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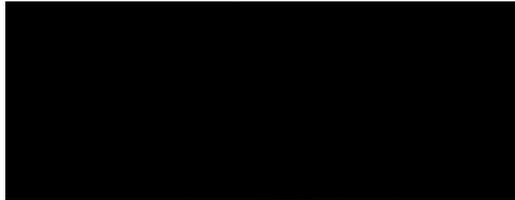
U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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*Be*



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 26 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

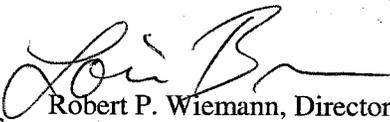
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

*for*   
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 sustained. The petition will be approved.

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

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. The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence on that issue consisted of an unsigned copy of the petitioner's Form 1120S U.S. income tax return for an S corporation for 2000 and an unsigned copy of the petitioners Form 100S California S corporation franchise or income tax return for 2000. The director determined that the evidence was insufficient to establish the petitioner's ability to pay the proffered wage, and issued a request for evidence (RFE) dated February 27, 2002. The RFE specifically requested evidence for 1998 and 1999.

Counsel responded to the RFE with a letter dated May 13, 2002 accompanied by additional evidence consisting of unsigned copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1998, 1999, and 2001. The copy of the 2001 tax return was largely illegible. Counsel's letter stated that wage reports were also being submitted, but in fact no wage reports were among the documents submitted.

The director issued a notice of intent to deny (ITD) dated July 3, 2002 finding that the evidence failed to establish the petitioner's ability to pay the proffered wage. The ITD also requested additional evidence on that issue, and specifically requested a clear and legible copy of the petitioner's 2001 tax return; quarterly wage reports for the last two quarters of 2001 and the first quarter of 2002; and documentation that that the corporation identified as the taxpayer in the previously-submitted evidence is doing business under the name of the petitioner.

Counsel responded to the ITD with a letter dated July 23, 2002 accompanied by a legible copy of the petitioner's Form 1120S U.S. income tax return for an S corporation for the year 2001 and copies of the petitioner's quarterly wage reports for the last two quarters of 2001 and the first quarter of 2002.

The director determined that the evidence was still insufficient to establish the petitioner's ability to pay the proffered wage, and issued a second notice of intent to deny (ITD) dated August 21, 2002. The director requested signed copies of the petitioner's tax returns for 1998, 1999, 2000 and 2001 and bank statements of the petitioner for the most recent six months.

The petitioner responded to the second ITD with a letter dated September 20, 2002 from an apparent Hispanic services organization accompanied by additional evidence consisting of the bank statements of the petitioner from the Bank of America for the months of February 2002 through August 2002; and signed copies of the petitioner's Form 1120S tax returns for the years 1998, 1999, 1999, 2000 and 2001.

In a decision dated February 13, 2003, the director 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.

An I-290B Notice of Appeal was filed on March 13, 2003 by an attorney who stated that he represented the petitioner. At the time of the filing of the notice of appeal no Form G-28 notice of entry of appearance as attorney or representative was in the file. After an initial review of the case in April 2004, the AAO contacted the attorney who had submitted the notice of appeal and requested a Form G-28. On May 5, 2004 a properly executed Form-G28 was received by the AAO, signed by counsel and by the individual who had signed the Form I-140 petition on behalf of the petitioner.

On the Form I-290B notice of appeal counsel had checked the block indicating that a brief and/or evidence would be submitted to the AAO within thirty days and in a letter attached to the notice of appeal counsel stated that the petitioner's accountant was gathering the proper documentation and that tax documentation would follow. Nonetheless, to date no additional documentation is in the file. The AAO will therefore evaluate the decision of the director based on the evidence submitted for the record prior to the director's decision.

As of the February 13, 2003 date of the director's decision, the petitioner's tax returns for the year 2002 were not yet due, therefore the return for the year 2001 was the most recent one available. Therefore the relevant period for analysis of the petitioner's tax returns is from 1998, which was the year of the priority date, through 2001.

The tax returns submitted for the record were for a corporation for which the employer identification number is the same as the number listed on the I-140 as the petitioner's IRS tax number. In addition, the bank statements in the record have the name of the corporation on the first line of the address block and the name of the petitioner on the second line. The foregoing evidence is found sufficient to establish that the petitioner's name is the business name of the corporation for which tax returns and other documentation were submitted for the record.

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 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

For the net income figure of an S corporation the AAO looks to the figure for ordinary income, shown on line 21 of the Form 1120S U.S. tax return for an S corporation. The petitioner's tax returns show the following amounts for ordinary income on line 21 on the respective returns: \$14,971 for 1998; \$13,480 for 1999; \$6,339 for 2000; and -\$1,508 for 2001. Since each of those figures is less than the proffered wage of \$24,024 per year, they fail to establish the ability of the petitioner to pay the proffered wage during the relevant period.

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 instant case, calculations based on the current assets and current liabilities shown on the Schedule L's attached to the petitioner's Form 1120S tax returns yield the following amounts for net current assets: \$30,588 for the beginning of 1998; \$43,155 for the end of 1998; \$36,504 for the end of 1999; \$36,173 for the end of 2000; and \$35,136 for the end of 2001. Each of those amounts is greater than the proffered wage of \$24,024 per year. The figures on net current assets are therefore sufficient to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence.

In his decision the director correctly cited the figures for ordinary income for each of the relevant years, but the director failed to calculate the net current assets for each year. Rather, the director looked only to the petitioner's "cash assets" for each year. The director found that the "cash assets" of the petitioner were \$26,781 for 1998; \$21,282 for 1999; \$36,173 for 2000; and \$35,136 for 2001. Those figures, however, do not correspond to the figures shown for cash on the petitioner's Schedule L's for each of those years or the net current assets in 1998 and 1999.

The director did not state the specific figures on which he based his denial. The only year for which "cash assets" were less than the proffered wage, according to the director's figures, was 1999. Presumably that is the reason the director found that the petitioner had failed to establish its ability to pay the proffered wage as of the priority

date and continuing until the petitioner obtains permanent residence. Nonetheless, the proper figures to consider, the petitioner's net current assets, taking into account the amounts shown as current assets on lines 1 through 6 of the Schedule L's and the amounts shown as current liabilities on lines 16 through 18 of the Schedule L's were greater than the proffered wage in 1999.

The director erred in failing to accurately calculate the petitioner's net current assets in 1998 and 1999, and erred in concluding that the evidence fails to establish the ability of the petitioner to pay the proffered wage during those years. As shown above, the net current assets of the petitioner were greater than the proffered wage as of the beginning of 1998 and continuing for each year through the end of 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 met that burden.

ORDER:       The appeal is sustained. The petition is approved.