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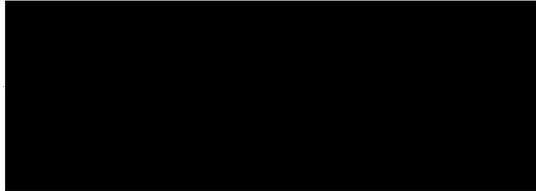
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

APR 21 2005



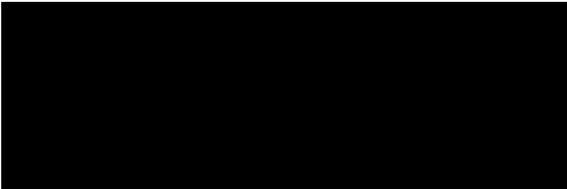
FILE: WAC 03 036 54261 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 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 granting 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 March 9, 2000. The proffered wage as stated on the Form ETA 750 is \$2,025 per month, which equals \$24,300 per year.

On the petition, the petitioner stated that it was established during 1993 and that it employs 36 workers. The petition states that the petitioner's gross annual income is \$1,028,600, but does not state its net annual income in the space provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Alhambra, California.

In support of the petition, counsel submitted the 2000 and 2001 Form 1120S, U.S. Income Tax Return for an [REDACTED] Incorporated. Because that corporation lists the same address as the petitioner, this office believes that it is the petitioner, and that [REDACTED] is a dba name. Those returns show that the petitioner reports taxes based on the calendar year.

The 2000 return shows that the petitioner reported ordinary income of \$20,482 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared ordinary income of \$8,610 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 10, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested [REDACTED] California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an [REDACTED]. That return shows that the petitioner declared ordinary income of \$1,859 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$32,276 and current liabilities of \$8,989, which yields net current assets of \$23,287.

Counsel also submitted the California Form DE-6 Quarterly Wage Reports of [REDACTED] Incorporated for the last three quarters of 2002 and the first quarter of 2003. Those forms show that the petitioner employed between 35 and 38 workers, but do not show that the petitioner employed the beneficiary during those quarters.

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 19, 2003, denied the petition.

On appeal, counsel argues that the amount of the petitioner's depreciation deduction should be considered in the determination of the petitioner's ability to pay the proffered wage, noting that depreciation does not represent a cash expenditure.

Counsel also states that two of the petitioner's current cooks will be released when the petitioner is able to hire the beneficiary, and that their wages during the salient years, therefore, should be considered a fund available to pay the proffered wage. As support for the assertion that the petitioner will release those two cooks, counsel submits an affidavit from [REDACTED] who gives his title as "Employer," and is shown on the petitioner's tax returns as a part owner. Counsel also provides Form W-2 Wage and Tax Statements showing that those cooks were paid \$14,085 and \$14,930 during 2002, for a total of \$29,015.

Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to

replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The evidence submitted on appeal indicates that the petitioner is willing to discharge two of its cooks in order to hire the beneficiary. The evidence does not, however, indicate the number of hours per week represented by those cook's wages, shown on the W-2 forms provided.¹ If those two cooks worked a total of 80 hours per week for those wages, for instance, then the beneficiary could not cover their shifts for the amounts they were paid, consistent with the proffered wage. In that event, only half of the amounts paid to those cooks could be considered available to pay the beneficiary for working 40 hours per week. The petitioner has not demonstrated what portion of those two cooks' shifts the beneficiary's 40 hours per week would suffice to cover, and has not, therefore, demonstrated what portion of the wages paid to those cooks is available to pay the beneficiary the proffered wage in exchange for a 40 hour work week.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income.

¹ Further, only 2002 W-2 forms showing the amounts paid to those cooks were submitted. Even if counsel's evidence were sufficient to show funds available to pay the proffered wage during 2002, it would not show any funds available to pay the proffered wage during 2000 and 2001.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,300 per year. The priority date is March 9, 2000.

During 2000 the petitioner reported ordinary income of \$20,482. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner reported ordinary income of \$8,610. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner reported ordinary income of \$1,859. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of \$23,287. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

An additional issue exists in this case that was not addressed in the decision of denial.² The purpose of the instant visa category is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. On appeal, counsel urges that the wages of two of the petitioner's current cooks, apparently legal U.S. workers, should be considered funds available to pay the proffered wage, as those cooks will be discharged if the petition is approved. That the petitioner intends to discharge two current employees if the

² In fact, the issue only presented itself on appeal.

beneficiary becomes available calls into question the legitimacy of the petitioner's claim that it is unable to find U.S. workers to fill the proffered position.

Because the petitioner was offered no opportunity to reconcile its claim of inability to fill with proffered position with a U.S. worker with its willingness to discharge current workers to hire the beneficiary, that issue plays no part in today's decision. This office notes, however, that even if the petitioner had satisfied CIS on the issue of its ability to pay the proffered wage, the petition could not be approved until the petitioner had addressed this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.