

PHOTOCOPY

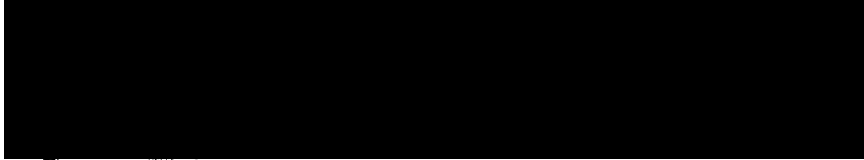
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

CONFIDENTIAL - Not to be released to
the public
Invasion of Personal Privacy

136



APR 24 2005

FILE: WAC 02 139 50412 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a recycling company. It seeks to employ the beneficiary permanently in the United States as a salvage laborer. 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. The AAO concurred with the director's decision on appeal.

On motion, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on February 14, 1997. The proffered salary as stated on the labor certification is \$9.40 per hour or \$19,552 per year.

On motion, the petitioner submits a letter from [REDACTED], a certified public accountant (CPA), and reiterates his position that he has established the ability to pay the proffered wage through the depreciation deduction. The petitioner states:

Petitioner requested the professional services of [REDACTED] a Certified Public Accountant, member of AICPA and CSCP for an opinion on this matter and conclude that the Service is in error not considering the Depreciation deduction of the Company as a cash flow for any operation.

In determining the petitioner's ability to pay the proffered wage, the CIS states that the court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. This is NOT Petitioner argument. Petitioners agree that net income is to be considered but affirms that depreciation Deduction is a net income under IRS and accountant practice as stated on the letter from [REDACTED] (CPA) attached as exhibit A.

Finally CIS states that there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." Petitioner's position is that "No precedent" is not a reason to deny a motion, it should be denied on its merits.

The petitioner's accountant states:

The business, [REDACTED] Industries, Inc. d/b/a [REDACTED] Company, has invested substantial capital into depreciable assets. The money to buy the assets is often from financing activities from outside investors/creditors or from related parties for either short term or long term periods. The financing of assets allows for advantages to the business in the way of a non-cash expense (depreciation) which in turn helps reduce cash needed to pay tax dollars that can be used for other ordinary and necessary expenses. Depreciation expense is a non-cash expense, and disguises the amount of cash that is available from operations when reviewing the income statement for the bottom line to see how much new cash has been accumulated by the company. The amount of depreciation expense could be considered as cash saved from operation of the business when considering the ability to pay for necessities from net profit.

* * *

The corporation has continued in existence for over a decade just while I have been the financial advisor and tax preparer for the corporation and its director(s). Simply analyzing a company's profit history and combining this information with a ratio of short term debt to current assets to determine the ability as to whether a person's wages can be afforded or whether an investment will be profitable is not sufficient evidence. Especially when a closely held business is involved, an analyst must consider all of the relevant facts to determine the going concern of a business, the ability to hire an employee(s), to make capital investments, etc. and/or to operate profitably and have the ability to manage additional expenses or investment outlays.

Of course, a company can not just continue to bring on new employees without risk and without the understanding of the need for each employee to contribute to the bottom line.

* * *

The business has continuously profited from investing in skilled labor to perform the work load required, from investing the funds from creditors into long lived assets that allow for beneficial tax deductions and cash flow advantages (such as depreciation), and from securing related party loans for unexpected events and emergency financing tasks from an ever present personal interest and strong personal financial position.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 1997 through 2000.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 1997 through 2000, were -\$16,783, -\$6,343, -\$14,381 and -\$25,846, respectively. The petitioner could not have paid the proffered wage in 1997 through 2000 from its net current assets.

The petitioner and CPA assert that depreciation is a non-cash expense and should be added back to the taxable income to establish the ability to pay the proffered wage. Depreciation 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. Similarly, the cost to replace long-term assets is not merely a "paper deduction" but an allocation of a real cost of doing business.

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. See *Chi-Feng Chang v. Thornburgh*, *supra* at 537 and *Elatos Restaurant Corp. v. Sava*, *supra*. 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 CPA speaks of the beneficiary's ability to contribute to the bottom line. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a salvage laborer will significantly increase profits for a recycling company. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Finally, the CPA mentions investing funds from creditors and obtaining related party loans for unexpected events and emergency financing. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

A petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that any unused funds from a line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, a line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The tax return for 1997 reflects a taxable income before net operating loss deduction and special deductions of \$7,908 and net current assets of -\$16,783. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 1997.

The tax return for 1998 reflects a taxable income before net operating loss deduction and special deductions of \$25,928 and net current assets of -\$6,343. The petitioner could have paid the proffered wage from its taxable income in 1998.

The tax return for 1999 reflects a taxable income before net operating loss deduction and special deductions of \$52,350 and net current assets of -\$14,381. The petitioner could have paid the proffered wage from its taxable income in 1999.

The tax return for 2000 reflects a taxable income before net operating loss deduction and special deductions of \$13,464 and net current assets of -\$25,846. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2000.

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of November 7, 2002 is affirmed. The petition is denied.