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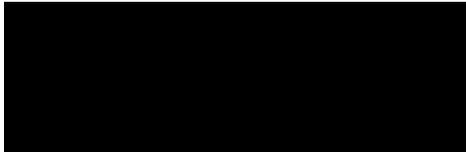
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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536



File: EAC 02 138 53045 Office: VERMONT SERVICE CENTER

Date: APR 13 2004

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

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 case will be remanded for further consideration and action.

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 and denied the petition accordingly.

On appeal, counsel submits a brief.

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, which is the date the Form ETA 750 Application for Alien Employment Certification, 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour, which equals \$26,145.60 per year.

With the petition, counsel submitted a letter, dated February 7, 2002, from an accountant. That letter states that during 1999

the petitioner had sales of \$619,268 and profit of \$30,095, and that during 2000 it had sales of \$640,786 and a profit of \$20,233. The letter further stated that 2001 was not yet completed, by which this office suspects he meant the calculations pertinent to sales and profit during that year were incomplete. The letter does not state whether the figures provided by the accountant were produced pursuant to an audit.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 29, 2002, requested additional evidence pertinent to that ability. The Service Center specifically requested complete copies of the petitioner's 2000 and 2001 federal income tax returns with all schedules and attachments.

The Service Center also requested that, if the petitioner employed the beneficiary during 2000 and 2001, it provide W-2 Wage and Tax Reports showing the amount it paid the beneficiary during those years.

Finally, the Service Center sent a questionnaire to the petitioner. The Service Center asked,

Will the prospective employee fill a newly created position? If your answer is no, how long has this position existed? What wage have you been paying the incumbent to [sic] this position? Identify the former employee, submit evidence of the salary paid to him or her, and document that the position was vacated. Submit copies of Form 941 for the period in question.

In response, counsel submitted a copy of four pages of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation, rather than the complete tax return as requested. Those pages of that return show that the petitioner declared ordinary income from trade or business of \$20,232 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

A cover letter from counsel, dated August 23, 2002, states that the petitioner had received an extension and had not yet filed its 2001 income tax return. Counsel provided no W-2 forms. Neither counsel nor the petitioner responded to the questionnaire.

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 November 14, 2002, denied the petition.

On appeal, counsel asserts that the petitioner's tax return does not reflect its cash position, and that its gross receipts are a more appropriate indicator of its ability to pay the proffered wage than its net income. Counsel further observes that the petitioner's 2000 tax return indicates that the petitioner paid \$85,782 in labor costs to subcontractors who worked in temporary positions. Counsel states that those funds would be used to pay the proffered wage if the petition is approved. Finally, counsel challenges the director's statement that the petitioner's current liabilities exceeded its current assets.

Counsel asserts that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was obliged to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner might have provided annual reports or audited financial statements, but chose not to.

Counsel asserts, but provides no evidence to support, that the petitioner's labor costs were available to pay the proffered wage. Counsel does not state what portion of those labor costs were paid to cooks, nor demonstrate what portion of the labor costs paid to cooks would be obviated by hiring the petitioner as a full-time cook. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence has been presented to demonstrate that any portion of the petitioner's labor costs could have been used to pay the proffered wage.

Counsel asserts that the petitioner's 2000 year-end current liabilities did not exceed its year-end current assets. End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. If a corporation's current liabilities exceed its current assets, its net current assets are negative, and, of course, it has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets.

The balance sheet on the petitioner's 2000 Schedule L shows that at the end of that year the petitioner had no cash on hand, no

receivables, \$2,780 in inventory, and no other current assets. The petitioner's total current assets were \$2,780. The petitioner had \$68,253 in accounts payable, \$2,671 in mortgages, notes, and bonds due within less than one year, and other current liabilities of \$7,064. The petitioner's 2000 total year-end current liabilities were \$77,988. The petitioner's 2000 year-end current liabilities exceeded its 2000 year-end current assets.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The only evidence pertinent to the petitioner's ability to pay the proffered wage is its 2000 tax return. During 2000, the petitioner declared ordinary income of \$20,232. The petitioner would have been unable to pay the proffered wage of \$26,145.60 per year out of that income. The priority date, however, is April 25, 2001. Financial data pertinent to 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner is not obliged to demonstrate the ability to pay the proffered wage during 2000.

In response to the May 29, 2002 request, counsel indicated that the petitioner's 2001 tax return was unavailable. Counsel stated that the petitioner had received an extension of time during which to file that return. The appeal in this matter was filed on December 13, 2002. The petitioner's 2001 income tax return was likely available then, but counsel did not provide it.

The basis for denying the petition, however, did not include the petitioner's failure to provide a copy of its 2001 return. This

office is disinclined to dismiss the appeal solely based upon grounds other than those upon which the director's denial was based. The appeal will not be dismissed based on the petitioner's failure to submit a requested tax return after the director failed to base his decision on that issue.

However, the record contains no competent evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. This office is unwilling to sustain an appeal when that important aspect has never been adequately addressed.

The matter will be remanded for further proceedings and action. The Service Center may reiterate its request for the petitioner's 2001 tax return, and may, in addition, request its 2002 return. The Service Center may reiterate its request that the petitioner respond to the questionnaire described above. The Service Center may reiterate its request that the petitioner provide a complete copy of its 2000 tax return. The Service Center may also request any other relevant evidence.

The petitioner may provide any additional evidence, including evidence to demonstrate the amount of any wages it may have paid to the beneficiary since the priority date. The Service Center shall subsequently issue a new decision in this matter.

ORDER: The petition is remanded for further consideration and action in accordance with the foregoing.