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Washington, DC 20536



**U.S. Citizenship
and Immigration
Services**



FILE: EAC 01 122 50693 Office: VERMONT SERVICE CENTER

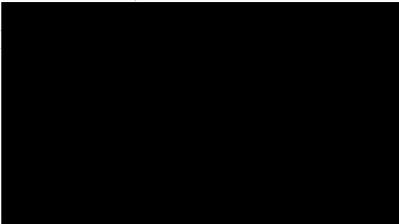
Date: APR 26 2004

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 foreign specialty cook. 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.

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 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. Here, the request for labor certification was accepted on March 9, 2000. The proffered salary as stated on the labor certification is \$19.00 per hour, which equals \$39,520 per year.

With the petition, counsel submitted a copy of the petitioner's 1998 Form 1120S, U.S. Income Tax Return for an S Corporation, for the calendar year. The tax return reflected an ordinary income of \$10,667 and net current assets of -\$5,967. This documentation was considered insufficient by the Service Center and on August 19, 2001, the Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of March 9, 2000. The Service Center requested that the additional evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also requested copies of the beneficiary's Form W-2, Wage and Tax Statement(s), if the petitioner employed the beneficiary in 2000.

In response, counsel submitted a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation and a letter from the president of the petitioning entity stating that the beneficiary "is currently

employed by our company. He earns a salary of \$720.00/week, which is paid in cash. Mr. [REDACTED] will be permanently employed by us as Cook, Italian Specialty. He will be employed under the terms and conditions of the Approved Labor Certification." Counsel also submitted a statement noting that:

...the position of "Cook, Italian Specialty," is not a new position at the Petitioner's business. In fact, the position has existed at least since the inception of the company in 1989. As the prior holders of this position were also paid on a cash basis, there are no payroll records or Form 941 for the periods in question. The prior holders of this position were paid competitive salaries, commensurate with their experience.

The petitioner's 2000 tax return shows that the petitioner declared \$3,008 as its ordinary income. The corresponding Schedule L indicates that at the end of that year the petitioner had current assets of \$6,249 and current liabilities of \$5,043, which yields net current assets of \$1,206.

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 February 1, 2002, denied the petition.

On appeal, counsel submits a letter from the petitioner's accountant, another copy of the letter from the petitioner's president indicating that the beneficiary was paid in cash, and another copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation.

The accountant's letter states that "based on a review of the accounts of Ogisu Corp. for the year 2000, I have determined that the corporation has the ability to pay the annual salary of \$39,520.00. Part of the assets on the 2000 tax return was \$46,414.00 as a security deposit. This was an asset of the corporation, which was held in cash."

Counsel contends that since the wage offered is \$39,520, the amount of the security deposit is sufficient to pay the wage.

Counsel is mistaken. There is no evidence in the record, which explains how this money could be freed up to be used in any way other than for a security deposit. Security deposits are considered to be long-term assets by AAO, and, as such, may not be considered when determining the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, 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 establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage. A mere statement by the petitioner's president or by counsel is insufficient to establish this fact. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 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." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 2000 tax return reflects an ordinary income of \$3,008 and net current assets of \$1,206. The petitioner could not pay the proffered wage of \$39,520 per year out of either the ordinary income or the net current assets.

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.

¹ A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.