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



U.S. Citizenship
and Immigration
Services



FILE:



Office: TEXAS SERVICE CENTER

Date:

NOV 26 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:

N/A

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**
PUBLIC COPY

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

CC:

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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 and denied the petition accordingly.

On appeal, the petitioner submits a statement and a request for oral argument.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. In fact, the petitioner set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 13, 2001. The proffered wage as stated on the Form ETA 750 is \$10.08 per hour, which amounts to \$20,966.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on July 1, 1997, to have a gross annual income of \$102,632, and to currently employ five workers. In support of the petition, the petitioner submitted the first page of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 10, 2003, the director requested additional

evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested copies of Forms W-2 issued to each employee in 2001 and 2002; copies of quarterly tax reports; copies of the petitioner's bank statements from April 2001 to the present; and any other supporting documentation illustrating the petitioner's continuing ability to pay the proffered wage.

In response, the petitioner submitted Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2002. The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$7,516	\$10,916
Current Assets	\$n/a	\$13,147
Current Liabilities	\$n/a	\$2,460
Net current assets	\$n/a	\$10,687

In addition, counsel submitted copies of the petitioner's checking account statements for the period from April 2001 through December 2002 and the petitioner's quarterly wage reports for four quarters in 2002, and Forms W-2, Wage and Tax Statements the petitioner issued to its employees in 2002. The quarterly wage reports and Forms W-2 do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. The petitioner also submitted copies of an unaudited income statement for the period ending on December 31, 2002.

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 April 23, 2003, denied the petition. The director noted that the petitioner would double its current wage expenses by paying the proffered wage and its checking account balances were too low to meaningfully supplement its ability to pay the proffered wage.

On appeal, the petitioner's owner, [REDACTED], states that he wants to expand his business and needs the beneficiary to do so. He states that he has enough "fixed assets" which he would use to expand his business. He admits in an attached letter that his taxes and bank account statements do not show his ability to pay the proffered wage, and states the following:

My financial condition is sound enough to expand my business. Right now my business is only open for breakfast and lunch. But I am planning to stay open for dinner and also go in for catering for Indian and American parties. That is only possible if I have another specialty cook besides me to help.

Mr. Dua also states he is "sure and more than confident that if I have the skilled help, my business has a vast scope to expand all over the United States."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The petitioner's net income in 2001 is \$7,516, which cannot cover the proffered wage of \$20,966.40. The petitioner's net income in 2002 is \$10,916, which cannot cover the proffered wage of \$20,966.40. Thus, the petitioner has not established its ability to pay the proffered wage out of its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, the petitioner's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner failed to provide information concerning its net current assets in 2001. As such, it has not demonstrated its ability to pay the proffered wage of \$20,966.40 out of its net current assets in 2001. The petitioner's net

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

current assets during 2002 were only \$10,687. As such, the petitioner could not pay the proffered wage of \$20,966.40 out of its net current assets in 2002.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of only \$7,516 and no evidence of net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a net income of only \$10,916 and net current assets of only \$10,687 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Additionally, no detail or documentation has been provided to explain how the beneficiary's employment as a cook will significantly increase profits for the petitioner's restaurant. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). No business plan or evidence of projected earnings is in the record of proceeding aside from the petitioner's speculative assertion that adding one cook to his business will enable it to expand to dinnertime and eventually the entire United States. The petitioner's speculative hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Additionally, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner cannot establish that it had the ability to pay the proffered wage at the time of filing the petition, so even if it proves a future ability based on business expansion and the beneficiary's contributions as an employee, it still cannot overcome its deficiency at the time of filing.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.