



U.S. Citizenship
and Immigration
Services

BL



FILE: EAC-02-143-50058 Office: VERMONT SERVICE CENTER Date: SEP 29 2004

IN RE: Petitioner: [Redacted]
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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 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 a statement and 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 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 October 5, 1998. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 1998.

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 June 11, 2002, 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 requested the petitioner's 2000 and 2001 federal tax returns and any evidence of wage payments already made to the beneficiary. The director also specifically requested the petitioner to provide the following information, to which the petitioner typed the following responses directly onto the request:

- | | |
|-------------------------------|----------------|
| 1.) Nature of business | Delicatessen |
| 2.) Gross annual income | [\$]483,538.00 |
| 3.) Net annual income | [\$]10,189.00 |
| 4.) Date business established | 1987 |
| 5.) Number of employees | 13 |

In response, the petitioner submitted its Form 1120 Corporate tax returns for the year 2001.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>1998</u>
Net income ¹	-\$10,189	-\$16,152
Current Assets	\$52,111	\$82,935
Current Liabilities	\$64,639	\$8,331
Net current assets	-\$12,528	\$74,604

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 February 27, 2003, denied the petition.

On appeal, the petitioner asserts that he will be replacing two employees with the beneficiary. The petitioner submits a letter from a certified public accountant (CPA), and copies of Forms W-2, Wage and Tax Statements, for the two employees the petitioner states will terminate their positions as part-time cooks and will be replaced by the beneficiary.

The petitioner states in a letter accompanying the appeal that the two part-time cooks [REDACTED] made \$5,473.52 and \$11,836.24, during the year 2001, respectively. He states that both employees will be replaced by the beneficiary. In addition, the CPA states in a letter accompanying the appeal that the two 50% owners of the petitioner will reduce their salary payments by \$20,000 and \$10,000 for the year 2003. Combining the two owners' pay reductions and termination of two part-time employees, the CPA states that the petitioner's "[t]otal compensation reductions expected in year 2003 will therefore be \$47,635." Additionally, the CPA explained that the petitioner's 2001 tax return's loss does not include a "depreciation charge-off of \$14,055," which should be added back "[w]hen attempting to determine if an entity can afford new expenses."

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 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 1998, 1999, 2000, or 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 expenses². 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

¹ Taxable income before net operating loss deduction and special deductions on Line 28.

² Thus, the CPA's implied request to add back depreciation will not be accepted.

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 reported net income in 1998 and 2001 was negative. Thus, it could not pay the proffered wage out of its net income in either year. No information was provided concerning 1999 or 2000.

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. 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.³ 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's net current assets in 1998 were \$74,604, which is greater than the proffered wage. The petitioner's net current assets during the year 2001, however, were negative. Thus, the petitioner has demonstrated its ability to pay the proffered wage out of its net current assets in 1998, but has failed to demonstrate its ability to pay the proffered wage out of its net current assets in 2001. No information was provided concerning 1999 or 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998 through 2001. In 1998, the petitioner shows a negative net income, but net current assets of \$74,604, which is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 1998.

In 1999 and 2000, the petitioner has not presented any evidence of its ability to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999 and 2000.

In 2001, the petitioner shows a negative net income and negative net current assets 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. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

³ 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.

The petitioner has established that it could utilize the wages of two terminated employees from 2002 onwards, which is a total of \$17,309.76. That amount does not cover the entire proffered wage of \$39,291.20, so the petitioner would have to show the availability of additional funds. However, the petitioner may not use the assets of its owners. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Thus, the CPA's assertion that the two owners of the petitioner would reduce their compensation prospectively will not be considered in determining the petitioner's ability to pay.

Regardless of the petitioner's prospective ability to pay the proffered wage, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 through 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.⁴

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.

⁴ The director also erred by failing to seek the petitioner's 1999 tax return; however, such error is negligible since the petitioner failed to provide its 2000 tax return in response to the director's request and because the burden of proof and production of evidence ultimately rests with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.