



U.S. Citizenship  
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JAN 23 2007

FILE:

SRC 03 139 52474

Office: TEXAS SERVICE CENTER Date:

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*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Texas 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 motel. It seeks to employ the beneficiary permanently in the United States as a hotel or motel manager. 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 submitted a statement.

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 October 3, 2001. The proffered wage as stated on the Form ETA 750 is \$30.92 per hour, which equals \$64,313.60 per year.

The Form I-140 petition in this matter was submitted on April 16, 2003. On the petition, the petitioner did not state the date it was established, the number of workers it employs, its gross annual income, or its net annual income. On the Form ETA 750, Part B, signed by the beneficiary on August 22, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Hollywood, Florida.

In support of the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on January 27, 2005, the Texas Service Center requested evidence pertinent to that ability. The service center also specifically requested copies of the petitioner's 2003 Forms 941 Employer's Quarterly Tax Returns and, if it employed the beneficiary during any of the salient years, the W-2 Wage and Tax Statements showing wages it paid to him.

In response, counsel submitted (1) the petitioner's 2000, 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation<sup>1</sup> and (2) analyses of the petitioner's ability to pay the proffered wage during 2000 and 2001 by [REDACTED] Enrolled Agent (EA).<sup>2</sup>

The tax returns submitted show that the petitioner is a corporation, that [REDACTED] owns it, that it incorporated on August 15, 1998, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2000 the petitioner declared a loss of \$3,190 as its ordinary income. At the end of that year it had \$59,883 in current assets and current liabilities of \$19,627, which yields net current assets of \$40,256.<sup>3</sup>

During 2001 the petitioner declared a loss of \$22,500 as its ordinary income. At the end of that year it had \$32,830 in current assets and current liabilities of \$646, which yields net current assets of \$32,184.

During 2002 the petitioner declared a loss of \$30,501 as its ordinary income. At the end of that year it had current assets of \$12,723 and current liabilities of \$1,269, which yields net current assets of \$11,454.

During 2003 the petitioner declared a loss of \$23,955 as its ordinary income. At the end of that year the petitioner's current liabilities exceeded its current assets.

[REDACTED], notes in his analysis of the petitioner's ability to pay the proffered wage that amortization and depreciation deductions do not represent actual cash outlays during the years taken, and he suggests that those amounts should therefore be considered funds available to pay additional wages.

(hereinafter "the EA.") notes that Schedule K shows that the petitioner received interest income of \$1,160 during 2001 and had year-end cash of \$31,241 at the end of that year. The EA urges that these funds be included in the calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Further, the EA states,

(T)here are approximately . . . \$23,737 of non-recurring taxes and allocated owner's living expenses that have been run through the business. The living expenses are legally allowed as

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<sup>1</sup> The first page of those returns show that the taxpayer is [REDACTED]. Elsewhere in the returns, however, the taxpayer is called [REDACTED]. That corporation shares the petitioner's address. Further, in a letter dated April 25, 2005 counsel refers to the petitioner as [REDACTED]. [REDACTED] This office finds that [REDACTED] and the petitioner are the same entity.

<sup>2</sup> An enrolled agent is a person authorized to represent taxpayers before the Internal Revenue Service. See U.S. Internal Revenue Service website at [www.irs.gov/taxpros/agents/article/0,,id=100710,00.html](http://www.irs.gov/taxpros/agents/article/0,,id=100710,00.html)

<sup>3</sup> Because the priority date of the instant petition is October 3, 2001 the petitioner's 2000 tax return is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

a deduction for an owner that [sic] is required to live on premises, but should be removed from the operating expenses to fairly present what the true current years [sic] business expenses and resulting profits are.

Further still, the EA states that the petitioner had \$32,591 in “reconstituted positive cash flow carryover from year 2000.”

Finally, the EA sums all of the amounts he stated were funds available to pay the proffered wage and notes that they exceed the annual amount of the proffered wage. The petitioner did not provide any W-2 forms or the requested Form 941 Employer’s Quarterly Tax Returns.

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 May 15, 2005, denied the petition.

On appeal, counsel stated,

The ability to pay by the employer was the only issue for denial on this case. The Petitioner respectfully disputes the findings of an inability to pay the proffered wage at the time that the priority date established [sic]. A careful examination of the financial analysis already submitted by [REDACTED] clearly shows that the net profits exceeded the proffered wage in question.

Initially, this office notes that the priority date of the instant petition is October 3, 2001. Evidence pertinent to the petitioner’s finances during 2000 is not, therefore, directly relevant to the petitioner’s continuing ability to pay the proffered wage beginning on the priority date. Evidence pertinent to 2000 will not be further addressed.

As to 2001 the EA’s assertion that “approximately \$23,737 of non-recurring taxes and allocated owner’s living expenses” should be removed from the operating expenses to fairly present . . . business expenses and resulting profits” implies that some amount that was claimed as a deduction was not actually an expense, and/or that some amount that was not claimed as income actually was income. The EA does not indicate the nature of those amounts any more concretely.

This office is unable to find any such line item amount<sup>4</sup> on the petitioner’s tax returns and is unable, therefore, to determine their nature for itself. This office is unable, therefore, to determine that any such amount should

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<sup>4</sup> That the amount indicated by the EA is not easily found on the petitioner’s tax returns could result for two perfectly legitimate reasons. First, counsel appears to assert that the \$23,737 is the sum of two different items, taxes and living expenses. They would be unlikely, therefore, to appear on the same line on the income tax return. Second, the amounts may be included with other amounts on the various lines upon which they were claimed/deducted. If the petitioner wishes to prevail on this point, however, the petitioner or counsel or the EA must demonstrate precisely the nature of those funds, rather than abstractly allude to them. Further, although the EA offered an ostensible reason that the living expenses should not be charged against income, the only reason offered pertinent to the taxes was that they are non-recurring. As explained in the footnote

be included as a fund available to pay additional wages and will not include that amount in its calculations. If that amount actually does represent a fund available to the petitioner this matter may be clarified on motion.<sup>5</sup>

Similarly, the precise nature of the petitioner's "\$32,591 in "reconstituted positive cash flow" is equally unclear. That amount does not appear as a line item and its nature is unclear to this office. Again, if the petitioner wishes to rely on that amount's availability to pay wages, it or its representative must demonstrate its existence and availability more concisely.

The EA's argument that the petitioner's depreciation and amortization deductions should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that depreciation and amortization deductions do not require or represent a specific cash expenditure during the year claimed. They are the systematic allocation of the cost of long-term assets, tangible and intangible, respectively. A depreciation deduction 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 or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

A depreciation 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. *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.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although the EA asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.<sup>6</sup> The EA appears to be

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which follows, this is insufficient cause to consider such taxes as funds available to pay the proffered wage.

<sup>5</sup> Further, the EA offered only abstract reasons that the living expenses and taxes should not be charged against income. Taxes, for instance, are fundamentally contingent in nature, that is, an entity does not owe taxes absent a triggering event. Most taxes might be said, therefore, to be non-recurring. In order to prevail the petitioner or its representative would be obliged to demonstrate the nature of the living expenses and taxes and demonstrate that they should not be charged against income in assessing the petitioner's ability to pay the proffered wage, rather than merely state the conclusion that they should not.

<sup>6</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed

asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part. End-of-year cash will, however, be included in the calculation of net current assets, below, which is an alternative method, separate from income, of demonstrating a petitioner's ability to pay the proffered wage.

This office accepts the EA's argument pertinent to interest income as valid. Not all of a subchapter S corporation's income and expenses are necessarily shown in its ordinary income. Some are shown in segregated form on the Schedule K of the Form 1120S, U.S. Income Tax Return for an S Corporation and retain their identity as interest, dividends, capital gain, etc., when passed through to the owners. Those amounts, whether profits or losses, are correctly included with the petitioner's ordinary income in assessing a subchapter S corporation's ability to pay the proffered wage during a given year.

In the instant case, the petitioner showed interest income of \$1,160 and section 1231 loss of \$7,804 during 2001. The additional net loss of \$6,644 will be subtracted from the petitioner's 2001 ordinary income in determining the petitioner's 2001 net income.

In addition to its 2002 ordinary income the petitioner showed interest income of \$85 on its 2002 Schedule K. That additional net gain will be added to the petitioner's 2002 ordinary income in determining the petitioner's 2002 net income.

In addition to its 2003 ordinary income the petitioner showed interest income of \$69 on its 2003 Schedule K. That additional net gain will be added to the petitioner's 2003 ordinary income in determining the petitioner's 2003 net income.

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, 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.

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during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

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, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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.

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 typically<sup>7</sup> 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 \$64,313.60. The priority date is October 3, 2001.

During 2001 the petitioner declared a loss of \$22,500 as its ordinary income. The petitioner declared an additional loss of \$6,644 on its 2001 Schedule K for a total net loss of \$29,144. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$32,184. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss of \$30,501 as its ordinary income. In addition to its ordinary income the petitioner showed interest income of \$85 on its 2002 Schedule K. The sum of those figures equals

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

a net loss of \$30,416. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$11,454. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss of \$23,955 as its ordinary income. In addition to its ordinary income the petitioner showed interest income of \$69 on its 2003 Schedule K. The sum of those figures equals a net loss of \$23,886. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on April 16, 2003. On that date the petitioner's 2004 tax return was unavailable. The request for evidence was issued on January 27, 2005. On that date the petitioner's 2004 tax return may still have been unavailable. The petitioner is excused, therefore, from providing evidence of its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. 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 this ground, which ground has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The January 27, 2005 request for evidence asked that the petitioner provide its 2003 Form 941 quarterly returns. The petitioner did not provide those returns, nor an explanation of that omission.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

This office notes, however, that providing that previously requested evidence on motion would likely be insufficient. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal or motion. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988).

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.