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U.S. Citizenship
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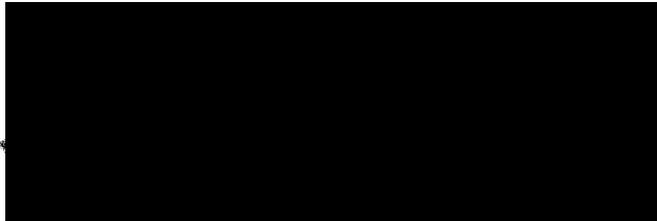


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **APR 13 2005**
EAC-02-146-54242

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:



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, 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 brief 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 April 23, 1997. The proffered wage as stated on the Form ETA 750 is \$422.80 per week, which amounts to \$21,985.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner but did indicate that he performs various cooking jobs in a self-employed capacity since 1994.

On the petition, the petitioner claimed to have been established on April 19, 1993. In support of the petition, the petitioner submitted its 1997 and 2000 U.S. Income Tax Return for an S Corporation.

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 22, 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 specifically requested evidence from 1997 to the present, but also gave alternative evidentiary requests specific to 1997 alone, such as evidence of wages paid to the beneficiary in that year.

In response, the petitioner submitted its Form 1120 Corporate tax return for the year 2001. An accompanying letter from counsel stated that the beneficiary is not working for the petitioner.

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

	<u>1997</u>	<u>2000</u>	<u>2001</u> ¹
Net income ²	-\$6,481	\$22,942	\$52,397
Current Assets	\$689	\$8,090	\$52,707
Current Liabilities	\$586	\$2,118	\$12,281
Net current liabilities	\$103	\$5,972	\$40,426

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 June 19, 2003, denied the petition, noting the loss reported by the petitioner in 1997.

On appeal, counsel concedes that the petitioner's business was "too slow" in 1997, but "profit has been increasing," and states that the beneficiary has been employed at the proffered wage since January 2003. The petitioner submits copies of paystubs issued to the beneficiary but failing to identify the issuing entity. The petitioner also resubmits a copy of its 2001 tax return with the same figures at those cited above.

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 any relevant year. The paystubs submitted on appeal do not identify the entity issuing paystubs to the beneficiary and thus fail to be competent and probative evidence of wage payments made from the petitioner to the beneficiary. It is also noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertions alone that the beneficiary was paid by the petitioner are insufficient absent corroborating evidence, which in this case, is insufficient.

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

¹ A second corporate return was filed stating net income of \$56,689 and \$11,954 in net current assets. Neither return is signed; both are prepared by different entities and have different dates. No explanation was provided for this but counsel's accompanying letter cited the figures on the first tax return, which will be the figures relied upon in this decision since they were by counsel.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

court specifically rejected the argument that the Service should have considered income before expenses were paid rather than 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. 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.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 failed to provide evidence concerning its continuing ability to pay the proffered wage in 1998 or 1999 despite the director's notice in his request for evidence that the petitioner must provide evidence from "1997, the date of filing and continuing to the present." The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although requested by the director⁴, the petitioner declined to provide copies of its tax returns for two relevant years that would establish its *continuing* ability to pay the proffered wage. The tax returns would have demonstrated the amount of taxable income and net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner has not demonstrated that it paid any wages to the beneficiary during any relevant year. In 1997, the petitioner shows a loss and net current assets of only \$103 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 the salient portion of 1997.

As stated above, the petitioner failed to provide evidence of its continuing ability to pay the proffered wage in 1998 or 1999. Thus, the AAO cannot examine the petitioner's net income or net current assets in either year.

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

⁴ Although the director focused on 1997 at the end of his request, he did give the petitioner notice of the regulatory and evidentiary requirements. Regardless of the director's discretionary request for evidence, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

The petitioner's net incomes in 2000 and 2001 are greater than the proffered wage. The petitioner's net current assets are also greater than the proffered wage in 2001. Thus, the petitioner has established its ability to pay the proffered wage in those years. However, if the petitioner pursues any additional proceedings in this matter, it must address and explain the two tax returns contained in the record of proceeding for 2001 that contain different numbers and provide a certified copy of the corporate tax return actually filed with the IRS.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, or 1999. 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.