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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B6

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: SEP 09 2004

IN RE:

Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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 provides assisted living for the elderly. 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, counsel submits additional evidence and asserts that the petitioner has established its continuing financial ability to pay the proffered salary.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 February 23, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

Within the preference visa petition, the petitioner claims to have been established in 1998, to have a gross annual income of approximately \$245,000, and to currently employ two workers.

In support of the petitioner's ability to pay the beneficiary's proposed annual wage offer of \$24,960, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1999, 2000 and 2001. They contain the following information:

	1999	2000	2001
Net income	\$ 592	\$ 304	\$ 2,236
Current Assets	\$3,154	\$4,773	\$ 6,133
Current Liabilities	\$ -0-	\$8,973	\$10,633
Net current assets	\$3,154	\$4,200	\$ 4,500

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 February 13, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its state quarterly wage report for the last eight quarters filed and a copy of its 2002 federal tax return.

In response, the petitioner, through counsel, provided a copy of its 2002 corporate tax return. It shows that the petitioner declared \$1,577 as net income in 2002. Schedule L of the tax return shows that the petitioner had \$4,683 in current assets and \$10,633 in current liabilities, resulting in \$5,950 in net current assets. Besides net income, Citizenship and Immigration Services (CIS) will consider a petitioner's net current assets as an alternative method of demonstrating a petitioner's ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and current liabilities are shown on Schedule L. 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.

In addition, counsel provided copies of the petitioner's state quarterly wage reports for the quarter ending March 31, 2001 through the quarter ending December 31, 2002. They show that the petitioner employed two workers during this period.

The director reviewed the petitioner's net income as shown on its 2001 and 2002 corporate tax returns and determined that the figures did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date of February 23, 2001. The director denied the petition on March 31, 2004.

On appeal, counsel submits a copy of the petitioner's 2003 corporate tax return. It shows that the petitioner declared a net income of \$27,716. Schedule L indicates that the petitioner had \$9,591 in current assets, reflected as the end-of-year cash balance, and declared no current liabilities, resulting in \$9,591 in net current assets. Counsel also submitted page one of a two page internet print-out, dated May 27, 2004, showing the petitioner's business checking account balance at Wells Fargo Bank to be approximately \$216,000 on this date, with an average balance of approximately \$5,800 for the last twelve months. Counsel asserts that not only the petitioner's taxable income, but also this cash resource should be taken into account when determining the petitioner's ability to pay the proffered wage. Counsel states that when the petitioner's total assets of \$10,633 are added to its taxable income as shown on its 2001 tax return, plus the cash shown on the 2004 bank statement, the total represents a sufficient amount to cover the beneficiary's proposed wage offer of \$24,960. Counsel cites a 2001 AAO case in support of his assertion.

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

First, the case counsel cited is not presently before the AAO and is not a binding precedent decision. The regulation at 8 C.F.R. § 103.37 describes the process whereby certain decisions are designated as binding precedents on all officers and employees of the Department of Homeland Security. There is no record that the case counsel cites has been designated as a binding precedent.

Second, counsel's reliance on the balance in the petitioner's bank account on a given date in 2004 is misplaced. It is noted that 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. Bank statements show the amount in an account on a given date and do not reflect a complete accounting of a petitioner's other encumbrances. Maintaining that a petitioner had a large amount on a given date in a particular bank account does not demonstrate a sustainable ability to pay a proffered wage, where, as in this case, the petitioner may have had a substantial amount on a particular date in May 2004, but does not explain its relatively modest average balances for the previous twelve months.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 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. There is no evidence in this case that the petitioner has employed the beneficiary.

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 AAO rejects counsel's argument that the petitioner's total assets of \$10,633, as shown on its 2001 tax return, should have been considered either standing alone, or in addition to its taxable income, in the determination of its 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, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, although counsel submits a tax return on appeal, which shows that the petitioner's net income was sufficient to cover the proffered wage in 2003, as noted by the director, the petitioner's net income in 2001 and

2002 was \$2,236 and \$1,577, respectively. Both amounts were well short of the proffered wage of \$24,960. Moreover, the petitioner's 2001 net current assets of \$4,500 and 2002 net current assets of \$5,950, were each insufficient to pay the beneficiary's proffered wage of \$24,960.

Counsel asserts that the petitioner's gross income has increased from 2001 through 2003 and would further insure the petitioner's ability to pay the proffered wage. As noted above, CIS looks at net income, rather than gross income. The petitioner's declared net income has been extremely modest in two out of the three relevant years and decreased 30% in 2002 from that reported in 2001. Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner must demonstrate a continuing ability to pay the proffered salary beginning at the visa priority date. In this case, the petitioner's evidence fails to establish its ability to pay the beneficiary's proposed wage offer in both 2001 and 2002.

Upon review of the financial information contained in the record, 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.