay the proffered wage, thereby overcoming the sole basis for the decision of denial.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.