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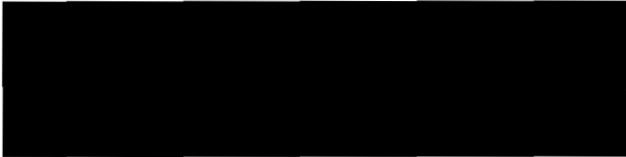
FILE: EAC-04-073-50826 Office: VERMONT SERVICE CENTER Date: MAY 09 2006

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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, counsel submits a brief and additional evidence.¹

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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.57 per hour or \$24,697.40 per year.² On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to currently employ 5 workers, but did not provide information on the date established, gross annual income and net annual income. In support of the petition, the petitioner submitted its Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarters of 1999 through 2002, and Form W-3, Transmittal of Wage and Tax Statements for 1999 through 2002.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

² Based on working 35 hours per week as indicated on the Form ETA 750A.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 3, 2004, the director requested additional evidence (RFE) pertinent to that ability. The director specifically requested evidence of the ability to pay as April 30, 2001 to the present in the form of tax returns, audited financial statements, annual reports, and the beneficiary's W-2 forms.

In response, counsel submitted the petitioner's Form 1065, U.S. Return of Partnership Income, for 2001, 2002 and 2003.

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 because the 2001 tax return appears to be doctored, and, on September 16, 2004, denied the petition.

On appeal, counsel asserts that the petitioner's accountant explains that a hand corrected tax year on tax form is entirely permissible and there is nothing inappropriate or illegal about the filing, and that the IRS tax printouts show that the petitioner has the ability to pay the proffered wage for the year of filing. The petitioner submits the IRS printouts of its tax return for 2001 and its W-3 form with all W-2 forms for its employees for 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 through 2003.

If the petitioner 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 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains the petitioner's Form 1065, U.S. Return of Partnership Income, for 2001 through 2003. Per the tax return the petitioner's fiscal year is based on a calendar year. On appeal counsel submits the IRS tax printouts for the petitioner's 2001 tax return, which shows that the petitioner filed its 2001 tax return on a form for another year with correction of the filing year. The tax returns reflect the following information regarding the petitioner's ability to pay the proffered wage of \$24,697.40 for the following years:

In 2001, the Form 1065 stated net income³ of \$30,746.

In 2002, the Form 1065 stated net income of \$32,014.

In 2003, the Form 1065 stated net income of \$30,296.

Therefore, for the years 2001 through 2003, the petitioner had sufficient net income to pay one proffered wage and appears to demonstrate the continuing ability to pay the instant beneficiary the proffered wage from the priority date to the present.

However, CIS record shows that the petitioner filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker on November 8, 2003⁴ using the priority date of April 25, 2001, five days before the priority date for the instant petition, reflected on a Form ETA 750. That petition was approved on September 20, 2004, the beneficiary of which filed an application for adjustment of status⁵ on December 15, 2004 and the application is still pending with the Vermont Service Center as of this date. The petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing **until the beneficiary obtains lawful permanent residence.** *See 8 C.F.R. § 204.5(g)(2).* Therefore, the petitioner must show that it also had sufficient income to pay any other sponsored immigrants the proffered wage from their priority dates to the present. Counsel submits the petitioner's W-3 and W-2 forms for all employees for 2001 on appeal. The W-2 forms show that in 2001 the petitioner paid 11 employees and issued 11 W-2 forms for each of the 11 employees. However, it did not pay any amount to the instant beneficiary nor did it pay to the other beneficiary. Therefore, the petitioner must demonstrate its ability to pay the proffered wages to each of the beneficiaries from 2001, the year of priority date to the present. Assuming the proffered wage for the previous beneficiary is the same as the one for the instant beneficiary, for the years 2001 through 2003, the petitioner had insufficient net income to pay the proffered wages to both beneficiaries.

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

³ Ordinary income (loss) from trade or business activities as reported on Line 22.

⁴ CIS receipt number: EAC-04-029-50093.

⁵ CIS receipt number: EAC-05-053-53531.

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.⁶ A partnership'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 partnership'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 reports net current assets of \$(6,300) in 2001, \$(21,233) in 2002 and \$(16,460) in 2003. The petitioner has not therefore, demonstrated the ability to pay one proffered wage out of its net current assets during the years 2001 through 2003.

Therefore, 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 continuing ability to pay the beneficiaries the proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner uses its business name as [REDACTED] Partnership and files Form 1065 U.S. Return of Partnership Income. The schedule K-1 of Form 1065 shows that [REDACTED] owns 100 percent of the business. However, it is unclear whether the petitioner is structured as a partnership since the petitioner did not submit any documents concerning the structure of the business entity and the schedule B of Form 1065 did not indicate what type of entity it is. Generally a general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. The record of proceeding does not contain enough information regarding the petitioner's entity type, the general partner's personal assets and expenses if applicable. As such, the petitioner has not demonstrated that the owner's assets might be utilized to pay the proffered wage assuming the petitioner was a general partnership and [REDACTED] was a general partner.

The evidence submitted establishes that the petitioner did not have the continuing ability to pay the proffered wages 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.

⁶ 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.