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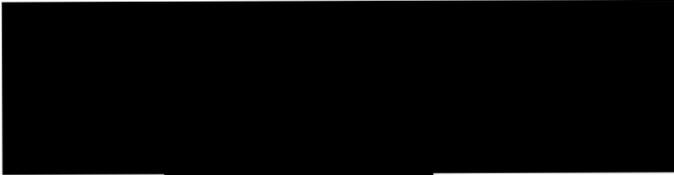
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: AUG 20 2007

EAC 05 200 52244

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.

Robert P. Wiemann for

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

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a night auditor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.37 per hour, which equals \$34,049.60 per year.

The Form I-140 petition in this matter was submitted on June 28, 2005. On the petition, the petitioner stated that it was established on September 6, 1998 and that it employs 12 workers. The petition states that the petitioner's gross annual income is \$960,541. The space reserved for the petitioner to report its net annual income was left blank. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in College Park, Maryland.

On the Form ETA 750, Part B, signed by the beneficiary on April 22, 2001, the beneficiary did not claim to have worked for the petitioner. On that form the beneficiary claimed to have worked forty hours per week for

the Embassy of India in Washington, D.C. since April 1999. The beneficiary also claimed to have worked forty hours per week for the Comfort Inn motel in Landover Hills, Maryland since April 1999.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) portions of the petitioner's 2001 and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the first page of the 2001 tax return of another corporation, (3) a letter dated June 20, 2005 from the petitioner's vice president, (4) a letter dated June 20, 2005 from the Embassy of India, (5) a letter dated June 22, 2005 from the manager of the Comfort Inn motel in Landover Hills, Maryland, and (6) a letter dated March 26, 2006 from an accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on September 6, 1998, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The Schedule K of the petitioner's 2001 return was not provided.² The corresponding Schedule M-1, however, shows that the petitioner had net income of \$0. At the end of that year the petitioner had current assets of \$66,344 and current liabilities of \$64,795, which yields net current assets of \$1,549.

The petitioner declared Schedule K, Line 17e Income/Loss Reconciliation of \$42,110 on its 2004 tax return. The corresponding Schedule L shows that at the end of that year its current liabilities exceeded its current assets.

In a letter dated December 7, 2005 counsel stated that the other tax return is that of an "affiliate" for whom the beneficiary also works as an employee of the petitioner. The relevance of that tax return, if any, to the ability of the petitioner to pay the beneficiary's wages is unknown to this office.

The petitioner's president's June 20, 2005 letter states, "[the beneficiary] will continue to be employed in the full[-]time position of night bookkeeper/auditor for [the petitioner]" This implies that on that date the petitioner employed the beneficiary.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

The June 22, 2005 letter from the manager of the Landover Hills Comfort Inn stated that the beneficiary was then a night auditor for that other motel and had been since April 2000.

The June 20, 2005 letter from the Embassy of India stated that the beneficiary was then working as an accountant at the embassy and had been since May 1998. This office notes that the beneficiary claimed, on the Form ETA 750B, to have worked for the embassy since April of 2000.

The accountant's March 26, 2006 letter asserts that the increase in the petitioner's cash on hand from the beginning of 2001 to the end of 2001, as shown on the petitioner's 2001 Schedule L, demonstrates, in itself, petitioner's ability to pay the proffered wage during that year. The accountant also cited the petitioner's net worth, its total salary expense, the portion of its debt that is long-term rather than current, the difference between its depreciation deduction and its debt service, and the ratio of its assets to its debt as indices of its ability to pay the proffered wage.

The accountant argued that the petitioner's depreciation deductions during the salient years must be considered in the determination of its ability to pay the proffered wage. Counsel stated that the petitioner's depreciation deductions "decreased taxable profits without decreasing the amount of cash the company had." The accountant appeared to assert that the difference between the petitioner's depreciation deduction and its debt service during the salient years is a statistic that is somehow relevant, though he did not further explain.

The accountant also noted that the petitioner's total assets exceeded \$1,500,000 during both of the years for which information was provided, but that its current liabilities were less than \$150,000 during those years, apparently asserting that either the difference or the ratio is relevant to the petitioner's ability to pay the proffered wage.

Finally, the accountant equated current assets with net current assets and stated that the petitioner's current assets, which exceeded the annual amount of the proffered wage during 2001, demonstrate its ability to pay the proffered wage.³

The acting director denied the petition on January 30, 2006.

On appeal, counsel asserted that the amount of the proffered wage that the petitioner must show the ability to pay during 2001 should be prorated to reflect the portion of the year that remained on the priority date, that the petitioner's cash on hand demonstrates its ability to pay the proffered wage, and that hiring the beneficiary would likely have resulted in lower costs to the petitioner.

Counsel requested that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record

³ The computation of net current assets and their relevance to the inquiry into the petitioner's continuing ability to pay the proffered wage beginning on the priority date are explained in detail below.

contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

The argument of counsel and the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁴ Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to **the petitioner to pay additional wages. Such a scenario is unacceptable. The petitioner's depreciation deductions will not be added back to the petitioner's income, either with or without the subtraction of debt service, in determining the funds available to it during a given year to pay additional wages.**

The assertion that the petitioner's cash on hand, in itself, or its increase in cash on hand from the beginning of a given year to the end, demonstrates the petitioner's continuing ability to pay the proffered wage during a given year is unconvincing. This office will consider a petitioner's cash on hand in the context of the computation of its net current assets, which computation is explained below. It will not consider any individual asset outside of that context.

The assertion that the petitioner's total wage expense demonstrates its ability to pay the proffered wage is similarly unconvincing. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that

⁴ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

Counsel also suggested that the petitioner could have eliminated some positions and used the wages paid to other workers as necessary to pay the proffered wage. Counsel submitted no evidence pertinent to this suggestion and whether counsel is asserting that housekeeping, managerial, or some other positions might be eliminated is unclear. The assertion that the petitioner could have eliminated some positions and used the wages of those positions to pay the beneficiary, absent any evidence in its support, is unconvincing.

The accountant implied that ratio or difference between total assets and current liabilities is relevant to its ability to pay the proffered wage. How either of those statistics would show that the petitioner was able to pay additional wages is unclear and counsel did not elaborate. This office is unable, therefore, to further address that argument.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. Although the petitioner indicated that the beneficiary worked for it during some portion of the pendency of the instant petition, the petitioner did not provide any evidence pertinent to the wages it 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

⁵ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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. 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).

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, or its net worth, however, are not available to pay the proffered wage, either before or after subtraction of its debt. 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 minus 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. On a Schedule L the petitioner's current assets are typically⁷ found at lines 1(d) through 6(d).

Current liabilities are liabilities due to be paid within a year. This office appreciates the distinction, raised by the accountant, between current liabilities and long-term debt, and will not include the petitioner's long-term debt in the calculation of the petitioner's net current assets. Year-end current liabilities are typically 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 \$34,049.60 per year. The priority date is April 27, 2001.

During 2001 the petitioner had net income of \$0. The petitioner is therefore unable to show the ability to pay any portion of the proffered wage with its profit during that year. At the end of that year the petitioner had net current assets of \$1,549. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

During 2004 the petitioner declared Schedule K, Line 17(e) Income of \$42,110. That amount is greater than the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner initially submitted no copies of annual reports, federal tax returns, or audited financial statements with the petition. On September 15, 2005 the service center issued a request for evidence in which they requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The request for evidence also specifically requested the petitioner's 2001 tax return. In response the petitioner provided its 2001 and 2004 tax returns.

Why the service center only requested the petitioner's 2001 return is unknown to this office. In any event, on the date of that request for evidence the petitioner's 2002 and 2003 tax returns should have been available. Those returns should have been requested and should have been provided. Because the service center did not request those returns, and the decision of denial was not based, even in part, on the petitioner's failure to provide them, this office will not base today's decision on that failure, even in part. If the petitioner chooses to pursue this matter further, however, it should provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage during 2002 and 2003.

The petition in this matter was submitted on June 28, 2005. On that date the petitioner's 2005 tax return was unavailable. On September 5, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial. Eligibility in this matter hinges on the petitioner demonstrating 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.⁸ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 27, 2001. The labor certification states that the position requires two years of experience as a bookkeeper/auditor, or in business bookkeeping and accounting.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

⁸ To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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.

The Form ETA 750 describes the duties of the proffered position as follows:

Records, reconciles and posts sales transactions for the day, billing credit card accounts, compiling deposits, creating and auditing transaction reports, and resolving discrepancies using knowledge of sound bookkeeping and cash management systems.

On the Form ETA 750B, which the beneficiary signed on April 22, 2001, he stated that he had been working full-time for both the Embassy of India and a Landover Hills motel since April of 1999. Letters of June 20, 2005 and June 22, 2005 indicate that, on those dates, he was still working for both the Embassy of India and the motel. Another letter dated June 20, 2005 from the petitioner's vice president indicates that he was also working full time for the petitioner on that date. This office rejects the assertion that the beneficiary held three full time jobs simultaneously.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The June 20, 2005 letter from the Embassy of India indicates that the beneficiary began working for the embassy during May of 1998, rather than during April of 1999 as the beneficiary stated. Further, that letter states that the embassy employed the beneficiary as an accountant, but gives no further description of the duties. Whether in that position the beneficiary performed some or all of the duties described on the Form ETA 750 is unclear.

Additionally, the June 22, 2005 letter from the motel states that the beneficiary is its night auditor, but does not state the duties of that position. Whether in that position the beneficiary performed some or all of the duties described on the Form ETA 750 is also unclear.

If the petitioner wishes to further pursue this matter however, it should provide the beneficiary's employment history and provide independent objective evidence in its support as required by *Matter of Ho, Id.* It should also provide complete descriptions of the duties of his positions with his various employers.

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.