



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 03 097 50862

Date: JUL 11 2005

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

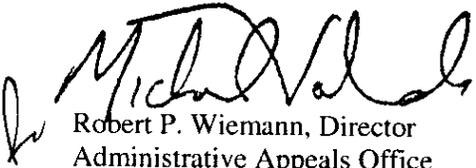
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner is an international grocery. It seeks to employ the beneficiary permanently in the United States as a meat cutter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$28,392.00 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and

insufficient to show that the beneficiary had the requisite two years work experience, the Vermont Service Center on March 20, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$13.65 per hour (\$28,392 per year) as of April 6, 2001, the date of filing and continuing to the present

Provide the receipt numbers of all the I-140 petitions your business has filed in the past year. When multiple petitions are filed, the petitioner's ability to pay the proffered wage for all the beneficiaries must be established.

Submit the 2001 federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

As an alternative you may submit annual reports for 2001, which are accompanied by, audited or reviewed financial statements.

If the beneficiary was employed by you in 2001 or 2002, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) ... showing how much the beneficiary was paid by your business.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$28,392.00 per year from the priority date.

- In 2002, the Form 1120 stated taxable income¹ of \$47,362.00.
- In 2001, the Form 1120 stated taxable income of \$42,433.00.

The director denied the petition on March 20, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it

¹ IRS Form 1120, Line 28.

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.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the year 2001 through 2002 for which petitioner's tax returns are offered for evidence.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities 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.

Examining the two Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2002, petitioner's Form 1120 return stated current assets of \$72,532.00 and \$6,365.00 in current liabilities. Therefore, the petitioner had \$66,167.00 in current net assets for 2002.

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 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.

Since the proffered wage was \$28,392.00 per year, this sum is more than the proffered wage.

- In 2001, petitioner's Form 1120 return stated current assets of \$47,701.00 and \$6,635.00 in current liabilities. Therefore, the petitioner had a \$41,066.00 in current net assets for 2001. Since the proffered wage was \$28,392.00 per year, this sum is more than the proffered wage.

Therefore, for the year 2001 and 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

As mentioned previously, the petitioner has several I-140 petitions pending. One has already been approved³ and two are pending. As already stated by the director in her decision, the petitioner's ability to pay the proffered wage must include all the petitions now pending or were approved based upon the petitioner's financial data presented for each case. The petitioner does not have sufficient taxable income to pay more employees (three times the proffered wages) based upon the financial data presented.

Counsel submits a study completed for petitioner accompanying the appeal that asserts there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date. In that study under the title "Financial Analysis" a "managerial finance" study group proposes that there are additional ways to determine the ability to pay. Counsel cites no legal precedent for the additive calculation, and, according to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In its calculations, the study group is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Under the title "Discretionary Funds" counsel through the study group propounds that that by adding "Taxable Income," "Depreciation," costs of advertising, and, "Cash on Hand" sufficient money could be ascertain to hire the new employees⁵. Counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to increase taxable income. Petitioner's counsel cited no legal precedent for his position. Counsel asserts that depreciation is a component of to be added to "Discretionary Funds." Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that 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

³ At the time of this discussion, I-140 petition EAC 99 179 51486 has been approved.

⁴ 8 C.F.R. § 204.5(g)(2), *Supra*.

⁵ The petitioner at the time of this Discussion has one I-140 petition approved for a new employee and two others pending.

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 the court should revise these figures by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel also includes in the above additive calculation of "Discretionary Funds" and, "Cash on Hand." Correlating the amounts stated in counsel's additive calculation with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. It is duplicative accounting and does not realistically reflect available funds to add cash from the balance sheet and taxable income.

Next, in the additive calculation, counsel includes items designated costs of advertising. The study group advocates that these monies may also be added back to the petitioner's ability to pay the proffered wage although expended. Money already expended for necessary items such as advertising cannot also be considered available to pay the proffered wage. Again, in its calculations, the study group is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Further, the study group proposes to use another expense of the company that is a "Loan Repayment to Stockholders" as an asset available to pay the proffered wage. Money already expended for necessary items cannot also be considered available to pay the proffered wage. Again, in its calculations, the study group is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result. Insofar as the money was allocated for repayment of debt for money paid by the shareholders, it is not an asset that can be considered. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Lastly, the petitioner by way of the study group report makes a final point in his case for additional funds to pay the proffered wage. Under the heading "Ratio of Gross Income to Employee" the study group argues that consideration should be given to the new employees' potential to increase the petitioner's revenues. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

The study group postulates that a projected increase in customer base can be calculated, not on the good will of petitioner's business, but upon demographics. The study group further claims that gross revenues will increase allowing more employees to be employed. This is speculative and not based upon facts but supposition. Counsel assertion is erroneous. Proof of ability to pay begins on the priority date, that is April 6, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.