



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: **NOV 22 2005**

EAC 03 187 53946

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 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 landscaper. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$21.50 per hour, which equals \$44,720 per year.

On the petition, the petitioner stated that it was established during 1978 and that it employs 24 workers. The petition states that the petitioner's gross annual income is \$3.8 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 will employ the beneficiary in Nantucket, Massachusetts.

In support of the petition, counsel submitted a copy of two pages of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. Those two pages of the petitioner's 2001 return shows that the petitioner is a corporation, that it incorporated on December 1, 1989, and that it reports taxes pursuant to a fiscal year running from October 1 of the nominal year to September 30 of the following year. The petitioner's 2001 fiscal year, therefore, runs from October 1, 2001 to September 30, 2002. During its 2001 fiscal year the petitioner declared a loss of \$9,315 as its taxable income before net operating loss deduction and special

deductions. Because the two pages submitted did not include the petitioner's Schedule L the Service Center was unable to calculate the petitioner's net current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on April 14, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested a copy of the petitioner's 2001 Schedule L and, if the petitioner employed the beneficiary during 2001, "copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid"

Finally, the Service Center noted that the petitioner had filed two alien worker petitions, the instant petition and one other. The proffered wage in the instant petition is \$44,720. The Request for Evidence states that the proffered wage of the petitioner's other alien worker petition is \$44,720. The Service Center stated that the petitioner must therefore demonstrate the ability to pay both of those wages during the salient years, a total of \$94,620.

In response, counsel submitted (1) 2001, 2002, and 2003 W-2 forms showing that the petitioner paid the beneficiary \$22,151.40, \$50,006.21, and \$46,473.47 during those years, respectively, and (2) copies of the petitioner's fiscal year 2001 and 2002 Form 1120 U.S. Corporation Income Tax Return.

The petitioner's 2001 Schedule K shows that the petitioner reports taxes pursuant to cash convention. The petitioner's 2001 end-of-year current liabilities exceeded its current assets, as shown on the petitioner's 2001 Schedule L.

The petitioner's 2002 fiscal year tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$18,511 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 a cover letter dated May 13, 2004 counsel argues that the sum of the petitioner's net income, depreciation deductions, cash on hand, and the wages it paid to the beneficiary¹ demonstrates the petitioner's ability to pay the proffered wage. Counsel also asserted that, although the facts of the other alien petition are not relevant to the instant case, the evidence submitted demonstrates the ability to pay the wage proffered in both cases.

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 2, 2004, denied the petition.

On appeal, counsel provides a letter, dated July 14, 2004, from the petitioner's accountant. That letter states that the petitioner's net income and its depreciation expense, taken together, demonstrate the petitioner's ability to pay the proffered wage. The accountant also states the petitioner's Cash Flows from Operations were \$163,939 and \$55,752 during the previous two fiscal years, but provides no audited income statements, nor any other evidence, in support of that assertion. Finally, the accountant notes that the petitioner's taxes

¹ Counsel incorrectly stated that the 2002 W-2 form shows that the petitioner paid the beneficiary \$69,001 during that year.

and financial statements are prepared pursuant to cash accounting, and, as such, do not reflect the amount of the petitioner's receivables.

Counsel argues that the amount of the petitioner's depreciation deduction should be added to its net income in determining the funds available to the petitioner's to pay additional wages. In support of that assertion counsel notes that depreciation deductions are not a cash expense and cites non-precedent decisions of this office.

Counsel also states that he is submitting another W-2 form, showing wages ostensibly paid to an individual named [REDACTED], but actually paid to the beneficiary. Counsel states that the amount shown on that W-2 form is \$23,819.10 and that this amount, added to the \$21,151.40 shown on the beneficiary's previously submitted 2001 W-2 form, exceeds the annual amount of the proffered wage. Counsel states that the beneficiary paid taxes on the sum of the amounts shown on both W-2 forms, but counsel did not provide a copy of the beneficiary's tax returns or any other evidence in support of that assertion. In support of the assertion that the amount shown on [REDACTED] W-2 form was actually paid to the beneficiary, counsel submitted a letter, dated July 13, 2004, from the petitioner's owner. Counsel did not, however, submit the W-2 form.

Initially, this office notes that the April 14, 2004 Request for Evidence asked that the petitioner "submit copies of the beneficiary's W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid [by the petitioner.]" The petitioner submitted only one W-2 form at that time, notwithstanding that the Request for Evidence indicated that if two W-2 forms had been issued the petitioner was obliged to provide both. Now, on appeal, counsel asks that another W-2 form be considered.

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). The 2001 W-2 form which counsel failed to submit would not, in any event, have been considered by this office. Further, even had the W-2 form submitted on appeal been timely submitted this office would require competent objective evidence that the funds were paid to the beneficiary, rather than to some other person, as the name on the W-2 form suggests.

In his letter of May 13, 2004, sent in response to the Request for Evidence, counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profits, adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is correctly included in the calculation of the petitioner's net current assets.

Counsel 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 a non-

precedent decision is of no effect, although counsel is free to argue that the reasoning of those decisions is convincing.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage, however, is unconvincing. 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.

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.

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

The petitioner's accountant asserts that the petitioner's Cash Flow From Operations was \$163,939 during its 2001 fiscal year and \$55,752 during its 2002 fiscal year. The accountant provides no additional evidence of that assertion. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner choose between copies of annual reports, federal tax returns, or audited financial statements to show its continuing ability to pay the proffered wage beginning on the priority date. The instant petitioner has selected its tax returns as its index of that ability. This office would, in the alternative, have accepted audited tax returns or annual reports, but none were provided. In the absence of that other evidence the accountant's assertion is insufficient to modify the figures shown on the petitioner's tax returns, upon which it has opted to rely in demonstrating its ability to pay the proffered wage.

As to a related issue, the accountant asserts that because the petitioner reports its taxes on a cash basis its returns do not reflect its receivables. The accountant appears to imply that the petitioner's net income would be higher if its returns were prepared pursuant to accrual. The accountant is correct that the petitioner's gross revenue does not include its receivables. This office notes, however that the petitioner's gross receipts for a given year include amounts received during the current year pursuant to receivables accrued during the previous year, which, pursuant to accrual accounting, would not be included in that year's receipts. The

accountant has not demonstrated, nor even explicitly alleged, that the petitioner's net income would be greater pursuant to accrual.

Even if the accountant had demonstrated that the petitioner's net income would have been higher if computed pursuant to accrual that would have been insufficient. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

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 established that it employed and paid the beneficiary \$22,151.40, \$50,006.21, and \$46,473.47 during 2001, 2002, and 2003, respectively. The petitioner has therefore shown the ability to pay the \$44,720 annual amount of the proffered wage during 2002 and 2003.

The determination of the petitioner's ability to pay the proffered wage during 2001 is complicated, however, by the fact that W-2 forms show wages paid during given calendar years, whereas the petitioner reports taxes pursuant to a fiscal year.

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), *affd.*, 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.

In the Request for Evidence, the Service Center stated that the petitioner has another alien petition pending and must show the ability to pay both the proffered wage in that case and the proffered wage in the instant case. The Service Center submitted no documentation from that other visa petition file from which this office can independently determine that the proffered wage in that other case is as stated in the Request for Evidence. That other proffered wage will not, therefore, be included in the calculations pertinent to the petitioner's ability to pay the proffered wage in the instant case. The petitioner must show the ability to pay the \$22,568.60 balance the proffered wage in this case during 2001.

The proffered wage is \$44,720 per year. The priority date is April 26, 2001.

The petitioner's 2000 fiscal year ran from October 1, 2000 to September 30, 2001. Its 2001 fiscal year ran from October 1, 2001 to September 30, 2002. The first five months after the priority date, therefore, fell within the petitioner's 2000 fiscal year and the last seven months fell within the petitioner's 2001 fiscal year. The petitioner submitted no 2000 W-2 form. The 2001 W-2 form indicates that during the petitioner's 2000 fiscal year the petitioner paid the beneficiary approximately \$9,229.75.²

Because the petitioner did not submit its fiscal year 2000 tax returns or any other evidence pertinent to its performance during its 2000 fiscal year, this office cannot determine whether its net income or its net current assets were sufficient to pay the balance of the proffered wage during that year. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage during its 2000 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during the first five months after the priority date.

² That is the amount the petitioner paid the beneficiary during all of 2001, \$22,151.40, multiplied by 5/12, to equal the approximate amount the beneficiary received during May, June, July, August, and September of 2001, which fell within the petitioner's 2000 fiscal year.

The petitioner's 2001 fiscal year began on October 1, 2001. The evidence demonstrates that approximately \$5,537.85 of the wages the petitioner paid to the beneficiary during the 2001 calendar year was attributable to its 2001 fiscal year.³ In addition, roughly \$37,504.66 of the \$50,006.21 the petitioner paid to the beneficiary during the 2002 calendar year is also attributable to the petitioner's 2001 fiscal year.⁴ The petitioner has demonstrated, therefore, that it paid total wages of approximately \$43,042.51 during its 2001 fiscal year.⁵ That amount is less than the proffered wage. The petitioner is obliged to show the ability to pay the balance of the proffered wage.

During its 2001 fiscal year, however, the petitioner declared a loss of \$9,315. The petitioner cannot show the ability to pay any portion of the proffered wage out of its income during that year. The petitioner's tax returns showed that at the end of that fiscal year the petitioner's had negative net current assets. The petitioner cannot, therefore, show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

The petitioner's 2002 fiscal year began on October 1, 2002. The evidence demonstrates that approximately \$12,501.55 of the wages the petitioner paid to the beneficiary during the 2002 calendar year was attributable to its 2002 fiscal year.⁶ In addition, roughly \$34,855.10 of the \$46,473.47 the petitioner paid to the beneficiary during the 2003 calendar year is also attributable to the petitioner's 2002 fiscal year.⁷ The petitioner has demonstrated, therefore, that it paid the beneficiary wages of approximately \$47,356.65 during its 2002 fiscal year.⁸ That amount is greater than the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

The Request for Evidence in this matter was issued on April 14, 2004. On that date, the petitioner's fiscal year 2003 fiscal year, which covers the twelve months from October 1, 2003 to September 30, 2004, was still in progress. The petitioner is excused from providing evidence of its ability to pay the proffered wage for its fiscal year 2003 and subsequent fiscal years.

³ That is, \$22,151.14 multiplied by 3/12, to indicate the approximate wages the petitioner paid to the beneficiary for work done during October, November, and December of 2001.

⁴ That is, \$50,006.21 multiplied by 9/12 to indicate the approximate wages the petitioner paid to the beneficiary for work done from January through September of that year.

⁵ That is, the sum of \$5,537.85 and \$37,504.66.

⁶ That is, \$50,006.21 multiplied by 3/12, to indicate the approximate wages the petitioner paid to the beneficiary for work done during October, November, and December of 2002.

⁷ That is, \$46,473.47 multiplied by 9/12 to indicate the approximate wages the petitioner paid to the beneficiary for work done from January through September of that year.

⁸ That is, the sum of \$12,501.55 and \$34,855.10.

The petitioner has not demonstrated the ability to pay the proffered wage during the first five months after the priority date or during its 2001 fiscal year. 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.