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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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APR 27 2005

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC-02-189-53612

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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
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 [REDACTED] restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Kosher food. 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 states that the petitioner has substantial financial resources and has established its ability to pay the proffered wage.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$14.96 per hour, which amounts to \$31,116.80 annually. On the Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary claimed to have worked for the petitioner from January 1997 through the date of the ETA 750B.

The I-140 petition was submitted on May 13, 2002. On the petition, the petitioner claimed to have been established on October 1, 1991 and to have a gross annual income of \$743,577.00. The items for the current number of employees and for the petitioner's net annual income were left blank on the petition. In the item for annual income, which the form states is applicable to a petitioner who is an individual, the petitioner stated an annual income of \$441,921.00.

In support of the petition, the counsel submitted a letter dated May 20, 2002 and the following evidence: a partial copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000; and a

letter from a restaurant in Brooklyn, New York stating the beneficiary's experience as a [REDACTED] cook with that restaurant from November 1992 to November 1994.

In a request for evidence (RFE) dated December 23, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the counsel submitted a letter dated March 7, 2003 and a copy of the first page of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001.

In a decision dated July 29, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional copies of some evidentiary documents which had been submitted previously.

Counsel states on appeal that the director abused his discretion in finding that the evidence in the record failed to establish the petitioner's ability to pay the proffered wage during the relevant time period.

Since no additional evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary claimed to have worked for the petitioner from January 1997 through the date of the ETA 750B. In his RFE, the director mentioned the beneficiary's Form W-2 Wage and Tax Statement for 2001 as a type of documentation which could show the amount of compensation paid to the beneficiary by the petitioner. However, no Form W-2 for the beneficiary was submitted in evidence. Nor did the petitioner submit any other evidence corroborating the beneficiary's claim of employment with the petitioner or indicating the amount of any compensation paid to the beneficiary by the petitioner.

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). Therefore the claim of the beneficiary on the Form ETA 750B to have been employed by the petitioner fails to establish the petitioner's ability to pay the proffered wage to the beneficiary during the relevant period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The tax returns in evidence are for an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the Form 1120S, U.S. Income Tax Return for an S Corporation. The instructions on the Form 1120S state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. In the instant petition, however, the Form 1120S Schedule K for 2000 shows no income other than that from a trade or business. Concerning the petitioner's 2001 tax return, no Schedule K was submitted in evidence. Therefore, for each of the tax returns in evidence, the petitioner's net income will be considered to be its figure for ordinary income.

The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 shows the amount of \$1,651.00 on line 21, for ordinary income. That information is not directly relevant to any year at issue in the instant petition, since the priority date is in the following year, 2001. The petitioner's Form 1120S tax return for 2001 shows the amount of \$1,011.00 on line 21, for ordinary income. That figure is less than the proffered wage of \$31,116.80, and it therefore fails to establish the petitioner's ability to pay the proffered wage that year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporate petitioner's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's Form 1120S tax return for 2000 yield the following amounts for net current assets: \$11,122.00 for the beginning of 2000 and \$19,922.00 for the end of 2000. The figure for the end of 2000 is the same in accounting terms as that for the beginning of 2001, which is the year of the priority date. It is therefore relevant to the instant petition. However since the figure for the corporation's net current assets for the end of 2000 is less than the proffered wage of \$31,116.80, it fails to establish the petitioner's ability to pay the proffered wage during 2001.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. On the petitioner's tax return for 2000, the petitioner states compensation of officers in the amount of \$102,800.00 and on its tax return for 2001 the petitioner also states that same amount of \$102,800.00 as compensation of officers. Each of the copies of the petitioner's Form 1120S tax returns in the record, however, is incomplete, and each lacks any statement identifying the recipient or recipients of the compensation of officers or stating the ownership shares in the petitioner of each such officer. Therefore the record provides no basis for finding that the officer or officers who received compensation from the petitioner held a controlling interest or controlling interests in the petitioner. For this reason, even though the amount of officer compensation each year exceeded the proffered wage, no

finding can be made that funds paid for officer compensation were funds under the discretion of the petitioner's owner or owners. Therefore the funds paid for officer compensation cannot be considered as available to pay the proffered wage.

In his brief, counsel states, "There is no statutory or common law requirement to submit a federal tax return." (Brief, page 2). That statement ignores the fact that the requirement for evidence in the form of tax returns, annual reports, or audited financial statements is found in a regulation, 8 C.F.R. § 204.5(g)(2). That regulation is quoted above. Counsel also discusses case precedents on the issue of the evidence necessary to support a CIS decision. Counsel then states, "It seems clear, then, that [CIS] retains at least the burden of producing substantial evidence supporting its determination." (Brief, page 4). Notwithstanding counsel's assertion, the burden of proof is on the petitioner, not on CIS. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In his decision, the director evaluated the petitioner's partial tax returns and found that they showed insufficient net income to pay the proffered wage in each respective year. For the year 2000, for which a Schedule L was submitted, the director found that the petitioner's net current assets were less than the proffered wage. The director noted that the petitioner had submitted only the first page of its tax return for 2001. The director therefore could not analyze the petitioner's net current assets in 2001. The director's analysis was correct, and his decision to deny the petition was also correct.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director.

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.