

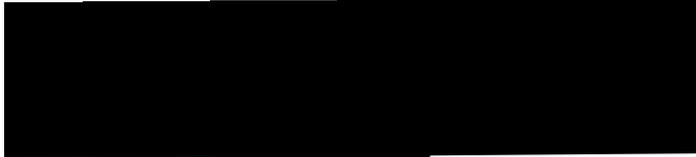
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

EAC 04 113 54121

Office: VERMONT SERVICE CENTER

Date: MAR 30 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont 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 developer and manufacturer of telephone equipment. It seeks to employ the beneficiary permanently in the United States as an account executive. 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 submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 April 11, 2001. The proffered wage as stated on the Form ETA 750 is \$58,458.40 per year.

On the petition, the petitioner stated that it was established on February 22, 1996 and that it employs 15 workers. The petition states that the petitioner's gross annual income is \$1,000,000 and that its net annual income is \$125,000.¹

¹ The tax returns submitted support the figure given as the petitioner's gross annual income, but do not support the figure claimed as the petitioner's net annual income.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On a letter, dated January 20, 2004 and submitted with the petition, however, the petitioner's president stated that he had employed the beneficiary as an account executive since February 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Trenton, New Jersey.

In support of the petition, counsel submitted the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. That return shows that the petitioner is a corporation, that it incorporated on February 22, 1996, that it reports taxes pursuant to accrual accounting, and that it reports taxes pursuant to a fiscal year beginning on February 1 of the nominal year and ending on January 31 of the following year. During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$16,112. At the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided a 2001 Form 1099 Miscellaneous Income statement showing that during that year the petitioner paid the beneficiary non-wage compensation of \$30,195.

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 September 15, 2004, denied the petition.

In a related matter counsel submitted a copy of the beneficiary's 2000 and 2002 Form 1040 U.S. Individual Income Tax Returns including 2000 and 2002 Forms 1099 showing that the petitioner paid the beneficiary \$20,000 during each of those years.

On appeal, counsel submits (1) copies of the petitioner's 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) a 2003 Form 1099, and (3) a brief.

The petitioner's 2002 income tax return shows that during that year it declared \$21,007 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that it declared a loss of \$13,837 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2003 Form 1099 provided shows that the petitioner paid the beneficiary \$26,000 during that year.

In the brief counsel argues that the petitioner's net profit, its end-of-year cash, the amount it paid to the beneficiary, and the amounts of its depreciation and amortization deductions should be added together, and that the sum of those amounts would be an index of the petitioner's ability to pay the proffered wage. As to the depreciation deduction counsel notes that it does not represent a monetary expenditure during the year taken. Finally, counsel urges that, as the priority date of the petition is April 11, 2001, the amount of the proffered wage due during 2001 should be pro-rated from that date to the end of the year.

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. Counsel is correct 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 or other basis 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.

While that expense does not require or represent the current use of cash, neither is it available to pay wages. The 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 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 counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, counsel does not offer any alternative allocation of those costs.² 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.

Counsel's assertion that the petitioner's end-of-year cash should be added to its net profits is similarly unconvincing. 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.

Counsel requests 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 towards an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of

² 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.

the year that occurred after the priority ate (and only that period), the petitioner has not submitted such evidence.

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 established that it employed the beneficiary during 2000,³ 2001, 2002, and 2003 and paid her \$20,000, \$30,195, \$20,000, and \$26,000 during those periods, respectively.

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. 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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 the 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.

The proffered wage is \$58,458.40 per year. The priority date is April 11, 2001.

Having demonstrated that it paid the beneficiary \$30,195 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$28,263.40 balance of the proffered wage. During 2001 the petitioner declared taxable

³ Because the priority date in this matter is April 11, 2001 evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The amount the petitioner paid the beneficiary during 2000 will not be further addressed.

income before net operating loss deductions and special deductions of \$16,112. That amount is insufficient to pay the balance of the proffered wage. 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. 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.

Having demonstrated that it paid the beneficiary \$20,000 during 2002 the petitioner is obliged to demonstrate the ability to pay the \$38,458.40 balance of the proffered wage. During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$21,007. That amount is insufficient to pay the balance of the proffered wage. 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. 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.

Having demonstrated that it paid the beneficiary \$26,000 during 2003 the petitioner is obliged to demonstrate the ability to pay the \$32,458.40 balance of the proffered wage. During 2003 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income 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. 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 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 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.