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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 21 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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DISCUSSION: Approval of the preference visa petition was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of golf accessories. It seeks to employ the beneficiary permanently in the United States as a foreign clerk. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel's office 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 the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on January 23, 1996. The proffered wage as stated on the Form ETA 750 is $11.50 per hour, which equals $23,920 per year.

With the petition, counsel submitted its 1997 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $64,029 during its 1997 fiscal year, which ran from October 1, 1997 through September 30, 1998.

On October 13, 2000, the California Service Center issued a Request for Evidence in this matter. That request, however, was concerned with the documentation of the beneficiary's employment history, and is irrelevant to the basis for the eventual decision of termination. On January 19, 2001, the California Service Center approved the petition.

On June 5, 2002, the California Service Center issued another request for evidence in this matter. The Service Center requested the petitioner's 1997, 1998, 1999, 2000, and 2001 tax returns, among other documents. In response to that request, the petitioner submitted its 1996, 1998, 1999, 2000, Form 1120 U.S. Corporation Income Tax Returns. The petitioner also submitted an additional copy of its 1997 tax return. The petitioner did not explain the omission of the requested 2001 tax return. The returns show that the petitioner reports taxes based on a fiscal year running from October 1 of the nominal year to September 30 of the following year.

The petitioner's 1996 fiscal year ran from October 1, 1996 to September 30, 1997. The 1996 return shows that during that fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of $127,074. The copy of the 1997 return shows the same figures as the copy previously submitted.

The petitioner's 1998 fiscal year ran from October 1, 1998 through September 30, 1999. The 1998 return shows that during that fiscal year the petitioner declared a loss of $1,440,101. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 1999 fiscal year ran from October 1, 1999 through September 30, 2000. The 1999 return shows that during that fiscal year the petitioner declared a loss of $493,599. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2000 fiscal year ran from October 1, 2000 through September 30, 2001. The 2000 return shows that during that fiscal year the petitioner declared a loss of $328,673. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

On October 4, 2002, the Director, California Service Center issued a Notice of Intent to Revoke in this matter. The director noted that during 1998, 1999, and 2000 the petitioner had declared a loss and found that the petitioner had not, therefore, demonstrated its ability to pay the proffered wage during those years. The petitioner was accorded 30 days to respond to the evidence but did not. The director revoked approval of the petition on January 13, 2003, finding that the petitioner had failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

The appeal submitted in this matter stated: "Enclosed please find the supporting documents, including company's payroll, W-2s/W-3s. We kindly request 30 days [sic] extension. Enclosed please find the letter of explanation." The documents described were included with the appeal. Those documents show amounts the petitioner paid in wages during 1996, 1997, 1998, and 2002. No explanation was given for the omission of documents pertinent to the years 1999, 2000, and 2001. The documents submitted do not indicate that the petitioner employed the beneficiary during any of those years.

A letter, dated January 30, 2003, was also enclosed with the appeal. That letter, signed by counsel's associate, states that counsel was then out of town pursuant to a family emergency and requested an extension of 30 days during within which to submit a brief or otherwise supplement the appeal. No further information, argument, or documentation has been received from counsel or the petitioner.

The implicit assertion that the petitioner's wage expense during 1996, 1997, 1998, and 2002 demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date is the only assignment of error submitted on appeal. Counsel's reliance on the amount of the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net

[1] The petitioner might demonstrate this, for instance, not by alleging, but by submitting evidence sufficient to demonstrate that beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

income[2], 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 the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income.

The director implied in the Notice of Intent to Revoke that the amount of the petitioner's depreciation deduction should be considered in the determination of the petitioner's ability to pay the proffered wage. That implicit assertion is incorrect.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. 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. 1080 (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. A 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.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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 the beneficiary.

If the petitioner does not establish that it paid an amount at least equal to the proffered wage during that period, the AAO 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, 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 net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its net income than the amount of the proffered wage.

In this case, the priority date is January 23, 1996. The proffered wage is $23,920 per year. The petitioner submitted no evidence pertinent to its ability to pay the proffered wage from the priority date through September 30, 1996, the last day of its 1995 fiscal year. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during that period.

During its 1996 fiscal year, the petitioner declared net income of $127,074. That amount is greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 1996 fiscal year.

During its 1997 fiscal year, the petitioner declared net income of $64,029. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage the proffered wage during its 1997 fiscal year.

During its 1998 fiscal year, the petitioner declared a loss of $1,440,101. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 1998 fiscal year.

During its 1999 fiscal year, the petitioner declared a loss of $493,599. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 1999 fiscal year.

During its 2000 fiscal year, the petitioner declared a loss of $328,673. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

The petitioner's 2001 fiscal year ran from October 1, 2001 through September 30, 2002. On June 5, 2002, the Service Center issued the second request for evidence in this matter, requesting that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that the petitioner submit, among other documents, its 2001 tax return. The petitioner's fiscal year 2001 tax return should then have been available. The petitioner did not submit that requested document or any other evidence of its ability to pay the proffered wage during that fiscal year. The petitioner has failed, therefore, to demonstrate its ability to pay the proffered wage during its 2001 fiscal year. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the period from the priority date through September 30, 1996. The petitioner also failed to demonstrate its ability to pay the proffered wage during its 1998, 1999, 2000, and 2001 fiscal years. 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.