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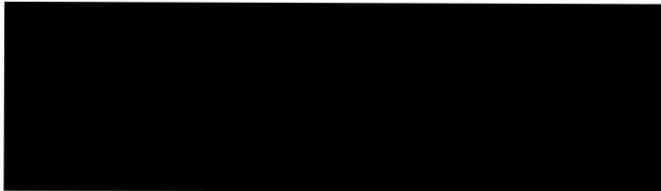
U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

By

PUBLIC COPY



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **MAY 03 2006**
SRC 03 255 54281

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a funeral services corporation. It seeks to employ the beneficiary permanently in the United States as a coordinator, Korean funeral arrangements. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

According to the petition, the business was established on September 1998, and, it employs three individuals.

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 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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$34,736.00 per year. The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; an explanatory letter; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; an Employer's Tax Return for March 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director issued a notice to deny the petition and requested on October 19, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of an annual report, U.S. federal tax return, or an audit (audited financial statement) all for 2003.

The director requested W-2 Wage and Tax Statements, W-3's Forms 941 with employee names.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted an explanatory letter from the petitioner; a Form 941 Employer's Quarterly Federal Tax Return for 2004; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for year 2003; and, a compiled financial statement as of September 30, 2004 (statement of assets, liability and equity).

The director denied the petition on November 22, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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. Evidence was submitted to show that the petitioner employed the beneficiary. The Form 941 Employer's Quarterly Federal Tax Returns for March 31, 2003, March 31, 2004, and for June 30, 2004 did not state the beneficiary was an employee. For September 30, 2004, the form stated that the beneficiary was an employee and was paid \$1,961.00.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure 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. 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*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$34,736.00 per year from the priority date of April 30, 2001:

- In 2001, the Form 1120S stated taxable income loss¹ of <\$152,882.00>.²
- In 2002, the Form 1120S stated taxable income loss of <\$80,455.00>.
- In 2003, the Form 1120S stated taxable income loss of <\$37,940.00>.

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. No evidence was submitted that the petitioner paid the beneficiary the 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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

¹ IRS Form 1120S, Line 28.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$8,295.00 and \$18,565.00 in current liabilities. Therefore, the petitioner had <\$10,270.00> in net current assets. Since the proffered wage is \$34,736.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$104.00 and \$109,832.00 in current liabilities. Therefore, the petitioner had <\$109,728.00> in net current assets. Since the proffered wage is \$34,736.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$1,062.00 and \$109,344.00 in current liabilities. Therefore, the petitioner had <\$108,282.00> in net current assets. Since the proffered wage is \$34,736.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

On appeal, counsel submits copies of the following documents as additional evidence: Form 1120S U.S. Income Tax Returns for 2001, 2002, and 2003; a compiled financial statement; a letter from an accountant, tax years W-3 and W-2 Forms; Form 941 Employer's Quarterly Federal Tax Returns; and, an appraisal report.

On appeal, counsel cites the case of *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) for the proposition that where " ... an employer who facially appears unable to pay the offered wage may rebut this conclusion by providing a reasonable expectation of increased business in the immediate future." We disagree. In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. Further, *Ubeda v. Palmer* concerns cases involving sole proprietorships not Subchapter S corporations.

Counsel further states that in 2001 the petitioner " ... had net asset [sic] of \$405,367 which is greater than the wage offered amount." Counsel is incorrect. As stated above, in 2001 the petitioner's Form 1120S return stated current assets of \$8,295.00 and \$18,565.00 in current liabilities. Therefore, the petitioner had <\$10,270.00> in net current assets. Since the proffered wage is \$34,736.00 per year, this sum is less than the proffered wage. If counsel is speaking of the total assets of the petitioner, and this is unclear, we reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. Counsel has submitted an appraisal of 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

⁴ 8 C.F.R. § 204.5(g)(2).

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.

Counsel states that also in year 2001, there was depreciation in the amount of \$86,914.00. Petitioner's accountant advocates the addition of depreciation and amortization⁵ taken as a deduction to eliminate the abovementioned deficiencies in 2001, 2002 and 2003. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel also states along the same line of argument that depreciation was \$86,914.00 "...and, therefore net cash flow was -\$27,337 (depreciation \$86,914, owner's income \$39,231 and negative net \$152,882). The company also had \$781,000 capital operation expenses in 2001. The total deduction amount of \$487,754 include [sic] depreciation amount of \$14,480 which is not a loss but deducted for tax purpose. Therefore, actual net cash flow was +\$117,464." The AAO is unable to understand counsel's computation of "net cash flow" or why net cash flow⁶ in the face of substantial taxable income losses of <\$152,882.00>, <\$80,455.00>, and <\$37,940.00> for tax years 2001, 2002 and 2003 evidences the ability to pay the proffered wage.

In this regard of information concerning the petitioner's finances, the director requested audited reports, but counsel has submitted a compiled financial statement as of September 30, 2004 for the business to show the ability to pay the proffered wage. Counsel cites no legal precedent for the admissibility of the compiled financial statement, and, according to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

⁵ Intangible assets on a balance sheet are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

⁶ In generally accepted accounting principles (GAAP) based cash flow statement the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, present an analysis of the financial health of a business.

⁷ 8 C.F.R. § 204.5(g)(2).

A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in CIS deliberations in these matters. The statements presented were not audited.

The accounting service that prepared the financial statement in a cover letter dated October 19, 2004 to that report qualified the financial statement as follows:

Management has elected to omit substantially all the disclosures ordinarily included in financial statements. If the omitted disclosures were included in these financial statements, they might influence the user's conclusions about the company's assets, liabilities, equity, revenues and expenses. Accordingly, these financial statements are not designated for those who are not informed about such matters.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.