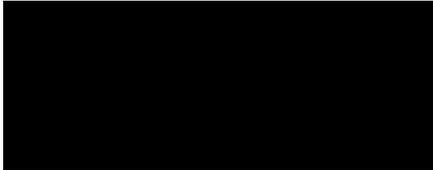




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

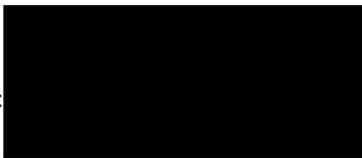
PUBLIC COPY



B6

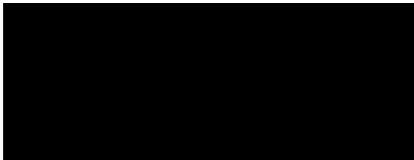
FILE: LIN 03 236 53212 Office: NEBRASKA SERVICE CENTER Date: NOV 10 2005

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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a custom dressmaker. It seeks to employ the beneficiary permanently in the United States making custom dresses. 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.

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 January 14, 1998. 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 September 1970 and that it employs 10 workers. Part three of the petition contains spaces in which the petitioner is required to state its gross annual income and its net annual income. The petitioner did not state those amounts on the petition. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December of 1993.¹ Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Chicago, Illinois.

¹ In a cover letter dated July 31, 2003 counsel added that the petitioner had not employed the beneficiary during 1999 or 2000.

In support of the petition, counsel submitted (1) a 2001 Form W-3 transmittal showing that the petitioner paid \$398,514.59 in total wages to its employees during that year, (2) a 2002 Form 1099 Miscellaneous Income statement showing that during that year the petitioner paid the beneficiary \$23,000, and (3) a partial copy of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return and a complete copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return.

The tax returns show that the petitioner is a subchapter C corporation, that it incorporated on January 1, 1977,² and that it reports taxes pursuant to the calendar year and cash convention accounting.

The 1998 return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$19,998. Because the corresponding Schedule L was not provided, the Service Center was then unable to determine the petitioner's net current assets during that year.

The 2001 return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$7,521. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$106,224 and current liabilities of \$48,995, which yields net current assets of \$57,229.

Because he found that the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Nebraska Service Center, on February 27, 2004, issued a Request for Evidence. The Director requested additional evidence pertinent to that ability.

In response, counsel submitted copies of the petitioner's 1998, 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns.

Portions of the 1998 return are missing. The 1998 tax return submitted did not, for instance, include a Schedule L. The beginning-of-year assets shown on a company's Schedule L, however, are normally identical to the end-of-year figures for the previous year. The 1999 Schedule L shows that the petitioner's 1998 end-of-year current assets were \$146,600 and its current liabilities were \$56,706, which yields net current assets of \$89,894.

The 1999 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$16,788 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$104,447 and current liabilities of \$25,924, which yields net current assets of \$78,523.

The 2000 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$16,536 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$91,146 and current liabilities of \$26,399, which yields net current assets of \$64,747.

² The Form I-140 states that the petitioner was founded during September 1970. The petitioner may have been held as some other type of entity prior to 1977 and then changed its mode of ownership. As it is not directly relevant to the approvability of the instant petition, this office will not further belabor that discrepancy.

The 2001 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$7,521 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$106,224 and current liabilities of \$48,955, which yields net current assets of \$57,269.

The director found 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 May 25, 2004, denied the petition. In that decision, the director noted the amount of the petitioner's taxable income and the amount of its end-of-year cash on hand, but did not note the balance of the petitioner's net current assets during the salient years.

On appeal, counsel stated that the computation of the petitioner's net current assets was incorrect. Counsel also asserted,

The officer also erred in concluding that depreciation is not considered in calculating the ability to pay the pay. Depreciation is a paper loss which (sic) is added back to the out (sic) income to determine positive cash flow. Positive cash flow is one method of determining financial ability to pay the wages offered.

Subsequently, counsel submitted a brief. In the brief, counsel reiterates his argument pertinent to depreciation and cites several non-precedent decisions of this office for the proposition that it should be considered in determining the petitioner's ability to pay the proffered wage. Counsel also urges that this office review the director's computations pertinent to the petitioner's net current assets.

Further, counsel asserted that the petitioner's business is growing and that, even if the petitioner's net income and net current assets should be found insufficient to pay the proffered wage, the petitioner should prevail and the petition should be approved.

Finally, counsel stated that the petitioner paid from \$120,000 to \$350,000 for outside labor during the salient years.

Counsel has cited non-precedent decisions, the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. 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

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.³

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 \$23,000 during 2002.

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*, the court held that CIS, then the Immigration and Naturalization 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 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.

The petitioner's net income, however, 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.

³ Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real cost of long-term tangible assets should not ever be deducted from revenue for the purpose of determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Such a scenario is unacceptable.

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 \$22,880 per year. The priority date is January 14, 1998.

During 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of \$19,998. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$89,894. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$16,788. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$78,523. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000 the declared taxable income before net operating loss deduction and special deductions of \$16,536. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$64,747. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the declared taxable income before net operating loss deduction and special deductions of \$7,521. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$57,269. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2002 the petitioner paid the beneficiary \$23,000. That amount is greater than the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. 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.