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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



B6

FILE: WAC-03-010-52159 Office: CALIFORNIA SERVICE CENTER Date: APR 13 2005

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

**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 is a Japanese 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 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 September 19, 1997. The proffered wage as stated on the Form ETA 750 is \$30,306 per year. 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 in 1997, to have a gross annual income of \$732,000, and to currently employ 14 workers. In support of the petition, the petitioner submitted its 2000 corporate tax return and evidence it sought an extension to file its 2001 corporate tax return.

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 April 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 sought the petitioner's corporate tax returns from 1997 to the present.

In response, the petitioner submitted its Form 1120 corporate tax returns for the years 1997, 1998, 1999, 2000, and 2001, with evidence that it sought an extension to file its 2002 corporate tax return.

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

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Net income <sup>1</sup>	-\$57,685	-\$28,360	-\$46,058
Current Assets	\$90,601	\$105,186	\$130,278
Current Liabilities	\$70,968	\$85,360	\$156,310
Net current assets	\$19,633	\$19,826	-\$26,032
	<u>2000</u>	<u>2001</u>	
Net income <sup>2</sup>	\$65,314	-\$46,409	
Current Assets	\$141,586	\$151,307	
Current Liabilities	\$148,144	\$221,449	
Net current assets	-\$6,558	-\$70,142	

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 18, 2003, the director again 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 sought the petitioner's corporate tax returns from 1997 to the present with signatures, as well as the petitioner's 2002 tax return.

In response, the petitioner provided signed and dated tax returns and counsel's accompanying letter stated that since the petitioner's 2002 fiscal year ended on September 30, it had not yet filed its corporate tax return for that year.

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 November 28, 2003, denied the petition. The director determined that the petitioner only established that it could pay the proffered wage in 2000 out of its net income, but not in any other year.

On appeal, the petitioner's owner submits a notarized declaration stating that he will replace unidentified "non-U.S. Citizen cooks/employees (both part-time and full-time)" with the beneficiary, and thus the petitioner has illustrated its ability to pay the proffered wage since it already paid wages to those employees. The petitioner's owner also states that hiring the beneficiary "will alleviate the burden of my preparing food and overseeing the kitchen so that [he] may focus [his] attention on managing the business." Thus, the petitioner's owner, Toyoko Yoshino, is one identified current employee whose already compensated past duties would be replaced by the beneficiary.

The petitioner also submits a letter from [REDACTED] of Hayden & Associates, "a locally prominent expert with over twenty years of senior-level experience advising companies and shareholders in corporate formations and restructuring situations in various industries." [REDACTED] states that after reviewing the director's decision, the petitioner's owner's declaration, and the petitioner's tax returns and payroll records, it is his opinion that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date

<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

<sup>2</sup> See note 1, *supra*.

because actual labor related expenses incurred throughout the period in question were already met. [REDACTED] bases his opinion upon the petitioner's owner's statement that the beneficiary will replace past and current "non-U.S. Citizen cooks/employees as well as from wages paid to the Owner/Officer."

The petitioner also submits copies of its quarterly wage reports, and W-3 and W-2 forms for 1997, 1998, 1999, and 2001. Those quarterly wage reports reflect that Toyoko Yoshino was paid \$21,000 in 1998, \$21,875 in 1999, and \$80,500 in 2001.

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.

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.

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.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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,

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 has not demonstrated that it paid any wages to the beneficiary during 1997, 1998, 1999, 2000, or 2001. In 1997 and 1998, the petitioner shows negative net income, and net current assets of only \$19,633 and \$19,826, respectively, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in either year. In 1999 and 2001, the petitioner shows 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 in either year. The petitioner has established its ability to pay the proffered wage in 2000 because its net income of \$65,314 is greater than the annual proffered wage of \$30,306.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner and [REDACTED] advised that the beneficiary would replace workers. The record does not, however, name these workers, state their wages, or verify their full-time employment in the same capacity as the proffered position. Wages already paid to others are not available to prove the ability to pay the proffered wage to the beneficiary at the priority date of the petition and continuing to the present, if those other employees performed other kinds of work making it impossible for the beneficiary to replace him or her. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. 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).

The petitioner did identify that the beneficiary would alleviate cooking responsibilities from the petitioner's owner and submitted evidence of the petitioner's owner's wages received in 1998, 1999, and 2001. If the beneficiary replaced the petitioner's owner in each year, CIS may reduce the proffered wage by the wage actually paid to the petitioner's owner. Reducing the proffered wage as such results in \$9,306 in 1998 and \$8,431 in 1999. The petitioner's net current assets in 1998 are greater than \$9,306. However, the petitioner's negative net income and negative net current assets in 1999 do not illustrate the petitioner's ability to pay the proffered wage. The petitioner's owner's wages earned of \$80,500 in 2001 are sufficient to demonstrate its ability to pay the proffered wage in that year. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999. The petitioner has shown its ability to pay the proffered wage in 1998 and 2001 through replacement of the petitioner's owner's cooking duties because of wages actually paid to the petitioner's owner for that reason in those years.

Despite its showing of its ability to pay the proffered wage in 1998, 2000, and 2001, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997 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.

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