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**U.S. Citizenship
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FILE: [REDACTED]
EAC 02 274 53855

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) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

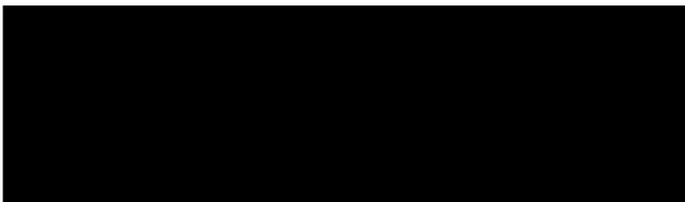
ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

CC:



DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is an Asian sweets, snacks, and delicacies business. It seeks to employ the beneficiary as a foreign food specialty cook. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because she determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, the petitioner submits a brief and additional evidence.¹

In pertinent part, Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$12.00 per hour or \$24,960 per year.**

With the petition, the petitioner submitted a copy of its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner's 2001 tax return reflected an ordinary income or net income of \$10,735 and net current assets of -\$3,112. The director considered this documentation insufficient and on November 3, 2003, she requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from

¹ The regulation at 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter. . . . Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted." In this case, the attorney representing the petitioner did not sign the notice of representation. However, the AAO will still consider counsel's arguments.

the priority date of April 30, 2001 and continuing to the present to be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director specifically requested the beneficiary's 2001 Form W-2, Wage and Tax Statement, if the petitioner employed the beneficiary in 2001.

In response, the petitioner submitted a copy of the beneficiary's 2001 Form 1099-MISC, Miscellaneous Income, a letter from the petitioner's general manager, and a compiled balance sheet for the petitioner as of December 31, 2001. The beneficiary's 2001 Form 1099-MISC reflected that the beneficiary earned wages of \$7,980 from the petitioner in 2001. The petitioner's compiled balance sheet showed current assets as \$23,562, current liabilities as \$1,674, and net current assets as \$21,888. The letter from the petitioner stated:

This is to certify the amount of \$26,674 described in column 16 of Schedule L represents a loan in the amount of \$25,000 payable over more than one-year period. Therefore, the current liability is only \$1,674. Thus the accounts payable should have been classified as "Current Liabilities = \$1,674" and "Long Term Loans Payable = \$25,000." Accordingly, the current liability of the Employer is \$1,674.

The cost of goods specified in column 2 of the Tax Return (Schedule A, Line 8), in the amount of \$313,923. Of this figure, an approximate amount of \$178,680 represents food raw materials; and an approximate amount of \$71,460 represents the supplies, and an amount of \$63,783 represents the cost of contract labor. This cost of contract labor was temporary in nature. One [sic] a new permanent employee is hired, this amount will be converted into permanent labor.

The petitioner did not, however, provide any corroborative evidence of the \$25,000 long-term loan or of the \$63,783 in contract labor. In addition, the petitioner did not provide a copy of an amended tax return for 2001.

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 July 1, 2004, denied the petition.

On appeal, the petitioner submits a letter from Accounting Associates, LTD., in support of its assertion that it has shown its ability to pay the proffered wage. The accountant's letter explained that when adding the wages paid to the beneficiary of \$7,980, the net income of \$10,735, the depreciation of \$6,585, and the amortization of \$2,333, the resulting total of \$27,633 is more than enough to pay the proffered wage of \$24,960. Counsel states:

If the beneficiary were employed on the date of filing the application for alien employment certification, *i.e.*, April 30, 2001, the Employer should have had the ability to pay a total wage of \$17,280 for the year 2001.

The corporate income tax return for the year 2001 has a taxable income of \$27,633 (net income \$10,735 + \$6,585 Depreciation + \$2,333 Amortization + \$7,980 paid to the beneficiary per Form 1099 Misc.).

In accordance with the Internal Revenue Code Sections 167, 1245, 1250 etc., the depreciation expense and amortization do not require any cash outlay. These are only

benefits to take the tax write-off. Therefore, these funds are available to the Employer for present or future use.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 at a salary equal to or greater than the proffered wage. Instead, the beneficiary was paid only \$7,980 or \$16,980 less than the proffered wage of \$24,960. The petitioner is obligated to show that it has sufficient income to pay the difference between the proffered wage and the actual wages paid to the beneficiary. In this case, the petitioner's net income was \$10,735, or \$6,245 less than the difference between the proffered wage and the actual wages paid to the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 were -\$3,112. The petitioner could not have paid the difference between the actual wages paid to the beneficiary and the proffered wage in 2001 from its net current assets.

The petitioner contends that it should only have had to pay \$17,280 for the period April 30, 2001 through December 31, 2001, and thus, would have had sufficient income to pay the proffered wage when adding the net income and the wages paid to the beneficiary in 2001. CIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The petitioner maintains that the amount of \$26,674 described in column 16 of Schedule L represents a loan in the amount of \$25,000 payable over more than a one-year period and the current liability of \$1,674. The petitioner did not, however, provide any corroborative evidence of the \$25,000 long-term loan. In addition, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's ability to pay the proffered wage. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner contends that of the \$313,923 cost of goods specified in column 2 of the tax return (Schedule A, Line 8), \$63,783 was in contract labor. The petitioner has not, however, provided any corroborative evidence of the \$63,783 in contract labor or any evidence that the beneficiary will replace any of the contract workers. Wages already paid to others are generally not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the other independent contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those contractors performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner asserts that depreciation and amortization should be added to the net income along with the wages paid to the beneficiary in order to determine the petitioner's ability to pay the proffered wage. However, counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

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 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 the petitioner asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.

The 2001 tax return reflects an ordinary income or net income of \$10,735 and net current assets of -\$3,112. The petitioner could have paid the proffered wage from either its net income or its net current assets in 2001. Thus, it has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.