

**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 06 042 50401

Office: TEXAS SERVICE CENTER Date:

JUL 31 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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the instant preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction contractor. It seeks to employ the beneficiary permanently in the United States as a construction 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.

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 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 was accepted for processing by any office within the employment system of the DOL. 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 \$45,282 per year.

The Form I-140 petition in this matter was submitted on November 23, 2005. On the petition, the petitioner stated that it was established during 1986. In the space reserved for the petitioner to state the number of workers it employs the petitioner entered, "5 Sub Contractors." The petition states that the petitioner's gross annual income is \$836,080. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on April 27, 2001, the beneficiary did not

claim to have worked for the petitioner. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Flower Mount, Texas.¹

The AAO reviews *de novo* issues raised in decisions challenged 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.²

In the instant case the record contains the 2001, 2002, 2003, and 2004 joint Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and [REDACTED]. 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.

Schedules C, Profit or Loss from Business attached to [REDACTED] tax returns show that [REDACTED] owned the petitioner as a sole proprietorship during each of the salient years.

During 2001 the petitioner returned net profit of \$50,985. The petitioner's owner and owner's spouse had no dependents during that year and declared adjusted gross income of \$44,483 during that year, including the petitioner's profit.

During 2002 the petitioner returned net profit of \$12,255. The petitioner's owner and owner's spouse had one dependent during that year and declared a loss of \$8,382 as their adjusted gross income during that year, including the petitioner's profit.

During 2003 the petitioner returned net loss of \$2,334. The petitioner's owner and owner's spouse had no dependents during that year and declared a loss of \$11,573 as their adjusted gross income during that year, including the petitioner's loss.

During 2004 the petitioner returned net profit of \$35,849. The petitioner's owner and owner's spouse had no dependents during that year and declared adjusted gross income of \$46,664 during that year, including the petitioner's profit.

The director denied the petition on March 23, 2006.

On appeal, counsel asserted,

The adjudicating officer considered the employer's living expenses from net income of 2001 in determining the financial ability to pay the beneficiary a proffered wage, and it is not an appropriate aspect. The employer's expenses and taxes are already deducted from the gross

¹ The Form I-140 visa petition indicates that the petitioner would employ the beneficiary at 2223 Royal Lane in Dallas, Texas. Reference to correspondence in the file, however, shows that address to be counsel's. This office believes that error was inadvertent.

² 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).

sales. The employer has not only profits from the business to be used financially for the business, but also accommodation of funds is also available funds to be used in operating the business. [Errors in the original.]

Counsel's point is not entirely clear. He seems to be asserting that the petitioner's owner's personal living expenses are already deducted from the petitioner's gross receipts to arrive at its net profit. This is not typically true of a sole proprietorship's owner's expenses, and no reason exists to believe that it is so in this case.

Counsel also noted the amount of the petitioner's Costs of Labor during each of the salient years and appeared to assert either that payment of those expenses demonstrates that the petitioner was able, in addition, to pay the proffered wage, or that the petitioner could have utilized the funds actually paid to contractors to pay the proffered wage instead.

Finally, counsel appeared to urge that the petitioner's depreciation and amortization deductions should be considered in the determination of the funds available to pay wages.

If counsel is urging that payment of the petitioner's contractors demonstrates that it can pay some additional amount, counsel's argument is unconvincing. Showing that the petitioner paid wages, contractor compensation, or other expenses 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 hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ 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 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.

If, on the other hand, counsel meant to assert that the petitioner was able to use the funds paid to contractors to pay the proffered wage, the record contains no evidence in support of that assertion. The evidence does not demonstrate, for instance, what portion, if any, of the amounts paid to contractors were for performing the duties of the proffered position, construction supervisor. If those payments were for the performance of other essential duties, such as pouring foundations, framing, electrical work, interior finish, etc., then they were not available to pay the wages of the proffered position, as hiring a construction manager would not obviate the

³ 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.

⁴ 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.

need for those services. The petitioner has not demonstrated that any portion of those funds was available to pay the proffered wage and they will not be further considered.

Counsel'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 specific cash expenditures during the year claimed. They are systematic allocations 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 a sinking fund necessary to replace buildings and equipment at the end of their useful life. 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 to its present purpose.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel 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.⁵ Counsel appears to be 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.

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,

⁵ Counsel does 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.

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. 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 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).

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that _she could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$45,282 per year. The priority date is April 30, 2001.

During 2001 the petitioner's owner and the owner's spouse declared adjusted gross income of \$44,483. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of other funds available to the petitioner 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's owner and owner's spouse declared a loss. The petitioner was unable to pay any portion of the proffered wage out of its owner's adjusted gross income during that year. The petitioner has submitted no reliable evidence of other funds available to the petitioner 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's owner and owner's spouse declared a loss. The petitioner was unable to pay any portion of the proffered wage out of its owner's adjusted gross income during that year. The petitioner has submitted no reliable evidence of other funds available to the petitioner 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.

During 2004 the petitioner's owner and owner's spouse declared adjusted gross income of \$46,664. That amount is greater than the annual amount of the proffered wage. If the petitioner had been obliged to pay the proffered wage out of its owner's adjusted gross income during that year, however, it would have left them with \$1,382 with which to support themselves during that year. No evidence was submitted pertinent to the petitioner's owner's household expenses and none is in the record. To expect the petitioner's owner to support his household on that amount for a year, however, is unreasonable. The petitioner has submitted no reliable evidence of other funds available to the petitioner during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on November 23, 2005. On that date the petitioner's 2005 tax return was unavailable. On December 8, 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 its burden to demonstrate 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, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.