

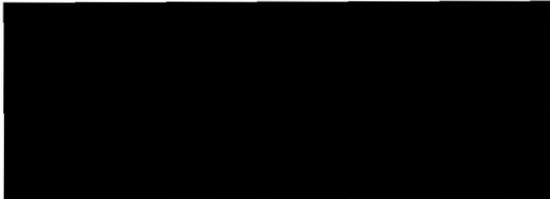
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U.S. Citizenship  
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FILE: EAC 04 061 50972 Office: VERMONT SERVICE CENTER Date: MAR 21 2006

IN RE: Petitioner: [Redacted]  
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:



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 preference 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 [REDACTED] is a dry cleaners. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

A brief;

Copies of bank statement pages for various months in 2001 in the name of [REDACTED]

- [REDACTED],<sup>1</sup> and, [REDACTED]
- [REDACTED] Form 1120S for its fiscal year beginning October 1, 2001.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000 per year).

The evidence in the record of proceeding shows that [REDACTED] is structured as an S corporation. On the petition, the petitioner claimed to have been established in April 15, 1997,<sup>2</sup> to have a gross annual income of \$150,000, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year lasts from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner since January 1998.

With the petition, the petitioner submitted the following documents:

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<sup>1</sup>The record of proceedings contains no explanation of the relationship between the petitioner and [REDACTED]. However, [REDACTED] signed both the ETA 750 and the petition.

<sup>2</sup>The petition lists April 15, 1997, as the date of [REDACTED] establishment. The submitted Form 1120S each lists April 22, 1997 as the date of Valet's incorporation.

- Copies of the beneficiary's W-2 Wage and Tax Statement for 2001 issued by [REDACTED]
- Copies of [REDACTED] Form 1120S for its fiscal years commencing in 2000 and 2001; and,
- Counsel's G-28.

The director denied the petition on July 23, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner deducted \$5,883 for depreciation from net income but should be added back to the income that is available to pay the proffered wage. Moreover, because the petitioner has already employed and paid the beneficiary \$19,125.03 in wages in 2001, the petitioner need only demonstrate its ability to pay the \$6,874.97 difference between the wages paid in 2001 and the proffered wage. Further, the director, rather than relying only upon the negative \$23,598 net income reported on the Form 1120 for 2001, should also have looked to the \$55,363 consisting of capital stock, paid-in capital and added-back depreciation. Further, counsel asserts that additionally, the petitioner had other cash assets to pay the proffered wage, including the ending balance of \$4,350.60 listed on the bank statement for October 2001, bringing the total available for paying the proffered wage to \$59,713.60.

At the outset, we note that counsel has not explained why the petitioner and the employer in the approved ETA 750 are **not the same**. The record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and **obligations** of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage.

Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the record of proceedings contains the federal income returns of [REDACTED] and the W-2s issued by [REDACTED] but no financial information concerning [REDACTED]. Even though the record of proceedings does not establish that the successorship in interest of the petitioner, we will review the evidence before us to see if it demonstrates [REDACTED]'s ability to pay the proffered wage.

In determining [REDACTED]'s ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether [REDACTED] **employed and paid the beneficiary during that period**. If [REDACTED] 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 [REDACTED]'s ability to pay the proffered wage. In the instant case, [REDACTED] established that it employed and paid the beneficiary \$19,125.03 in 2001. **Therefore, [REDACTED] has not established that it employed and paid the beneficiary the full proffered wage of \$26,000 during the period from the priority date to the present.** Instead, [REDACTED] paid partial wages in 2001, which is \$6,874.97 less than the proffered wage in 2001. [REDACTED] is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

If [REDACTED] does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on [REDACTED] 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. 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).

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, which counsel now makes, that the Service should have considered income before expenses were paid rather than net income. We specifically reject counsel's assertion, that depreciation should be added back to net income in determining [REDACTED]'s ability to pay the proffered wage.

The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning [REDACTED] ability to pay the proffered wage of \$26,000 per year from the priority date.

In its fiscal year beginning in the year 2000, the Form 1120S stated net income<sup>3</sup> of -\$18,337.

In its fiscal year beginning in the year 2001, the Form 1120S stated net income of -\$23,598.

Therefore, for the petitioner's fiscal years beginning in 2000 and 2001, [REDACTED] did not have sufficient net income to pay the \$6,874.97 difference between the wages actually paid to the beneficiary and the proffered wage.

If the net income [REDACTED] 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 [REDACTED]'s assets. We reject, however, the idea that [REDACTED]'s total assets should have been considered in the determination of the ability to pay the proffered wage. [REDACTED]'s total assets include depreciable assets that [REDACTED] 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, [REDACTED]'s total assets, which counsel asserts includes paid-in additional capital and capital stock, must be balanced by [REDACTED] liabilities. **Otherwise, they cannot properly be considered in the determination of [REDACTED] 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 [REDACTED] current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown

<sup>3</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in

on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, [REDACTED] is expected to be able to pay the proffered wage using those net current assets. [REDACTED]'s net current assets during its fiscal year beginning in the year 2000, was -\$12,405, and during its fiscal year beginning in the year 2001, -\$11,049.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, [REDACTED] had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine [REDACTED]'s ability to pay the proffered wage from the priority date. Counsel states that its bank statements show a closing balance of \$4,350.60 for the first month of its fiscal year beginning in 2001.

Counsel's reliance on the balance in [REDACTED]'s bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner, which do not demonstrate that the petitioner or its predecessor could pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Nor does the record demonstrate that [REDACTED] is the successor-in-interest to the corporation that filed the ETA 750.

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.

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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.