

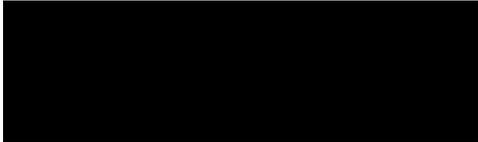
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U.S. Citizenship  
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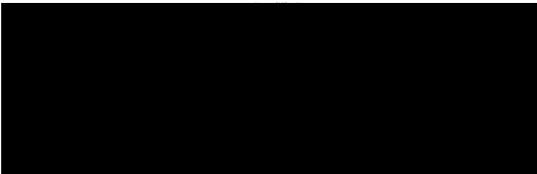
FILE: [Redacted]  
WAC 03 034 53348

Office: CALIFORNIA SERVICE CENTER Date:

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:



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, California 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 cleaner and alteration business. 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 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 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 June 12, 2001. The proffered wage as stated on the Form ETA 750 is \$13.75 per hour, which equals \$28,600 per year.

On the petition, the petitioner stated that it was established on June 26, 1997 and that it employs 11 - 14 workers. 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 will employ the beneficiary in Pasadena, California.

In support of the petition, counsel submitted the joint 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owners with corresponding Schedules C showing that the petitioner is a sole proprietorship.

Because the priority date is June 12, 2001 figures from the 1999 and 2000 returns are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and will not be further addressed.

The 2001 Schedule C shows that the petitioner returned a profit of \$40,047 during that year. The 2001 Form 1040 U.S. Individual Income Tax Return shows that the petitioner's owners declared adjusted gross income of \$34,470 during that year, including all of the petitioner's profit offset by deductions, and that they had two dependents during that year.

On April 4, 2003 the Director, California Service Center issued a Notice of Intent to Deny in this case. The Director noted that the adjusted gross income shown on the petitioner's owner's joint 2001 Form 1040 U.S. Individual Income Tax Return was insufficient to pay the beneficiary the proffered wage and support the petitioner's owners' family at the poverty level.

In response, counsel submitted a letter, dated April 29, 2003, from the petitioner's bookkeeper. That letter notes that the petitioner's owners' adjusted gross income, together with the amount of the petitioner's depreciation deduction, is sufficient to support the petitioner's owners' family and pay the proffered wage. The bookkeeper also noted that the petitioner opened a second location during January 2002 with an initial investment of \$130,000.

In a letter dated May 1, 2003 counsel urged that the bookkeeper's analysis should be accepted as showing the petitioner's ability to pay the proffered wage. Counsel also argues that the money used to open the new location would have been available to pay the proffered wage during 2001 had that become necessary.

Counsel provided a copy of the petitioner's owners' joint 2002 Form 1040 U.S. Individual Income Tax Return. The corresponding Schedules C shows that the petitioner returned a profit of \$71,951 during that year and that the other, newly opened, business suffered a loss of \$27,157. The tax return shows that the petitioner's owners declared adjusted gross income of \$36,000 during 2002, including all of the petitioner's income and the new store's losses, offset by deductions. During that year, the petitioner's owners had one dependent.

Counsel provided copies of bank statements showing activity and balances of the petitioner's commercial account during April, May, June, and July of 2001. The petitioner ended those months with balances of \$40,007.93, \$38,551.42, \$55,645.86, and \$41,480.94, respectively.

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 June 23, 2003, denied the petition.

On appeal, counsel again asserts that the petitioner's depreciation deduction should be considered in the determination of its ability to pay the proffered wage. Counsel also notes that, because companies seek to minimize their tax liability, the net income shown on their tax returns is not necessarily an accurate index of their ability to pay wages. Finally, counsel states, but provides no evidence to document, that the petitioner will release its current part-time tailor when the beneficiary is available to work.

Counsel submits a letter, dated September 13, 2001, from one of the petitioner's two owners. That letter states that the beneficiary will replace a specific, named employee who declines to work full-time and has informed the petitioner that she wished so leave her job. Counsel states that the money being used to pay its

current tailor's salary would be used to pay the beneficiary's salary when the petitioner is able to hire her. That part owner states that she and the other owner, her husband, are personally able to pay the proffered wage. Counsel submits 2001 and 2002 W-2 forms and a printout of payroll data showing that the petitioner paid \$7,612.50 and \$8,192.58 to its current tailor during those years, respectively.

Counsel's argument pertinent to minimization of tax liability is inapposite. Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date using copies of annual reports, federal tax returns, or audited financial statements. The petitioner was not obliged to rely on its tax returns, but having elected to use them to demonstrate the ability to pay the proffered wage it is bound by those returns. The argument that they are poor indicators of the petitioner's ability to pay the proffered wage neither proves that the petitioner is able to pay the proffered wage nor excuses it from the obligation of demonstrating that ability.

The assertion that the petitioner's depreciation deduction should be considered in the determination of the petitioner's ability to pay the proffered wage is unconvincing. 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. 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 reliance on the bank statements in this case is misplaced. First, bank statements 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, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Third, funds shown on a petitioner's bank statements need not, ordinarily, reflect additional available funds that were not shown on its tax returns. If the amount in the petitioner's accounts had far exceeded the petitioner's annual gross receipts, or if the statement indicated that an account was inactive, that might demonstrate that the account contained funds which would not be consumed in the ordinary course of business by the petitioner's expenses. In this case, however, the amounts in the petitioner's bank account during the months for which statements were submitted and the activity of the account are entirely consistent with the use of that account as a depository for the petitioner's receipts and a fund from which to draw checks to pay expenses. The amounts in the petitioner's accounts have not been shown to represent any additional funds not shown on its tax returns.

Finally, counsel notes that the petitioner opened a new location during 2002 and states that the funds used for that purpose could, in the alternative, have been used to pay the beneficiary's wages, had that been necessary. The letter from the petitioner's bookkeeper confirms that the petitioner opened a new location and states that an initial investment of \$130,000 was expended for that purpose.

Initially, this office questions whether the unsworn statement of the bookkeeper is sufficient evidence of the expenditure of those funds. This office need not, however, reach that question. The bookkeeper's letter does not state what portion of the funds spent to open the new location was the petitioner's owners' equity and what portion of the funds were borrowed.

An 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. Whatever portion of the funds expended to open the new location would not correctly be included in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel has submitted no evidence that, even if believed, would demonstrate whether funds actually belonging to the petitioner's owners were spent in acquiring a new location.

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 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.

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 June 12, 2001. The priority date is \$28,600 per year.

The petitioner has established that it could have paid \$7,162.50 during 2001, had it been able to hire her, rather than paying that amount to its current tailor. Having demonstrated the ability to pay that portion of the proffered wage, the petitioner must demonstrate the ability to pay the \$21,437.50 balance of the proffered wage.

During 2001 the petitioner's owners declared adjusted gross income of \$34,470 during that year, including all of the petitioner's profit. If the petitioner's owners had been obliged to pay the balance of the proffered wage out of that amount during 2001 they would have been left with \$13,032.50 upon which to support their family of four. To believe that they might have supported themselves on that amount is unreasonable. No reliable evidence is in the file to suggest that the petitioner's owners had any other funds with which to support themselves or pay the proffered wage during that year. The petitioner has not, therefore, shown that it was able to pay the proffered wage during 2001.

The petitioner has established that it could have paid \$8,192.58 during 2002, had it been able to hire her, rather than paying that amount to its current tailor. Having demonstrated the ability to pay that portion of the proffered wage, the petitioner must demonstrate the ability to pay the \$20,407.42 balance of the proffered wage.

During 2002 the petitioner's owners declared adjusted gross income of \$36,000 during 2002, including all of the petitioner's income and the new store's losses, offset by deductions. If the petitioner's owners had been obliged to pay the balance of the proffered wage out of that amount during 2002 they would have been left with \$15,592.58 with which to support themselves and their dependent child during that year. No reliable evidence is in the file to suggest that the petitioner's owners had any other funds with which to pay the proffered wage or support themselves and their dependent child during that year. The petitioner has not, therefore, 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.