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U.S. Citizenship
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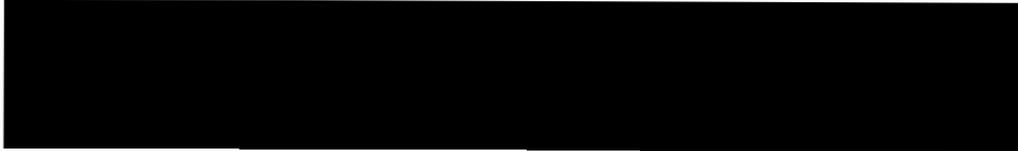


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Office: VERMONT SERVICE CENTER

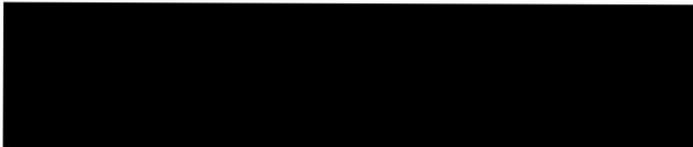
Date: APR 25 2006

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, Chief
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 shipping container repair service. It seeks to employ the beneficiary permanently in the United States as a welder/fitter/machine mechanic. 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 16, 1998. The proffered wage as stated on the Form ETA 750 is \$20.55 per hour, which equals \$42,744 per year.

On the petition, the petitioner stated that it was established during 1991 and that it employs 42 workers.¹ The petition states that the petitioner's gross annual income is \$4,701,845 and that its net annual income is \$11,876. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since August 1994. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Woodbridge, New Jersey.

In support of the petition, counsel submitted the petitioner's 1998 and 1999 Form 1120S, U.S. Income Tax Returns for an S Corporation, a 1998 Form W-2 Wage and Tax Statement, and a letter from counsel dated July 30, 2002.

¹ The petitioner provided no evidence of the number of workers it employs.

The petitioner's tax returns show that it is a corporation, that it incorporated on July 26, 1991, and that it reports taxes pursuant to the calendar year and cash convention accounting.

The petitioner's 1998 tax return shows that the petitioner declared ordinary income of \$11,876 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 1999 tax return shows that that the petitioner declared ordinary income of \$38,690 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1998 W-2 form shows that during that year the petitioner paid the beneficiary \$40,730.10.

In his July 30, 2002 letter counsel stated that he was providing the petitioner's 1998, 1999, 2000, and 2001 tax returns and 1998, 1999, 2000, and 2001 W-2 forms showing wages paid to the beneficiary. The petitioner's 2000 and 2001 tax returns and the 1999, 2000, and 2001 W-2 forms, however, were not submitted.

On June 2, 2004 the Vermont Service Center issued a request for evidence in this matter. The subject matter of that request, however, had no bearing on the basis for the subsequent decision of denial.

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 September 15, 2004, denied the petition.

On appeal, counsel submits (1) 2002 and 2003 W-2 forms, (2) the petitioner's reviewed comparative balance sheets as of December 31, 1997 and December 31, 1998, (3) the petitioner's compiled comparative balance sheets as of December 31, 2002 and December 31, 2003, (4) one page (Schedule L) of the petitioner's 2003 tax return, (5) a letter, dated October 18, 2002, from an accountant, and (6) a brief.

The 2002 and 2003 W-2 forms submitted show that the petitioner paid the beneficiary \$45,380.40 and \$45,757.65 during those years, respectively.

The petitioner's 2003 Schedule L shows that the petitioner declared \$166,889 in ordinary income during that year. That schedule also shows that at the end of 2002 and at the end of 2003 the petitioner's current liabilities exceeded its current assets. Finally, counsel circled the amounts of the petitioner's 2002 and 2003 end-of-year retained earnings on that schedule.

The October 18, 2004 accountant's letter notes that the petitioner's tax returns are prepared pursuant to cash accounting but that its financial statements are prepared pursuant to accrual. The accountant asserts that accrual is a superior index of the company's financial condition. The accountant further asserts, based on the petitioner's financial statements, that the company should have little or no difficulty paying the proffered wage.

In the brief counsel notes that the decision of denial did not mention the W-2 forms submitted showing wages paid to the beneficiary during the salient years and failed to discuss some of the salient years entirely. Counsel also asserts that the petitioner's depreciation deduction should be included in the analysis of the petitioner's ability to pay the proffered wage. Finally, counsel asserts that the petitioner paid the beneficiary \$40,730.10, \$41,804.55, \$41,128.18, \$45,523.70, \$45,380.40, and \$45,757.65 during 1998, 1999, 2000, 2001, 2002, and 2003, respectively.

The record contains no indication, other than counsel's assertion, that the petitioner paid any wages to the beneficiary during 1999, 2000, or 2001. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. No amount of the wages allegedly paid during those years will be included in the analysis of the petitioner's ability to pay the proffered wage.

The reliance of counsel and the accountant on the unaudited (reviewed and compiled) financial records provided 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, that the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's assertion, make them inaccurate indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Counsel's assertion 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 require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost or other basis 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 cost of equipment and buildings 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 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, she does not offer any alternative allocation of those costs.² Counsel appears to be asserting that the real cost of long-term tangible 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 established that it employed the beneficiary during 1998, 2002, and 2003 and paid him \$40,730.10, \$45,380.40, and \$45,747.65 during those years, respectively.

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

² 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.

Contrary to counsel's assertion, however, the petitioner's total assets 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.

The proffered wage is \$42,744 per year. The priority date is December 16, 1998.

During 1998 the petitioner paid the beneficiary \$40,730.10. The petitioner must show the ability to pay the \$2,013.90 balance of the proffered wage during that year. The petitioner declared a net profit of \$11,876 during that year. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

The petitioner did not demonstrate that it paid any wages to the beneficiary during 1999 and must demonstrate the ability to pay the entire proffered wage during that year. During 1999 the petitioner declared a net profit of \$38,690. 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 to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The petitioner did not demonstrate that it paid any wages to the beneficiary during 2000 and must demonstrate the ability to pay the entire proffered wage during that year. The petitioner failed to provide copies of annual reports, federal tax returns, or audited financial statements pertinent to 2000 as required by 8 C.F.R. § 204.5(g)(2).³ The petitioner has failed to demonstrate the ability to pay the proffered wage during 2000.

The petitioner did not demonstrate that it paid any wages to the beneficiary during 2001 and must demonstrate the ability to pay the entire proffered wage during that year. The petitioner failed to provide copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001 as required by 8 C.F.R. § 204.5(g)(2). The petitioner has failed to demonstrate the ability to pay the proffered wage during 2001.

³ 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.

The petition in this matter was submitted on August 1, 2002. On that date the petitioner's 2002 and 2003 tax returns were unavailable, and they were not subsequently requested. The petitioner was not required, therefore, to demonstrate its ability to pay the proffered wage during those years.⁴ The petitioner has submitted 2002 and 2003 W-2 forms showing that it paid the beneficiary \$45,380.40, and \$45,747.65 during those years, respectively. Those amounts exceed the annual amount of the proffered wage. The petitioner has, therefore, demonstrated the ability to pay the proffered wage during those years.

Although the petitioner demonstrated its ability to pay the proffered wage during 1998, 2002, and 2003, it failed to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, and 2001.⁵ 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.

⁴ The petitioner would only be required to produce evidence pertinent to 2002 or 2003 if its returns had been available when the petition was filed or when a request for more evidence pertinent to its continuing ability to pay the proffered wage beginning on the priority date was issued.

⁵ If the service center had requested specific documents pertinent to those years and the petitioner had failed to provide them, then the petition would be deniable pursuant to 8 C.F.R. § 103.2(b)(14). That basis for denial generally cannot be overcome on appeal or motion by then submitting the previously requested evidence. *See Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Because the service center did not request tax returns or W-2 forms pertinent to specific years, however, this office may consider that evidence if it is submitted on appeal or pursuant to a motion. In any subsequent proceedings, the petitioner should submit the 1999, 2000, and 2001 W-2 forms showing wages it paid to the beneficiary and copies of its annual reports, federal tax returns, or audited financial statements pertinent to 2000 and 2001 if it wishes this office to consider that evidence.