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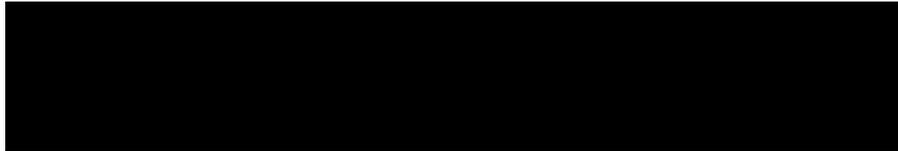
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

B6



FILE:

[Redacted]
SRC 03 133 51259

Office: TEXAS SERVICE CENTER

Date: **APR 11 2006**

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, Texas 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 dry cleaner and laundry service. It seeks to employ the beneficiary permanently in the United States as a garment repairer. 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 statement 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 15, 2001. The proffered wage as stated on the Form ETA 750 is \$12.29 per hour during a 35-hour week, which equals \$22,367.80 per year.

On the petition, the petitioner stated that it was established on November 17, 1998 and that it employs five workers. In the spaces reserved for the petitioner to state its net and gross annual income "N/A" was entered. On the Form ETA 750, Part B, 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 Conyers, Georgia.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner is a corporation, that it incorporated on November 13, 1998, and that it reports taxes pursuant to the calendar year and cash convention accounting.

The 2001 tax return shows that during that year the petitioner declared ordinary income of \$5,769. A note attached to that return urges that the "total amount of Petitioner's available funds" consists of its depreciation

deduction added to its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and current liabilities of \$12,120, which yields net current assets of -\$12,120.

The 2002 tax return shows that during that year the petitioner declared ordinary income of \$738. That return is also accompanied by a note urging that the "total amount of Petitioner's available funds" consists of its depreciation deduction added to its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and current liabilities of \$14,307, which yields net current assets of -\$14,307.

Counsel also submitted the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001 and 2002. Those returns show that the petitioner employed between four and thirteen workers and paid wages of between \$20,760 and \$44,611.75 during those quarters but that it did not employ the beneficiary.

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 August 30, 2004, denied the petition.

On appeal, counsel submits (1) a letter, dated September 27, 2004, from a professor of accounting, (2) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, and (3) a statement.

The accounting professors September 27, 2004 letter urges that the petitioner's depreciation and amortization deductions should be added to its ordinary income during the salient years "to determine the employer's available fund in the tax returns." The professor further states that depreciation and amortization deductions "are not out-of-pocket expenses, but purely accounting deductions on paper."

The petitioner's 2003 tax return shows that during that year the petitioner declared ordinary income of \$27,887. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and current liabilities of \$19,173, which yields net current assets of -\$19,173.

In his statement on appeal counsel questions how the net current asset figures stated in the decision of denial were derived. Counsel also urges that the petitioner's depreciation deduction should be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

The argument of counsel and the professor of accounting that the petitioner's depreciation and amortization deductions should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel and the professor are correct that depreciation and amortization deductions do not require or represent a specific cash expenditure during the year claimed. They are the systematic allocation of the cost or other basis of long-term assets, tangible and intangible, respectively.

A 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. But the cost or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. While that 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.

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 tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.¹ Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

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. 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. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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

¹ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

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, the petitioner's year-end cash and those assets expected to be consumed or 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Form 1120S, U.S. Income Tax Return for an S Corporation, end-of-year current assets are shown on Schedule L, lines 1(d) through 6(d). Year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to collect roughly 1/12th of those net current assets during each ensuing month, and to be able, therefore, to pay the proffered wage. The net current assets are expected to be converted to cash as the proffered wage becomes due.

In the instant case, the petitioner reports taxes pursuant to cash convention accounting. As such, some current assets and current liabilities that would be listed on a return prepared pursuant to accrual basis are not shown on the petitioner's return. The petitioner's net current assets, as derived from its current assets and its current liabilities as shown on its tax returns, however, are the best possible approximation of the instant petitioner's net current assets based on information available on those returns.

The proffered wage is \$22,367.80 per year. The priority date is February 15, 2001.

During 2001 the petitioner declared ordinary income of \$5,769. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$738. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no evidence of any other funds 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.

The petition was submitted on April 7, 2003. On that date the petitioner's 2003 tax return was unavailable. No request for evidence was issued in this case that would have required the submission of the petitioner's 2003 tax return. Although the petitioner was not required to submit that return, because it was submitted on appeal it shall be addressed.

During 2003 the petitioner declared ordinary income of \$27,887. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence that demonstrates it had the ability to pay the proffered wage during 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 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.