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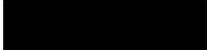
U.S. Citizenship
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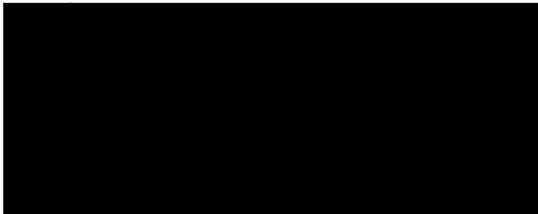
Petitioner:

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 Acting Director, Vermont 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 painting and carpentry business. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 October 3, 2002. The proffered wage as stated on the Form ETA 750 is \$26.29 per hour, which equals \$54,683.20 per year.

On the petition, the petitioner stated that it was established during 1978 and that it employs 35 workers. The petition states that the petitioner's gross annual income is \$2,500,000. The petitioner did not state its net annual income in the space provided for that figure. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July of 1999. The petition indicates that the petitioner will employ the beneficiary in King of Prussia, Pennsylvania. The Form ETA 750 states that the petitioner will employ the beneficiary in Conshohocken, Pennsylvania.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the Vermont Service Center, on March 16, 2004, requested evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically

requested the 2002 and 2003 Form W-2 Wage and Tax Statements showing the wages the petitioner paid to the beneficiary during those years.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel did not submit copies of annual reports, federal tax returns, or audited financial statements for 2003 and did not explain that omission. This office notes, however, that the Request for Evidence was issued on March 16, 2004. On that date the petitioner's 2003 tax return may not have been available.

Counsel also failed to submit the requested W-2 forms at that time, nor did counsel give any reason for that omission. Both 2002 and 2003 W-2 forms should have been available on the date of the Request for Evidence.

The 2002 tax return shows that the petitioner is a corporation, that it incorporated on January 1, 1992,¹ and that it reports taxes pursuant to the calendar year and cash accounting. During 2002 the petitioner reported ordinary income of \$18,339. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$35,071 and current liabilities of \$31,714, which yields net current assets of \$3,357.

The Acting 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 July 1, 2004, denied the petition.

On appeal, counsel submits (1) copies of the petitioner's 2001 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the petitioner's reviewed comparative balance sheets and income statements for 2001 and 2002, (3) the petitioner's reviewed comparative balance sheets and income statements for 2002 and 2003, (4) 2002 W-2 forms showing wages paid to [REDACTED] an instant beneficiary, and to two other employees, by Byrne Painting of New Jersey.

In his brief, counsel argues that the petitioner's net income, its net current assets, and the wages it has been paying the beneficiary all show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In calculations pertinent to the petitioner's net income, counsel includes the petitioner's 2001 income and seeks to show the ability to pay the proffered wage by averaging the three years for which returns were submitted. As was noted above, the petitioner's income during 2001 is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date. Further, an average is inappropriate, as the petitioner cannot show the ability to pay the proffered wage during 2002, for instance, with net income earned during 2003.

As to the petitioner's net current assets, counsel cites the petitioner's Current Ratio and Quick Ratio, rather than a direct comparison of the amount of the petitioner's net current assets to the amount of the proffered

¹ This appears to conflict with the petitioner's statement, made on the Form I-140 petition, that it was established during 1978.

wage. The two ratio statistics urged by counsel, though they differ slightly from each other, are both measures of an entity's ability to pay its existing short-term liabilities with its short-term assets. Neither of those ratios is of much use in determining an entity's ability to take on the additional obligation of paying additional wages. The treatment of net current assets is addressed further below.

Counsel misstates the computation of current ratio as follows: “. . . the Current Ratio is determined by dividing the current assets with [sic] the current liabilities, and adding Depreciation and Net Income of the company. Depreciation by definition is not considered a loss.”

Neither an entity's depreciation deduction nor its net income is part of the calculation of its Current Ratio, which is the ratio of its current assets to its current liabilities and is computed by dividing current assets by current liabilities. Because the Current Ratio is not an index of an entity's ability to pay additional wages, however, and this office is not persuaded to rely upon it, this office will not dwell further on that calculation. Neither, however, is this office persuaded by counsel's assertion that depreciation is not a real expense.

Counsel is correct that a depreciation deduction does not require or 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.²

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, or any other, to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The petitioner's 2003 tax return shows that it declared ordinary income of \$70,147 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In the March 16, 2004 Request for Evidence the Service Center specifically requested that the petitioner provide 2002 and 2003 W-2 forms showing amounts it paid to the beneficiary during that year. Counsel did not then submit any W-2 forms but now seeks to have them considered on appeal.

² 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 and, in some instances, large cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the petitioner's ability to pay the proffered wage. Even if this office were inclined to accept counsel's argument pertinent to the depreciation schedule, that scenario would be unacceptable.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office need not and does not comment on the sufficiency of the beneficiary's 2002 W-2 form offered on appeal.

Because the priority date of the instant petition is October 3, 2002, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. This office notes, however, that the address given on that 2001 tax return as that of the petitioner was [REDACTED] King of Prussia, Pennsylvania.

Counsel's reliance on the unaudited financial statements submitted in this case 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. The accountant's report that accompanied those financial statements makes clear that they are not audited, but reviewed. As that report also makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Figures from those unaudited financial statements will not be considered in the determination of the petitioner's ability 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 submitted no timely evidence to 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 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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.

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 \$54,683.20 per year. The priority date is October 3, 2002.

During 2002 the petitioner reported ordinary income of \$18,339. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$3,357. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence to show that any other funds were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner reported ordinary income of \$70,147. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis.

Issues exist in this case that were not addressed in the decision of denial.

The petitioner named on the Form I-140 is [REDACTED] Painting. The tax returns submitted are those of [REDACTED] Painting, Incorporated. The W-2 forms submitted were issued by Byrne Painting of New Jersey. Whether those three companies are identical are unknown to this office.

Because this issue was not raised in the decision of denial, today's decision does not rely on that discrepancy, in whole or in part. If the petitioner seeks to overcome this issue on motion, however, it should address this discrepancy.

The Form ETA 750 was approved for John Byrne Painting of 1013 Conshohocken Road in Conshohocken, Montgomery County, Pennsylvania. The Form I-140 petition, all three tax returns, all three W-2 forms, both sets of financial statements, and the Form G-28 Notice of Entry of Appearance, as well as other documents in the record, all state that the petitioner's address is 1160 DeKalb Street in King of Prussia, Chester County, Pennsylvania.

The petitioner has submitted a labor certification valid for employment in Montgomery County, Pennsylvania. The petitioner, however, appears to be in Chester County, Pennsylvania. Whether the Form ETA approved for employment in Montgomery County is valid for a job in Chester County is unclear. Because this issue was not raised in the decision of denial, however, this office does not base today's

decision, in whole or in part, on that issue. If the petitioner attempts to overcome the basis of today's decision on a motion, however, it should address that issue.

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.