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U.S. Citizenship  
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FILE: LIN 03 240 51317 Office: NEBRASKA SERVICE CENTER Date: **NOV 22 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 case will be remanded for further consideration.

The petitioner is a filling station and convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which equals \$20,800 per year.

On the petition, the petitioner stated that it was established on December 1998 and that it employs nine workers. The petition states that the petitioner's gross annual income is "\$1 million +." The petitioner did not state its net annual income in the space provided on the Form I-140 petition for that purpose. 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 would employ the beneficiary in Milwaukee, Wisconsin.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, the petitioner's 2001 and 2002 Form 941 Employer's Quarterly Wage Reports, and quarterly wage reports of another Quick Pick Food Market.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on December 2, 1998, and that it reports taxes pursuant to the calendar year and accrual accounting.

The 2001 return shows that the petitioner declared ordinary income of \$12,961 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$81,854 and current liabilities of \$2,345, which yields net current assets of \$79,509.

The 2002 return shows that the petitioner declared a loss of \$2,872 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$65,885 and current liabilities of \$3,385, which yields net current assets of \$62,500.

The petitioner's Form 941 Employer's Quarterly Wage Reports for all four quarters of 2001 and all four quarters of 2002 show that the petitioner paid total wages of between \$13,972.50 and \$26,722.50 during each of those eight quarters. The petitioner's paid wages totaling \$62,390 during 2001 and \$77,831.25 during 2002.

Counsel also submitted the Form 941 Employer's Quarterly Wage Reports of a Quick Pick Food Mart at [REDACTED] West Allis, Wisconsin for the first and second quarters of 2003. If those wage reports pertain to an entity other than the petitioner, then the proposition counsel intended to support with those documents is unknown.

On February 27, 2004 the Director, Nebraska Service Center issued a Request for Evidence in this matter, stating that the evidence submitted was insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center requested additional evidence pertinent to that ability.

In response, counsel cited the total of the petitioner's total annual wage expense, the amount of its depreciation and amortization deductions, and the amount of its ordinary income in stating that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In support of the assertion that the petitioner's depreciation and amortization deductions are merely "paper losses," counsel submits a letter, dated April 5, 2004, from the petitioner's accountant.

With the response to the Request for Evidence counsel also provided a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$8,976 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$86,848 and current liabilities of \$5,112, which yields net current assets of \$81,736.

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 14, 2004, denied the petition.

On appeal, counsel submits copies of the petitioner's bank statements and a copy of the Form 941 Employer's Quarterly Federal Tax Return of the Quick Pick Food Mart in West Allis, Wisconsin. Again, if that document

pertains to an entity other than the petitioner, then the proposition counsel intended to support with the quarterly returns of the West Allis convenience store is unknown.

In a brief submitted with the appeal, counsel reiterates his argument that the sum of the petitioner's ordinary income added to its depreciation and amortization deductions shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel characterizes the petitioner's depreciation and amortization deductions as "noncash" deductions.

Counsel's assertion that the petitioner's depreciation and amortization deductions should be added back to the petitioner's income is unconvincing. Counsel is correct that those deductions do not represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively.

The depreciation deduction 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 those expenses do not require or represent the current use of cash, neither are they 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 selection of an accounting method and a depreciation schedule 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.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

Further, amounts spent on long-term 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 assets should never be deducted from revenue for the purpose of determining the petitioner's continuing ability to pay additional wages. Even if this office were inclined to accept counsel's argument pertinent to the depreciation schedule, that scenario would be unacceptable.

Counsel's citation of the petitioner's total annual wage expense is also unconvincing. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the

petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>1</sup> or otherwise increased its net income,<sup>2</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

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.<sup>3</sup> 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 reported on its tax returns.

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 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.

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<sup>1</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage. The petitioner would then be obliged, of course, to demonstrate the reason that other employee is leaving. Because the purpose of the instant visa category is to provide foreign workers for positions for which U.S. workers are unavailable, the petitioner must not be seeking to employ a foreign worker out of preference over a U.S. worker.

<sup>2</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

<sup>3</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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).

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 \$20,800 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared ordinary income of \$12,961. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$79,509. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$2,872. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$62,500. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$8,976. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$81,736. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2003.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. The petitioner has sufficiently demonstrated, therefore, its continuing ability to pay the proffered wage beginning on the priority date.

Additional issues were raised in the instant case, however, that were not addressed in the decision of denial. Specifically, this office notes that the beneficiary's family name is the same as that of one of the petitioner's owners. This may indicate a familial relationship. Further, the home address shown on the petitioner's tax returns as that of one of the petitioner's owners is the same as that shown on the Form I-140 as the home address of the beneficiary. That the beneficiary is apparently living with one of the petitioner's owners strengthens the inference that the beneficiary may be related to one of the petitioner's owners.

Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship.” *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

In the instant case, the beneficiary shares the family name of the petitioner’s owner. This creates the suspicion, at least, that the beneficiary and the petitioner’s owner are related. If this is so, it casts suspicion on the assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position. Because this issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to respond, this office will not dismiss the appeal on that basis, but will remand for additional consideration and action.

In addition, documents submitted pertinent to 2002 and previous years appear to indicate that the petitioner’s business is in Milwaukee. Some documents pertinent to 2003,<sup>4</sup> however, show an address in West Allis, Wisconsin. If the petitioner is indicating that it now intends to employ the beneficiary at an address different from that on the Form ETA 750, the Service Center is free, of course, to determine whether the labor certification is valid for employment at that other location. The Service Center is also free to inquire into any other bases upon which the petition might not be approvable, including the ability to pay the proffered wage during years after 2003.

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 petition is remanded for further consideration and action in accordance with the foregoing.

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<sup>4</sup> That is, although the petitioner’s 2003 tax return shows the Milwaukee address, the 2003 and 2004 wage reports show the West Allis address.