



U.S. Citizenship
and Immigration
Services

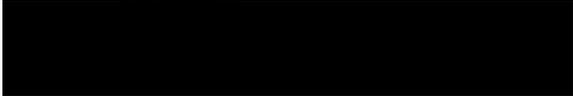
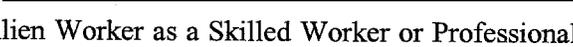
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FILE: WAC-03-027-52406 Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2004**

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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 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, California 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 chef/cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal counsel states that the beneficiary was previously employed by the petitioner and that a consideration of the petitioner's entire financial situation establishes its ability to pay the proffered wage during the relevant period.

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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date 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). The petition's priority date in this instance is October 11, 1995. The beneficiary's salary as stated on the labor certification is \$13.00 per hour or \$27,040.00 per year.

The petitioner filed a previous I-140 petition based on this same labor certification. That I-140 petition was denied by the director in a decision dated July 11, 2002, after the failure of the petitioner to submit requested financial documents to establish its ability to pay the proffered wage. The petitioner filed the instant petition on November 11, 2002, requesting that the labor certification submitted with the previous I-140 petition be merged into the record of the instant petition. The labor certification original is now in the record of proceedings in the instant petition.

In the instant petition, the evidence submitted initially and in response to a request for evidence issued by the director includes the following: a copy of the petitioner's California seller's permit dated July 1, 1999; a copy of a California alcoholic beverage license issued to one of the petitioner's owners, valid from March 1, 2002 to February 28, 2003; copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1997, 1998, 1999, 2000 and 2001; copies of the petitioner Form 100S California S corporation franchise or income tax returns for the years 1997 and 1998; copies of the petitioner's Form DE-6 quarterly wage and withholding reports for the first, second and fourth quarter of 2001 and the first quarter of 2002; a copy of an unaudited profit and loss statement of the petitioner for July 2001; a copy of an unaudited cash flow and

amortization statement for a loan to an unidentified party in September 2001; a copy of a Form 4506 Request for Copy or Transcript of Tax Form dated May 16, 2003 signed by an owner of the petitioner requesting copies from the Internal Revenue Service of the petitioner's Form 1120S tax returns for 1995 and 1996; a copy of a letter dated June 21, 2003 from a former employer of the beneficiary confirming the beneficiary's experience as a chef/cook from January 1987 to January 1989; copies of Form 1040A and Form 1040 U.S. individual income tax joint returns of the beneficiary and his wife for 1995 through 2000, with attached Form W-2 wage and tax statements; and copies of Form 540A and Form 540 California resident income tax returns of the beneficiary and his wife for 1995 through 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal counsel submits no additional evidence.

Counsel states on appeal that the beneficiary was previously employed by the petitioner and that a consideration of the petitioner's entire financial situation establishes its ability to pay the proffered wage during the relevant period. Counsel states that in 1999 and 2000 the beneficiary earned more than the proffered wage.

Since no additional evidence was submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted for the record prior to the director's decision.

Concerning the identity of the petitioner, the tax documents in the record show the petitioner's name as one of three names on the second line of the address block of the corporate tax returns for 1997 and 1998. The IRS tax number appearing on the I-140 petition is the same as the employer identification number appearing on the tax returns for 1997 and 1998. The corporate tax returns in the record for later years do not show any business names on the second line of the address block, but the employer identification number is the same on those later returns. Therefore it appears that the petitioner's name one of the business names of the corporation for which tax returns and other evidence was submitted for the record.

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 W-2 wage and tax statements of the beneficiary show that the beneficiary was employed by the petitioner from 1995 through 2000.

Counsel asserts that in 1999 and 2000 the petitioner paid the beneficiary at a level higher than the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertion of counsel regarding the compensation paid the beneficiary in 1999 are supported by evidence in the record, but counsel's assertion concerning the beneficiary's compensation in 2000 lacks support in the record.

The beneficiary's W-2 forms from the petitioner show compensation in the following amounts: \$20,523.75 for 1995; \$16,562.50 for 1996; \$10,321.36 for 1997; \$9,746.88 for 1998; \$30,612.00 for 1999; and \$8,862.00 for 2000. Only in the year 1999 was the compensation paid by the petitioner to the beneficiary greater than the proffered wage of \$27,040.00. For the other years, the amounts needed to raise the beneficiary's actual compensation to the proffered wage were \$6,516.25 for 1995; \$10,477.50 for 1996; \$16,718.64 for 1997;

\$17,293.12 for 1998; and \$18,178.00 for 2000. The information on the beneficiary's W-2 wage and tax statements therefore fails to establish the petitioner's ability to pay the proffered wage during the relevant period, except for 1999, when the beneficiary's compensation exceeded the proffered wage.

As another means of determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 the Immigration and Naturalization Service, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record indicates that the petitioner is an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner did not submit tax returns for the years 1995 and 1996, therefore the petitioner's ordinary income for those years does not appear in the record. For the other years in the relevant period, the petitioner's tax returns show the following amounts for ordinary income: -\$240,206.00 for 1997; -\$240,018.00 for 1998; \$16,348.00 for 1999; \$105,013.00 for 2000 and \$47,942.00 for 2001. For the years 1997 and 1998 the petitioner's ordinary income is negative, and those figures therefore fail to establish the petitioner's ability to pay the amounts which would have been needed to raise the beneficiary's compensation to the proffered wage in those years. The figure for the petitioner's ordinary income for 1999 is not needed for this analysis, since, as shown above, the petitioner paid the proffered wage to the beneficiary that year.

For the year 2000, the ordinary income of \$105,013.00 exceeds the amount of \$18,178.00 which would have been needed to raise the beneficiary's compensation to the proffered wage that year. For the year 2001 the evidence indicates that the beneficiary was no longer employed by the petitioner, but the petitioner's ordinary income of \$47,942.00 for 2001 is greater than the proffered wage of \$27,040.00. The petitioner's figures for ordinary income therefore establish its ability to pay the proffered wage in the years 2000 and 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Since the petitioner did not submit tax returns for the years 1995 and 1996, the petitioner's net current assets for years cannot be calculated. Calculations based on the Schedule L's attached to the petitioner's tax returns

submitted for the record yield the following amounts for net current assets: -\$228,535.00 for the beginning of 1997; -\$235,424.00 for the end of 1997; -\$250,306.00 for the end of 1998; -\$184,667.00 for the end of 1999; \$37.00 for the end of 2000; and -\$71,241.00 for the end of 2001. The figures for 1997 and 1998 are negative, therefore those net current assets figures fail to establish the petitioner's ability to pay the proffered wage in those years. For 1999, 2000 and 2001 the petitioner's ability to pay the proffered wage is established by either the beneficiary's W-2 forms or by the petitioner's ordinary income figures, as shown above. Therefore the net current assets figures for 1999, 2000 and 2001 are not needed for this analysis.

Counsel submitted a copy of a Form 4506 Request for Copy or Transcript of Tax Form dated May 16, 2003 signed by an owner of the petitioner requesting copies from the Internal Revenue Service of the petitioner's Form 1120S tax returns for 1995 and 1996. The fact that the petitioner has requested copies of its tax returns for those years does not relieve the petitioner of its burden of proof to provide evidence on its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. No financial information at all was submitted for 1995, which is the year of the priority date, nor for 1996.

For the foregoing reasons, the petitioner's tax information fails to establish the petitioner's ability to pay the proffered wage in 1995, 1996, 1997, and 1998.

The record contains copies of four of the petitioner's Form DE-6 quarterly wage and withholding reports. The totals of wages paid by the petitioner as shown on those reports are \$67,766.78 for the first quarter of 2001; \$58,400.77 for the second quarter of 2001; and \$55,427.49 for the fourth quarter of 2001; and \$57,002.49 for the first quarter of 2002. Although those figures show that the petitioner was paying significant amounts in compensation to its employees during those quarters, that evidence is merely cumulative for the year 2001, since, as shown above, the petitioner's ordinary income for 2001 is sufficient to establish its ability to pay the proffered wage that year. The petitioner's tax information for the year 2002 was apparently not yet available at the time the record closed before the director. The quarterly report for the first quarter of 2002 shows wage payments at level consistent with those in 2001, and is therefore evidence that the petitioner's financial situation remained substantially the same in 2002.

The record also contains an unaudited profit and loss statement of the petitioner for July 2001 and a copy of an unaudited cash flow and amortization statement for a loan to an unidentified party in September 2001. Because the tax evidence sufficiently establishes the petitioner's ability to pay the proffered wage in 2001, those two financial statements are not needed for this analysis. But, in any event, unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

In his decision, the director correctly stated the net income figures from the petitioner's tax returns and correctly calculated the net current assets based on those returns. The director also correctly stated the amounts of the beneficiary's compensation received from the petitioner as shown on the beneficiary's W-2 wage and tax statements. The director's order of analysis lacked some clarity, since the amount of the beneficiary's actual compensation from the petitioner should have been analyzed before considering the petitioner's net income and net current assets. Nonetheless, the finding of the director that the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence was correct, and the director therefore correctly denied the petition.

On appeal, counsel submits no additional evidence. For the reasons discussed above, the assertions of counsel in his brief on appeal fail to overcome the decision of the director.

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.