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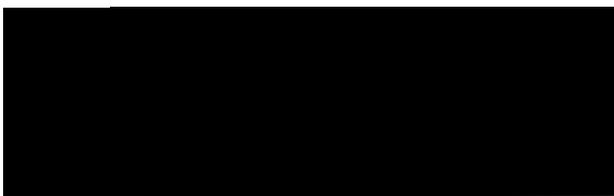
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



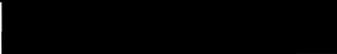
U.S. Citizenship
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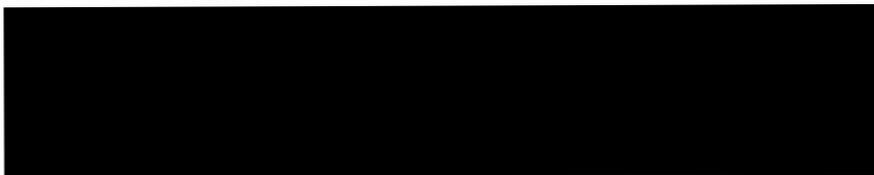
Petitioner:



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 tile installation contractor. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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 statement 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which equals \$31,200 per year.

On the petition, the petitioner stated that it was established during 1987 and that it employs eight workers. The petition states that the petitioner's gross annual income is \$3,238,777 and that its net annual income is \$1,257,095.¹ On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 2000.

In support of the petition, counsel submitted the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, and its 2002 Form 1065 U.S. Return of Partnership Income.

¹ Reference to the petitioner's 2002 tax return shows that the figure listed was the petitioner's Line 8 Total income, rather than its net income.

The 2000 corporate return shows that the petitioner was a subchapter C corporation during the period it covers (October 1, 2000 to September 30, 2001), that it incorporated on August 24, 1990, and that it reported taxes pursuant to cash convention and a fiscal year running from October 1 of the nominal year to September 30 of the following year.

During its 2000 fiscal year the petitioner declared a loss of \$15,458 as its taxable income before net operating loss deductions and special deductions. At the end of that fiscal year the petitioner's current liabilities, as reported on the corresponding Schedule L, exceeded the petitioner's current assets.

The 2001 corporate return covers only the period from October 1, 2001 to December 31, 2001² and indicates that the petitioner was a subchapter S corporation during that period, having elected subchapter S status on November 21, 2001. That return further indicates that the petitioner reported taxes pursuant to cash convention during that period.

Between October 1, 2001 and December 31, 2001 the petitioner declared a loss of \$30,963 as its ordinary income. At the end of that period the petitioner's current liabilities, as reported on the corresponding Schedule L, exceeded the petitioner's current assets.

The 2002 partnership return³ covers the period from January 15, 2002⁴ through the end of 2002, and indicates that the petitioner started business on January 15, 2002 and reports taxes pursuant to cash convention.

From January 15, 2002 to December 31, 2002 the petitioner reported a loss of \$134,361 as its ordinary income. At the end of that period the petitioner's current liabilities, as reported on the corresponding Schedule L, exceeded the petitioner's current assets.

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 October 8, 2004, denied the petition.

On the Form I-290B form appeal, counsel states, "The financial evidence has not been fully evaluated." With that appeal counsel submits a letter, dated December 17, 2004, from the petitioner's accountant.

The accountant's letter states, "The 2000 U.S. Income Tax Return . . . was a three month period filing which does not typically reflect the financial condition of this entity, as this period is the slowest time frame in our client's seasonal business cycle." The accountant further notes that because the petitioner reports taxes pursuant to cash convention its receivables are not reported on its returns. The accountant states that, based upon its reliance on cash basis accounting and the labor intensive, rather than capital intensive, nature of the

² This tax period occurred because the petitioner, when it changed from subchapter C to subchapter S status, also switched from reporting taxes based on its fiscal year to reporting based on the calendar year.

³ The petitioner, as a limited liability company, correctly filed a Form 1065 U.S. Return of Partnership Income.

⁴ What type of business entity the petitioner operated as from January 1, 2002 to January 15, 2002, if any, is unknown to this office. None of the returns submitted covers that period.

petitioner's business, it would always have negative net current assets. The accountant also noted that the petitioner has a line of credit from a bank, but presented no documentation to support that assertion. The accountant states that the petitioner is able to pay the proffered wage.

If the petitioner demonstrated that it generally reported sufficient net income to pay the proffered wage, and the return for the three months from October 1, 2001 to December 31, 2001 were the only return to show a loss, and the petitioner demonstrated that such a loss was unlikely to recur, then this office could overlook that loss in finding the ability to pay the proffered wage, based on the accountant's explanation that that period is the slowest in the petitioner's business. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, however, the petitioner's tax returns show recurring losses.

The accountant's explanation for the petitioner's negative net current assets is reasonable. That it does not report its receivables on its Schedule L, however, forecloses the possibility of proving its ability to pay the proffered wage using those receivables as a component of its net current assets. If the petitioner does not report positive net current assets on its tax returns, then it cannot show the ability to pay the proffered wage with its net current assets as shown on those returns. The accountant's explanation indicates that nothing is suspicious about the fact that the petitioner's tax returns show negative net current assets. That explanation does not, however, demonstrate the petitioner's ability to pay the proffered wage out of its net current assets.

The accountant's reliance on the petitioner's line of credit is 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.

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 beneficiary claimed, on the Form ETA 750B, to have worked for the petitioner since June 2000, the petitioner submitted no evidence of any wages it paid to the beneficiary.⁵ The petitioner did not establish that it employed and paid the beneficiary.

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.

⁵ In connection with a collateral matter, submission of a Form I-485 Application to Adjust Status, the beneficiary submitted copies of his 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns. Because the corresponding Form W-2 Wage and Tax Statements were not submitted with those returns, the provenance of the income reported on them is unknown to this office. Those returns cannot be used, therefore, to show that the petitioner paid the proffered wage, or some portion of it, to the beneficiary during those salient years. Further, they have no other relevance to the approvability of the instant petition and shall not be considered further.

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 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. 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* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

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 net of 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 typically⁶ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$31,200 per year. The priority date is April 16, 2001.

During its 2000 fiscal year the petitioner declared a loss. It is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net income during that fiscal year, which ran from October 1, 2000 to September 30, 2001. At the end of that year the petitioner's tax return showed negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage with its net current assets during that fiscal year. The petitioner submitted no reliable evidence of any other funds available to it during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 2000.

The petitioner reported, on the 2001 Form 1120, U.S. Corporation Income Tax Return submitted, that from October 1, 2001 to December 31, 2001 it suffered another loss. The petitioner is unable, therefore, to

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

demonstrate the ability to pay any portion of the proffered wage out of its net income during that period. At the end of that period the petitioner's tax return showed negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage with its net current assets during that period. The petitioner submitted no reliable evidence of any other funds available to it during that period with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the period from October 1, 2001 to December 31, 2001.

The record contains no evidence pertinent to the petitioner's finances during the period from January 1, 2002 to January 15, 2002, nor even any evidence that it was in existence during that period. The petitioner has not demonstrated that it was able to pay the proffered wage during that period.

During the period from January 15, 2002 to December 31, 2002 the petitioner reported a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage of its net income. At the end of that period the petitioner's tax return showed negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage with its net current assets during that period. The petitioner submitted no reliable evidence of any other funds available to it during that period with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the period from October 1, 2001 to December 31, 2001.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage from October 1, 2000 to September 30, 2001; from October 1, 2001 to December 31, 2001; from January 1, 2002 to January 15, 2002, and from January 15, 2002 to December 31, 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

The record contains another issue, however, that was not addressed in the decision of denial.

From October 1, 2000 to September 30, 2001 the petitioner was held as a subchapter S corporation. From October 1, 2001 to December 31, 2001 it was held as a subchapter C corporation. The mode of its ownership from January 1, 2002 to January 14, 2002, if it existed at all, is unknown. From January 15, 2002 to December 31, 2002 Stonemark Tile was held as a limited liability company.

Each time a Stonemark company was disbanded and a new company formed with the same name, the company changed ownership, notwithstanding that the company disbanded and the company formed may have had owners in common. When an existing, approved Form ETA 750 is to be used by a company other than the company to which it was issued, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that the new company assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that, each time a new company was formed, it assumed all of the right, duties, obligations, and assets of the former entity.

This issue was not raised in the decision of denial and the petitioner has not been accorded the opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue.

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.*