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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 110 54446 Office: CALIFORNIA SERVICE CENTER Date: MAR 28 2005

IN RE: Petitioner: 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:

[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 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. 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 March 10, 1999. The proffered wage as stated on the Form ETA 750 is $11 per hour, which equals $22,880 per year.

On the petition, the petitioner stated that it was established during 1998 and that it employs no 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 San Francisco, California.

In support of the petition, counsel submitted the petitioner's owner's 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Return. Schedules C attached to each of those forms show that the petitioner's owner operated the petitioner as a sole proprietorship during each of those years.

The 1998 Schedule C shows that the petitioner suffered a loss of $641 during that year. The 1998 return shows that the petitioner's owner declared adjusted gross income of $28,111, including the petitioner's loss, and that the petitioner had one dependent during that year. The priority date, however, is March 10, 1999.

Information pertinent to the petitioner's and petitioner's owner's finances during 1998 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 1999 Schedule C shows that the petitioner returned a profit of $27,569 during that year. The 1999 return shows that the petitioner's owner declared adjusted gross income of $27,667, including the petitioner's profit during that year, and had no dependents.

The 2000 Schedule C shows that the petitioner returned a profit of $27,033 during that year. The 2000 return shows that the petitioner's owner declared adjusted gross income of $27,385, including the petitioner's profit, during that year, and had no dependents.

The 2001 Schedule C shows that the petitioner returned a profit of $11,280 during that year. The 2001 return shows that the petitioner's owner declared adjusted gross income of $7,501, including the petitioner's profit, during that year, offset by deductions, and had no dependents.

Counsel also submitted bank statements with the appeal, showing the balance in the petitioner's accounts at the end of various months.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on July 14, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a statement of the petitioner's owner's family's recurring expenses.

In response, counsel submitted a copy of the petitioner's 2002 Form 1040 U.S. Individual Income Tax Return. The Schedule C attached to that return shows that the petitioner returned a profit of $14,736 during that year. The return shows that the petitioner's owner declared adjusted gross income of $10,695, including the petitioner's profit, and had no dependents during that year.

Counsel also submitted a budget showing the recurring monthly expenses for the petitioning business. In a letter dated September 25, 2003, and submitted with the petitioner's response, the petitioner's owner explained that the budget included her own personal expenses, as she lives at the business site.

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 October 18, 2003, denied the petition.

On appeal, counsel implies that some unspecified portion of the petitioner's expenses were unnecessary. Counsel states that, had the petitioner been obliged to pay the proffered wage to the beneficiary, it would have paid that expense first and simply not incurred some of the other expenses deducted on the Schedule C. Counsel further states that the petitioner's depreciation deduction is not an actual out-of-pocket expense, and that additional amount was available to pay wages.

Counsel provides photocopies of stock certificates showing that the petitioner's owner owns 26,000 shares of a corporation. Counsel asserts, but provides no evidence to demonstrate, that those shares are worth approximately $1 each, for a total of approximately $26,000.

Further still, counsel states that the petitioner's owner is part owner of a shopping mall, and that her part ownership is worth $15,000. For evidence of that assertion, counsel states, "See Deed of Trust, Declaration of Respondent, attached." [Emphasis in the original.]

The petitioner's owner's declaration states, "I . . . have invested $15,000 in the Eastmont Mall prior to 1999 Priority Date which I continue to hold as a part owner. I can also cash out of this whenever I want. [*See attached deed.*]" [Emphasis in the original.]

No deed to the property is attached. Instead, counsel attached a letter, dated June 2, 1997, from a realty company, stating that the petitioner's owner invested $15,000 in the Eastmont Mall. Counsel also provides a Collateral Assignment of Deed of Trust, dated April 4, 1994, showing that the petitioner's owner and other part owners assigned their deed of trust to a mortgage company as collateral for a loan. An attachment to that assignment shows that the petitioner's owner's share of that loan is $15,000.

The petitioner's owner's declaration also states that she had $10,000 in a savings account during 2003. As evidence of that assertion, counsel submits a letter, dated February 26, 2003, from a savings bank, stating that, on that date, the petitioner's owner had $10,541.47 in a savings account and $626.21 in a checking account.

Counsel argues that the petitioner had, based on all of the factors shown above, the ability to pay the proffered wage.

Counsel's reliance on the petitioner's bank balances 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, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

As was stated above, counsel presented no evidence of the current market value of the shares of stock that he claims could be liquidated to pay the proffered wage. Further, counsel provides no evidence that those shares of stock are unencumbered. As to the petitioner's owner's partial ownership in a shopping mall, counsel demonstrates that the petitioner's owner invested $15,000 in that shopping mall initially. Counsel does provide evidence that the petitioner's owner's partial ownership in that project is encumbered in the amount of $15,000. Counsel provides no evidence of the current market value, if any, of the petitioner's owner's equity in that mall. The value of the petitioner's owner's equity in the stocks and the mall is not in evidence and cannot, therefore, be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel's assertion that the petitioner need not have incurred the expenses deducted on the Schedule C is unconvincing.

26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses states,

> "(a) In general
>
> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

By claiming those deductions the petitioner's owner represented that the associated expenses were necessary. Counsel presented no evidence in support of his assertion on appeal that, to the contrary, they could be readily obviated. Without such evidence this office is not swayed by counsel's argument.

Counsel's argument that the petitioner's depreciation deduction should be considered as a fund available to pay wages is similarly 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.

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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of her 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 she could have paid the proffered wage out of her adjusted gross income and supported herself on the amount remaining.

The proffered wage is $22,880 per year. The priority date is March 10, 1999.

During 1999 the petitioner's owner declared adjusted gross income of $27,667. That amount exceeds the annual amount of the proffered wage. If she had been obliged to pay the proffered wage out of her adjusted gross income during that year, however, the petitioner's owner would have been left with only $4,787.

To expect that the petitioner's owner could support herself for a year on $4,787, however, is unreasonable. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income of $27,385. That amount exceeds the annual amount of the proffered wage. If she had been obliged to pay the proffered wage out of her adjusted gross income during that year, however, the petitioner's owner would have been left with only $4,505. To expect that the petitioner's owner could support herself on that amount is unreasonable. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner declared adjusted gross income of $7,501. That amount is insufficient to pay the proffered wage. The petitioner is unable to demonstrate its ability to pay the proffered wage out of the petitioner's owner's adjusted gross income. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of $10,695. That amount is insufficient to pay the proffered wage. The petitioner is unable to demonstrate its ability to pay the proffered wage out of the petitioner's owner's adjusted gross income. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. 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 1999, 2000, 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 petitioner also failed to provide requested evidence. For both reasons, the petition may not be approved.

An additional issue exists in this case not mentioned in the decision of denial. The Request for Evidence issued on July 14, 2003 requested a budget showing the amount necessary for the petitioner's owner to support herself. The petitioner declined to provide a budget that segregated those costs from the costs of running the petitioning business. The petitioner's failure to provide that requested budget complicates the task of determining whether the petitioner's owner could have paid the proffered wage and still supported herself.[1] Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied for this additional reason.

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.

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[1] On appeal counsel attempted to rely on the Department of Health and Human Services poverty guidelines to show the amount necessary for the petitioner's owner to sustain herself. Those guidelines are not area-specific and are a less accurate index of the amount required to maintain an individual or a family than a list of their actual expenses. For that reason this office declines to accept those guidelines as a valid substitute for the requested budget.