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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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Washington, DC 20536

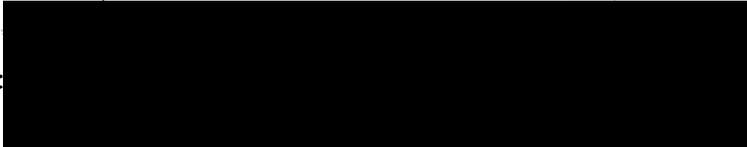


APR 05 2004

File:  Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:  
Beneficiary:



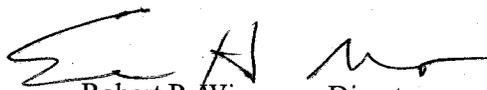
Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

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 July 23, 1999. The proffered wage as stated on the Form ETA 750 is \$755.60 per week, which equals \$39,291.20 per year. Part B of the Form ETA 750 states that the petitioner is living in Ecuador and has been unemployed since December of 1998.

The Form I-140 petition states that the petitioner in this case is Vespa Cibobuono/Marbea Corporation of New York, New York. With the petition counsel submitted a photocopied 1999 Form 1120 U.S. Corporation Income Tax Return of Vento Corporation of Great Neck, New York.

On April 3, 2002, the Vermont Service Center issued a Notice of Action in this case. The Service Center noted the discrepancy between the name and address on the petition and the name and address on the 1999 photocopied tax return. The Service Center also stated that portions of the photocopied tax return appeared to have been altered. The Service Center requested that the petitioner provide evidence showing that the petitioner and Vento Corporation are the same entity. The Service Center also requested that the petitioner provide certified copies of its 1998, 1999, and 2000 tax returns.

In response, counsel submitted a letter, dated June 25, 2002. In that letter, counsel stated that "the tax return submitted initially was incorrect." Counsel also submitted a letter, dated May 15, 2002, from an official of the petitioning company stating that Vento Corporation is not the same entity as the petitioner.

Counsel also submitted copies of the petitioner's 1998, 1999, and 2000 tax returns. Contrary to the instructions of the Service Center, those returns were not certified. Those returns show that the petitioner reports taxes based on a fiscal year which runs from June 1 of the nominal year to May 31 of the following year.

The 1998 return covers the fiscal year from June 1, 1998 through May 31, 1999. This office notes that, because the priority date in this matter is July 23, 1999, the information on the petitioner's fiscal year 1998 return is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

The 1999 return, covering the fiscal year from June 1, 1999 through May 31, 2000, states that the petitioner declared taxable income before net operating loss deduction and special deductions of \$20,336 during that year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of \$24,269 and current liabilities of \$7,637, which yields net current assets of \$16,632.

The 2000 return, covering the fiscal year from June 1, 2000 through May 31, 2001, states that the petitioner declared taxable income before net operating loss deduction and special deductions of \$21,666 during that year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of \$51,134 and no current liabilities, which yields net current assets of \$51,134.

Finally, counsel provided one page of each of the petitioner's monthly bank account statements from July 12, 1999 through June 11, 2001.

On February 14, 2003, the director issued a decision in this matter. The director noted that the dates on the tax returns submitted for the petitioner had been altered. 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 denied the petition.

On appeal, counsel stated that the tax return of Vento Corporation was initially provided based on an accountant's error. Counsel stated that the petitioner's owner also owns Vento Corporation, but that Vento Corporation has no other connection to the instant case.

Counsel further stated that the dates on the petitioner's tax returns were altered because the forms used had an incorrect date on them. Counsel stated that before the returns were submitted to IRS the accountant changed the year stated on the form to reflect the tax year for which it was submitted. In support of that assertion, counsel provided a letter, dated April 9, 2003, from the petitioner's accountant. The accountant confirmed that their company had altered the dates on the returns and confirmed the reason for that alteration. The accountant stated that his firm is using 1996 tax software which prints 1996 return blanks. The accountant stated that his firm changed the year printed on returns from "1996" to the correct year. This office finds the explanation asserted by counsel and confirmed by the accountant to be credible.

To corroborate the figures on the tax returns, counsel provided the first page of three IRS printouts. Those printouts are of information from the petitioner's fiscal year 1998, 1999, and 2000 tax returns. This office finds that those printouts confirm the data on the tax returns submitted. The remaining issue is whether the evidence submitted demonstrates the petitioner's continuing ability, beginning on the priority date, to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent and probative evidence of a petitioner's ability to pay a proffered wage.

In determining the petitioner's ability to pay the proffered wage, 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 the beneficiary an amount equal to or greater than the proffered wage during that period, CIS will next 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that INS, 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. *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.

The priority date is July 23, 1999. The proffered wage is \$39,291.20 per year. The petitioner's 1999 fiscal year ran from June 1, 1999 to May 31, 2000.

The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during its 1999 fiscal year, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 52 days of that 365-day fiscal year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 313 days of that fiscal year. The proffered wage multiplied by 313/365<sup>th</sup> equals \$33,693.55, which is the amount the petitioner must show the ability to pay during its fiscal year 1999.

During fiscal year 1999, the petitioner declared income of \$20,336. That amount is insufficient to pay the salient portion of the proffered wage. As was stated above, the petitioner did not demonstrate that it paid the beneficiary any wages. At the end of that fiscal year, the petitioner had net current assets of \$16,632. That amount is also insufficient to pay the salient portion of the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during that portion of its

fiscal year 1999 after the priority date.

During fiscal year 2000, the petitioner must demonstrate the ability to pay the entire proffered wage. During that fiscal year, the petitioner declared income of \$21,666. That amount is insufficient to pay the proffered wage. However, the petitioner ended the year with net current assets of \$51,134, an amount that exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during fiscal year 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the portion of its fiscal year 1999 after the priority date. 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.