



U.S. Citizenship  
and Immigration  
Services



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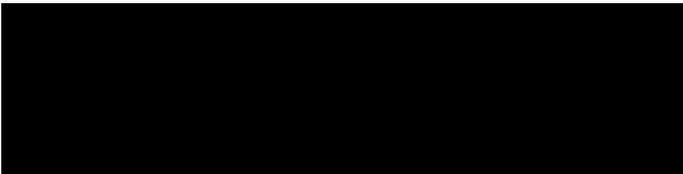
Office: TEXAS SERVICE CENTER Date:

APR 28 2005

IN RE: Petitioner: [redacted]  
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

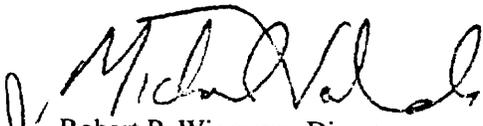
ON BEHALF OF PETITIONER:



APR 28 2005

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Mexican Restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 noting also that the letter submitted to document the beneficiary's employment history appeared questionable.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 27, 2001. The proffered salary as stated on the labor certification is \$7.75 per hour or \$16,120 per year.

With the petition, the petitioner, through counsel, submitted a letter from the beneficiary's prior employer stating that it employed the beneficiary from December 1997 to the present, and a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected taxable income before net operating loss deduction and special deductions of \$173,735, cost of labor of \$188,554, and net current assets of \$75,940. The director determined that this documentation was insufficient and on July 29, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage from the priority date to the present and additional evidence of the beneficiary's experience. The director specifically requested copies of the petitioner's state quarterly federal tax reports for 2001 and 2002, copies of the petitioner's annual report submitted to the Kentucky Department of State, a copy of legal

authorization for the petitioner to use a fictitious name to do business in Kentucky, and copies of the beneficiary's Forms W-2, Wage and Tax Statements, for the years 1997 through 2001.

In response, counsel provided legal authorization for the petitioner to use the name of [REDACTED] Mexican Restaurant, a copy of the petitioner's 2001 and 2002 annual reports, copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Returns, for 2001 and for the first two quarters of 2002, and copies of the beneficiary's 1999, 2000, and 2001 Forms W-2 showing that the beneficiary was employed by his prior employer during that period.

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 14, 2002, denied the petition. The director also denied the petition stating that the evidence provided as proof of the beneficiary's experience did not appear to be reliable. It is noted that the director could have asked for clarification of the evidence or requested an investigation into the reliability of the evidence. She chose not to do so. The AAO does not concur with the director with regard to the letter. With the single exception of the prior employer's title not being on the original letter, it follows the guidelines as stated on the request for evidence in that they were submitted in letter form on the previous employer's letterhead showing the name of the person verifying the information, and they state the beneficiary's title, duties, and dates of employment/experience. Given that the petitioner has submitted an identical letter that includes the prior employer's title, the AAO is convinced that the petitioner has established that the beneficiary meets the experience requirements of the labor certification. In addition, the facts that the initial letter of employment lacks the prior employer's title and the I-140 does not show the beneficiary's social security number while his Forms W-2 do, have been satisfactorily addressed on appeal. Furthermore, while the director doubted the beneficiary's Forms W-2 because the name on the W-2s did not exactly match the name on the petition, this office agrees that [REDACTED] is [REDACTED].

On appeal, counsel submits a brief; previously submitted evidence; an affidavit from the beneficiary's prior employer giving his title and providing a picture of the beneficiary; an affidavit from the beneficiary attesting to his employment with the prior employer from 1997 to the present and to his name; an affidavit from the petitioner; copies of Internal Revenue Service (IRS) instructions for Forms 1120 and 1120-A; a copy of IRS publication 538; a copy of an article from IRS' *The Digital Daily* entitled "Cost of Goods Sold"; photographs of the petitioner; and an affidavit from the petitioner's accountant. The accountant's letter states:

The labor costs for cooks and certain other employees for [REDACTED] Inc. appear on Form 1120, Page 2, Schedule A "Cost of Goods Sold," Line 3 ("Cost of Labor"). This is where I have recorded those wages paid to employees who are directly responsible for the preparation of cooked food from raw food materials, and this is my understanding of where these costs should appear. The cost of direct labor for 2001 was \$188,554.

\* \* \*

██████████ Inc. is a legitimate and thriving business which does over \$1.2 million each year in business.

Counsel cites several passages from the *INS Adjudicator's Field Manual* and asserts that the petitioner has established its ability to pay the proffered wage and that the petitioner has established that the beneficiary meets the experience requirements of the labor certification.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative 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, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 during the year in question, 2001, were \$75,940. The petitioner could have paid the proffered wage in 2001 from its net current assets<sup>2</sup>.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of \$173,735<sup>3</sup> and net current assets of \$75,940. The petitioner could pay the proffered wage in 2001 from either its taxable income or its net current assets.

In summary, the petitioner has established that it had the ability to pay the proffered wage at the priority date, April 27, 2001, and continuing.

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 met that burden.

**ORDER:** The appeal is sustained.

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<sup>1</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>2</sup> It is noted that the petitioner has filed another petition for a skilled worker with a filing date for the same year as the current petition. Nevertheless, a review of the record shows that the petitioner could have paid the proffered wages of both beneficiaries from its net current assets in 2001.

<sup>3</sup> This taxable income also shows that the petitioner could have paid the proffered wages of both beneficiaries from its taxable income in 2001.