PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship
and Immigration
Services

[redacted]

File: LIN 02 242 50053 Office: NEBRASKA SERVICE CENTER Date: APR 21 2004

IN RE: Petitioner:
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: [redacted]

INSTRUCTIONS:

This is the decision 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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and alteration business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies 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.

On appeal, counsel submits a statement 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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $24,000 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation. The return shows that the petitioner declared ordinary income of $12,514 during the 2001 calendar year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $23,765 and current liabilities of $13,971, which yields net current assets of $9,794.

Counsel also submitted a letter, dated July 5, 2002, from the petitioner's president. In that letter the president states that the petitioner has the ability to pay the proffered wage based on its steady growth. No evidence of that steady growth was provided. The petitioner's president also stressed the petitioner's gross income.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on November 27, 2002, requested additional evidence pertinent to that ability.

In response, counsel submitted copies of the petitioner's (1) 2001 and 2002 Form W-2 Wage and Tax Statements and Form W-3 transmittals, (2) Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001 and the first three quarters of 2002, (3) Form IL-941 Illinois Quarterly Withholding Income Tax Returns for those same quarters, and (4) Employer's Contribution and Wage Report for those same

quarters. None of those documents indicates that the petitioner employed the beneficiary during any of the salient years.

The 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 July 10, 2003, denied the petition. The director noted that the petitioner's 2001 tax return did not demonstrate the petitioner's ability to pay the proffered wage during that year.

On appeal, counsel cited a non-precedent decision for the proposition that the petitioner's depreciation deduction should be considered in the determination of the petitioner's "true income" and its ability to pay the proffered wage. Counsel cited a statement by an official of the Nebraska Service Center for the same proposition. In addition, counsel provided a letter from the petitioner's president, dated July 28, 2003. That letter states that the amount charged to depreciation was available to pay the proffered wage.

Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. Similarly, the alleged statement by the Nebraska Service Center official is not binding on this office nor even on the Nebraska Service Center. Even assuming that the statement of that official was accurately paraphrased, policies are subject to change. Counsel appears to interpose that case and that statement as binding precedent, rather than to argue that the reasoning therein is convincing. They are not precedent.

Further, although a depreciation deduction does not represent a specific cash expenditure during the year claimed, the argument that it is a fund available to pay the proffered wage is unconvincing. A depreciation deduction 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. 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 petitioner provided information pertinent to the wages it paid its employees during 2000 and 2001. Because the priority date is April 30, 2001, information pertinent to 2000 is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. The information pertinent to 2000 will be disregarded.

If the petitioner intended the amount it paid in wages during 2001 to be considered an index of its ability to pay the proffered wage during that year, its reliance 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 income[2], the petitioner is obliged to show

---

[1] The petitioner might demonstrate this, for instance, not by alleging, but by submitting evidence sufficient to

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 ordinary income.

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 both CIS and 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 the Service 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 the INS, now 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.[3]

The priority date is April 30, 2001. The proffered wage is $24,000 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 119 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the

---

demonstrate that beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

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

[3] This office emphasizes, however, that because of the nature of net current assets, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. A petitioner's net income may not correctly be added to its net current assets in determining the petitioner's ability to pay the proffered wage.

remaining 246 days. The proffered wage multiplied by 246/365th equals $16,175.34, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared ordinary income of $12,514. That amount is insufficient to pay the salient portion of the proffered wage. The petitioner ended the year with net current assets of $9,794. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated that it was able 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 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.