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U.S. Department of Homeland Security

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Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 163 50055 Office: CALIFORNIA SERVICE CENTER Date: APR 22 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 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a horse training facility. It seeks to employ the beneficiary permanently in the United States as a horse trainer. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor 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.

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 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.

Eligibility in this matter hinges on the petitioner's 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 on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $15.72 per hour, which equals $32,697.60 per year.

With the petition counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on June 4, 2002, the California Service Center requested evidence pertinent to that ability.

Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center requested that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. The Service Center stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center asked for information pertinent to the petitioner's 2000 and 2001 fiscal years.

The Service Center also specifically requested copies of the petitioner's 2000 and 2001 tax returns, copies of the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for the previous three quarters, and a brief description of the duties of each employee.

In response, counsel submitted the petitioner's 2001 Form 1065 U.S. Return of Partnership Income and the 2000 and 2001 Form 1040 U.S. Personal Income Tax Returns of both of the petitioner's owners.

Counsel did not submit the petitioner's 2000 tax return as the Service Center had requested. This office notes, however, that the priority date is April 26, 2001 and the petitioner reports taxes based on the calendar year. Information on the petitioner's 2000 tax return, therefore, is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. The 2000 tax returns of the petitioner's owners are also not directly relevant.

The petitioner also declined to submit the petitioner's California Form DE-6, stating that the beneficiary is the petitioner's only employee and has no valid social security number.

The petitioner's 2001 tax return shows that the petitioner declared a loss of $141,640 as its ordinary income from trade or business activities during that year. The corresponding Schedule L shows that at the end of that year the petitioner had $1,811 in current assets and no current liabilities, which yields $1,811 in current assets. The Schedule K-1 shows that both of the petitioner's owners are general partners.

The 2001 tax return of one of the petitioner's owners shows that during that year he declared a loss of $115,540 as his adjusted gross income during that year. The 2001 tax return of the other partner shows that she declared a loss of $13,875 as her adjusted gross income during that year.

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 December 4, 2002, denied the petition.

On appeal, counsel stated that he would submit evidence that the petitioner's owners are obliged and able to pay the proffered wage.

This office acknowledges that, as general partners, the petitioner's owners are obliged to pay the petitioner's debts and obligations. The remaining issue is their ability to pay the proffered wage.

With the appeal, counsel submits one page of an investment account for December 2002. The statement indicates the value of various investments in that account but does not indicate the name of the owner. In his brief, counsel stated that the account belongs to one of the petitioner's owners. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The owner of the account statement is unidentified and the statement cannot be considered in the determination of the ability of the petitioner to pay the proffered wage.

Counsel also submits a FNMA Form 1004 Uniform Residential Appraisal Report (URAR) showing that a property at the petitioner's mailing address, owned by [redacted] had an estimated value of $175,000 on February 9, 2000. The appraisal was not accompanied by the FNMA Form 1004B, Statement of Limiting Conditions, which ordinarily accompanies any URAR. As such, the purpose for which the report was produced, any assumptions or contingencies, and who is permitted to rely on that report are unknown to CIS. Further, because no statement of the qualifications of the appraiser accompanies the report, this office is unable to assess the reliability of the value estimate. Further still, because counsel submitted no evidence that the property is unencumbered, this office is unable to determine the value of the owner's equity in the subject property. Yet further, although this office notes that one of the petitioner's owners is named [redacted] counsel submitted no evidence that the [redacted] who owns that property is the same person. The value estimate will not be considered for any purpose.

Finally, even if the value of the real estate, the property owner's identity, and the amount of the owner's equity were established, real estate is not ordinarily sufficiently liquid to be used to pay wages.

Counsel also submits a 2002 Form SSA-1099 indicating that the Social Security Administration paid benefits of $12,364.90 to one of the petitioner's partners during that year.

In his brief, counsel lists the income and assets of the petitioner's partners. Counsel makes no argument that the petitioner's owners' income and assets represent funds in addition to those shown on the their tax returns. Counsel does not explicitly argue that some figure other than the petitioner's owners' adjusted gross incomes should be used as an index of their ability to contribute toward paying the proffered wage. Counsel implies, though, that the depreciation deduction of one of the partners should be considered in the determination of the petitioner's ability to pay the proffered wage.

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. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). 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.

In determining the petitioner's ability to pay the proffered wage, CIS examines 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 in assessing a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. *See also Chi-Feng Chang v. Thornburgh*, Supra at 537; *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 INS, now CIS, had properly relied upon 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.

In the case of a partnership, however, general partners are obliged to pay the debts and obligations of the partnership out of their own income and assets, as was stated above. Therefore, the income and assets of the general partners are correctly included in the calculation of the funds available to pay the proffered wage. If the petitioning partnership itself is unable to demonstrate the ability to pay the proffered wage during a given year, the petition may still be approved if the general partners demonstrate the ability to pay that wage.

The priority date is April 26, 2001. The proffered wage is $32,697.60 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 petitioner on the priority date. On the priority date, 116 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 249 days. The proffered wage multiplied by 249/365 equals $22,305.62, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared a loss. The petitioner has not demonstrated the ability to contribute anything out of its income toward paying the proffered wage. The petitioner had net current assets of $1,811, an amount insufficient to pay the salient portion of the proffered wage.

Both of the petitioner's owners declared losses during 2001 also. The petitioner's owners have not demonstrated the ability to contribute toward payment of the proffered wage out of their incomes. Further, neither partner has submitted evidence of any other income or assets available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability 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.