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U.S. Department of Homeland Security  
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U.S. Citizenship and Immigration Services

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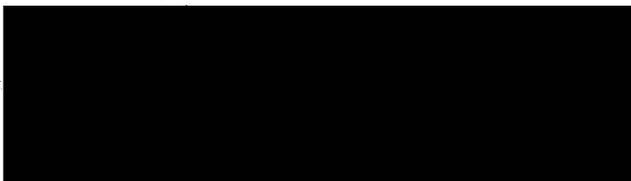
FILE: EAC 05 065 50168 Office: VERMONT SERVICE CENTER Date: DEC 11 2006

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The 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 landscaping contractor. 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 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 the petitioner and counsel submitted 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.98 per hour, which equals \$26,998.40 per year.

The Form I-140 petition in this matter was submitted on December 30, 2004. On the petition, the petitioner stated that it was established during 1994 and that it employs 17 workers. The petition states that the petitioner's gross annual income is \$1,027,046 and that its net annual income is -\$20,380.

The Form ETA 750 filed with the DOL does not name the instant beneficiary as the alien whom the petitioner initially sought to hire. On the original Form ETA 750, Part B, signed by the original beneficiary on April 23, 2001, that beneficiary claimed to have worked 40 hours per week for the petitioner since June 1998. The petitioner substituted the instant beneficiary for the original beneficiary. With the Form I-140, the petitioner filed a new Form ETA 750, Part B, signed by the instant beneficiary on December 20, 2004. On this form, the substituted 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 Jefferson, Maryland.

In support of the petition, counsel submitted the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner is a corporation owned by [REDACTED] and [REDACTED] that it incorporated on April 6, 1994, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The 2001 return shows that the petitioner declared a loss of \$20,380 as its ordinary income during that year. At the end of that year the petitioner had current assets of \$1,498 and current liabilities of \$167, which yields net current assets of \$1,331.

The 2002 return shows that the petitioner declared \$9,468 in ordinary income during that year. At the end of that year the petitioner had current assets of \$2,843 and no current liabilities, which yields net current assets of \$2,843.

The 2003 return shows that the petitioner declared a loss of \$31,902 as its ordinary income during that year. At the end of that year the petitioner's current liabilities exceeded its current assets.

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 March 15, 2005, denied the petition.

On appeal, counsel submitted (1) payroll summaries for 2003, 2004, and January 1 through May 24, 2005, (2) an unaudited profit and loss statement for the period from January 1, through May 24, 2005, (3) accounts receivable aging summary as of May 24, 2005, (4) a letter dated April 21, 2005 from the petitioner's accountant, (5) a letter dated May 26, 2005 from the petitioner's president and vice-president, and (6) counsel's own letter dated May 30, 2005.

The payroll summaries list the petitioner's employees during 2003, 2004, and January 1, through May 24, 2005. The beneficiary's name is not on those lists.

In her April 21, 2005 letter the accountant cited the petitioner's depreciation deductions as funds available to pay additional wages during the years taken. The accountant stated that the petitioner paid outside contractors \$23,768 and \$16,614 during 2001 and 2002, respectively. The accountant further stated that the petitioner, in hiring the beneficiary, would have reduced its dependency on those contractors. The accountant also indicated that the beneficiary will pay for himself in that the petitioner will charge for his services. Finally, the accountant stated that the market for landscaping services is robust and that the petitioner's net income during the first four months of 2005 was approximately \$50,000.

The May 26, 2005 letter from the petitioner's president and vice-president states that the petitioner has grown in size and recognition and that its profitability continues to improve. It indicates that the petitioner has a potentially lucrative patent pending for an aquatic gardening product and that the beneficiary's website development skills will enhance the marketing of the petitioner's business such that the petitioner will no longer need to pay thousands of dollars to vendors for marketing. The letter also states that the petitioner maintains a line-of-credit sufficient to pay two months wages to its employees.

In his May 30, 2005 letter counsel cited the accountant's April 21, 2005 letter and the Accounts Receivable Aging Summary as support for the proposition that the petitioner has the ability to pay the proffered wage. Counsel also stated that the petitioner employs 18 full-time staff and two part-time staff year round. Counsel refers to the payroll summaries provided as support for that proposition and the proposition that the petitioner has a monthly payroll of almost \$50,000.

Counsel is correct that the petitioner's accounts receivable, in conjunction with its other current assets and its current liabilities, is a valid consideration in assessing its ability to pay the proffered wage. The treatment of current assets, current liabilities, and net current assets is addressed further below.

The petitioner's reliance on unaudited financial records 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. The unaudited financial statements will not be considered.

The petitioner's reliance on its line of credit to show its ability to pay the proffered wage is similarly misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The assertion of the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay 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 are actual expenses of doing business, whether they are 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. See *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 accountant implies that they should not be charged against income according to their depreciation schedule, she does not offer any alternative allocation of those costs.<sup>1</sup> The accountant appears to be asserting that the

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<sup>1</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during 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 to pay additional wages. Such a scenario is unacceptable.

Although the accountant stated that the petitioner paid \$23,768 during 2001 and \$16,614 during 2002 to outside contractors this office is unable to locate those figures on the petitioner's 2001 and 2002 tax returns. Those returns show no Schedule A Line 3 Cost of Labor. Other than the accountant's assertion, the record contains no evidence that those amounts were paid to contractors.

Even if those figures were sufficiently established, the accountant provided no information from which this office can determine what portion of those outside contractor expenses hiring the beneficiary would have obviated. What portion of those services the beneficiary, a landscape gardener, could have provided is not indicated. The number of hours of work represented by those sums is not indicated.

Further, even if the accountant had demonstrated that hiring the beneficiary would have obviated the entire amount of the petitioner's outside contractor services during both years, this office notes that the amounts stated by the accountant are less than the annual amount of the proffered wage and could not in themselves, therefore, fully satisfy the petitioner's burden of demonstrating its continuing ability to pay the proffered wage beginning on the priority date.

Although the petitioner and its accountant assert that the petitioner's income will increase based on the aquatic gardening product the petitioner is developing, based on its enhanced reputation owing to awards that it has won, based on the increasing popularity of landscaping, and based on the petitioner's ability to charge for the beneficiary's services, counsel has submitted no evidence of the amount by which the petitioner's net income will increase because of any of those factors. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, there is no evidence in the record to support the suggestion that in the past the petitioner paid thousands of dollars to vendors for marketing and related tasks. Likewise, there is no evidence that the beneficiary has website development skills and related skills that he will apply on behalf of the petitioner such that the assistance of such vendors will no longer be needed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

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year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

*Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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, although the original beneficiary claimed to have worked for the petitioner from June 1998 through at least April 2001, the petitioner did not provide any other evidence to establish that it employed and paid the original beneficiary. The petitioner has not demonstrated that it paid wages to the original beneficiary or the instant beneficiary during any of the salient years.

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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 that 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 minus 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 Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>2</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than

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<sup>2</sup> The location of the taxpayer's current assets and current liabilities varies from one Schedule L to another.

the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The priority date is April 27, 2001. The proffered wage is \$26,998.40 per year. Because the petitioner has not demonstrated that it paid any wages to the beneficiary during the salient years it is obliged to demonstrate the ability to pay the entire proffered wage during each of the salient years.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$1,331. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable 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 \$9,468 in ordinary income. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$2,843. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable 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.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, 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 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on December 30, 2004. On that date the petitioner's 2004 tax return was unavailable. No evidence pertinent to 2004 was subsequently requested. The petitioner is excused from its obligation to show its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. 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.