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



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

MAY 17 2004

IN RE:

Petitioner:

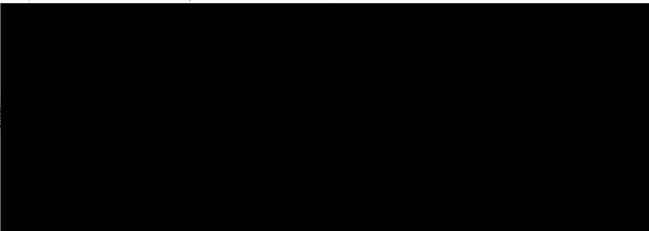


Beneficiary:

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 specialty chef, Mexican cuisine. 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 petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning at the priority date and continuing until the beneficiary obtains permanent residence. On appeal the petitioner, through counsel, submits 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 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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

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. The petition's priority date in this instance is March 26, 2001. The beneficiary's salary as stated on the labor certification is \$10.00 per hour or \$20,800.00 per year.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 27, 2002, the director requested evidence 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.

In response to the RFE the petitioner submitted the following: copies of the petitioner's Form 941 employer's quarterly federal tax returns for the quarters ending March 31, 2002, June 30, 2002 and September 30, 2002; a copy of the petitioner's Form 1120 U.S. corporation income tax return for 2001; and a copy of the petitioner's California Form 100 franchise or income tax return for 2001.

In his decision, the director found that the petitioner had submitted six Form I-140 petitions for different beneficiaries and found that the evidence failed to establish the ability of the petitioner to pay the proffered wage to the beneficiary in the instant case while also paying the proffered wages to the beneficiaries of the

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

On appeal, counsel submits additional evidence. Some of this evidence consists of additional copies of certain of the petitioner's federal and state tax returns which had been previously submitted for the record. The documents submitted for the first time on appeal are the following: a copy of the petitioner's Form 941 employer's quarterly federal tax return for the quarter ending December 31, 2002; copies of the petitioner's Form 1120 U.S. corporation income tax returns for 1999 and 2000; and a copy of the petitioner's California Form 100 franchise or income tax return for 2000.

On the Form I-290B notice of appeal counsel left blank the box for item number 3, where the reasons for the appeal should be stated. Nonetheless, the attached evidence consisting of tax documents of the petitioner indicates that the petitioner is asserting on appeal that it has the ability to pay the proffered wage.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS first examines 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, however, the petitioner did not establish that it had previously employed the beneficiary.

As another 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 *Elatos Restaurant Corp., supra*, at 1054.

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 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 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.

In the record in the instant petition, the petitioner's Form 1120 U.S. corporation tax return for 2001 shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$98,285. That amount is greater than the proffered wage of \$20,800. In addition, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2001 yield figures for net current assets of \$185,945 for the beginning of 2001 and \$233,437 for the end of 2001. Those amounts are also greater than the proffered wage of \$20,800. Therefore, if the instant petition were the only I-140 submitted by the petitioner the evidence would establish the petitioner's ability to pay the proffered wage, based both on the petitioner's net income for 2001 as well as on the petitioner's net current assets at the beginning and at the end of 2001.

CIS records, however, show that the petitioner has filed nine other I-140 petitions since June 1999. Three of those were filed in the name of the petitioner, but without the concluding abbreviation, "Inc." The six considered by the director were filed in the full name of the petitioner, including the abbreviation, "Inc." Two of the other petitions have been approved and seven remain pending.

In his decision the director cited figures on the proffered wages for other beneficiaries, information apparently obtained from the files in other petitions submitted by the petitioner. In considering those petitions, the director failed to specify the years in which those petitions had been filed or approved. Although it is reasonable for the director to consider all petitions filed by a single petitioner when evaluating the petitioner's ability to pay the proffered wage to any particular beneficiary, any such consideration must also take into account the dates such petitions were filed and, for those which were approved, the dates of such approvals. A simple adding of the proffered wages in all pending and approved petitions is an incomplete analysis, since the cost to the petitioner of paying multiple beneficiaries will vary, depending on the number of petitions which are pending each year.

The responsibility for compiling and presenting sufficient evidence, however, lies not with the director but with the petitioner. In the instant petition, the petitioner has submitted no evidence which addresses the issue of its ability to pay the proffered wages to multiple beneficiaries.

In his decision, the director relied only on the taxable income information shown on the petitioner's Form 1120 U.S. corporation income tax returns. The director failed to analyze the net current assets of the petitioner in each of the relevant years. Nonetheless, although the above analysis shows that the net current assets of the petitioner at the beginning and at the end of the year 2001 would have been sufficient to pay the proffered wage to the single beneficiary in the instant petition, the failure of the petitioner to submit evidence in the instant petition pertaining to its ability to concurrently pay the proffered wages to multiple beneficiaries prevents any analysis of this issue based on either the petitioner's net income or its net current assets.

The petitioner must show that it had sufficient net income or net current assets to pay all the wages as of the priority date of each petition and continuing until each beneficiary obtains permanent residence. The evidence submitted prior to the decision of the director failed to establish those facts.

For the above reasons, therefore, although the analysis of the director was incomplete, the director was correct in concluding that the evidence failed to establish the ability of the petitioner to pay the proffered wage to the beneficiary while also paying the proffered wages to the beneficiaries of other petitions submitted by the petitioner.

On appeal the petitioner submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The evidence submitted for the first time on appeal does not overcome the decision of the director. The evidence consists of additional tax returns for years prior to the year of the priority date, plus a more recent quarterly federal tax return. The evidence newly submitted on appeal fails to address the issue of the petitioner's ability to pay the proffered wages to multiple beneficiaries. For example, the record remains absent evidence of the proffered wage for all the I-140's and evidence of what wages were paid to the beneficiaries of those petitions in 2001.

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.