

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

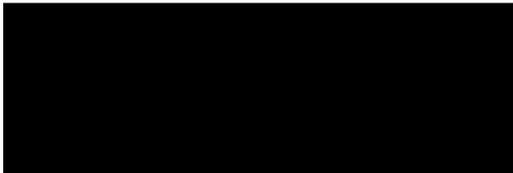
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
SRC 05 077 51297

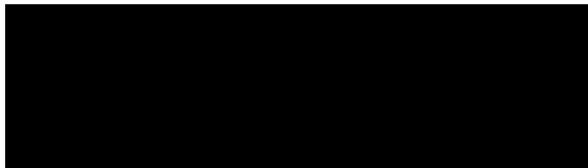
Office: TEXAS SERVICE CENTER

Date: APR 25 2007

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a laundry and dry cleaners. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 maintains that the director erred in evaluating the evidence and asserts that the petitioner has established its financial ability to pay the proffered wage.

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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 9, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$50,100 per year. The ETA 750B, signed by alien beneficiary on November 21, 2003, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, filed January 6, 2005, it is claimed that the petitioner was established in 1988.

In support of the petitioner's ability to pay the proffered wage of \$50,100 per year and in response to the director's request for evidence, the petitioner has provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2003.² It indicates that the petitioner files its taxes using a standard calendar year. In 2003,

¹ The record contains a copy of an ETA 750 naming the same alien and same petitioner with a priority date of April 30, 2001, although the minimum job requirements are different. However, the petitioner failed to provide the original ETA 750 and the director's decision is based on the subsequent ETA 750 as set forth above.

² Although incomplete (one page) copies of its 2001 and 2002 federal income tax returns are contained in the record showing ordinary income of \$6,361 and -\$36,384, respectively, the financial information covering the priority date of December 9, 2003 and forward, is more relevant to the determination of the petitioner's ability to pay the proffered wage.

the petitioner reported gross receipts or sales of \$104,419, total income of \$88,365, no officer compensation, \$10,245 in salaries or wages and ordinary income³ of -\$19,986. Schedule L of the tax return reflects that the petitioner had \$42,132 in current assets and \$64,618 in current liabilities, yielding -\$22,486 in net current assets.

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ They represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets are shown on line(s) 1 through 6 and the current liabilities are shown on line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of its bank statements for February through May 2004, July and August 2004, October 2004, and January through May 2005. Although the record, though counsel's transmittal letter, indicates that the petitioner may have hired the beneficiary at some point, no evidence of such employment or payment of wages was provided.

Upon reviewing the evidence submitted in support of the petition, including the bank statements and tax return(s), the director concluded that the evidence submitted did not support petitioner's continuing ability to pay the proffered wage beginning on the priority date, and, on July 28, 2005 denied the petition.

On appeal, counsel merely asserts that the petitioner's bank statements indicate sufficient assets to pay the proffered wage. He contends that this should be considered as the tax returns reflect factors that are irrelevant to the calculation of the actual financial ability, such as a non-cash expense like depreciation.

Counsel's assertions are not persuasive. 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 may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. In this matter, the record does not contain any evidence of the petitioner's employment and payment of wages to 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 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). In *K.C.P.*

³ For the purpose of this review, ordinary income will be treated as net income.

⁴ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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. Similarly, depreciation will not be added back to a petitioner's net taxable income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, 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. (Original emphasis.) *Chi-Feng* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. 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 funds available to pay the proffered wage. Further, a 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.

With regard to the selected copies of bank statements provided to the record, it is noted that 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 provides an inaccurate financial portrait of the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage.

In this matter, neither the petitioner's net income of -\$19,986, nor its net current assets of -\$22,486 were sufficient to pay the certified wage of \$50,100. The petitioner failed to provide either audited financial statements, annual reports, or evidence that the petitioner may have employed the beneficiary at the certified wage for any other period. It is note that the 2003 tax return suggests that no employee had been paid at a level commensurate with the proffered salary. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the argument presented on appeal, the AAO concurs with the director's determination that the petitioner has not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date. A petitioner must establish the

elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.