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FILE:



Office: VERMONT SERVICE CENT.

Date:

AUG 30 2005

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IN RE:

Petitioner:

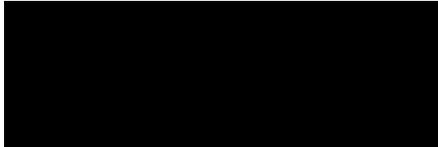


Beneficiary:

PETITION:

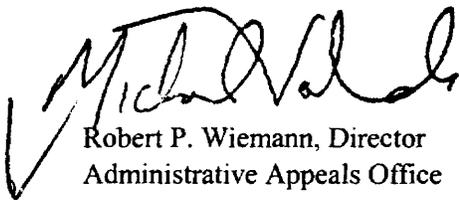
Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1183(b)(3)

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 Acting Center Director (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 kosher 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 claims that the director misinterpreted the evidence and that the petitioner had the continuing financial ability to pay the proffered wage.

Item 3 of the notice of appeal (Form I290-B) instructs a petitioner to state the reason for the appeal. Within this statement, counsel suggests that he is accumulating more documents and that he will "submit them with my Brief shortly." Item 2 of the notice of appeal affirmatively states that counsel is submitting a separate brief and/or evidence *with this form*. (Emphasis added.) As no additional time was requested and nothing further has been received to the record, this decision will be rendered on the record as it currently stands.

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) provides:

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. 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 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour, which amounts to \$41,600 per

annum. On the Form ETA 750B, signed by the beneficiary on April 31, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed March 2003, the petitioner claims to have been established in 1992, to have a gross annual income of \$266,679, and to currently employ four workers. The petitioner initially provided an incomplete copy of its Form 1120, U. S. Corporation Income Tax Return for 2001 in support of its ability to pay the beneficiary's proposed wage offer of \$41,600 per year. The tax return omits copies of statement(s) 1 through 5 as noted on the return.

The tax return also reflects that the petitioner files its returns using a fiscal year running from May 1st until the following April 30th. Thus, the 2001 tax return covers the period from May 1, 2001 until April 30, 2002. It reveals that the petitioner reported a net taxable income of -\$4,811 before the net operating loss (NOL) deduction. Schedule L of the return indicates that it had \$6,320 in current assets and \$4,243 in current liabilities, resulting in \$2,077 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of demonstrating a petitioner's financial ability to pay the proposed wage offer. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's year-end 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.

Along with this tax return, the petitioner submits a letter, dated March 17, 2003, from [REDACTED] Vice-President." Mr. [REDACTED] letter expresses a wish for the petition's approval so that the beneficiary can "continue his services with us." The letter also misstates the projected position as offering an annual salary as \$31,200 rather than \$41,600.

On June 4, 2003, the director issued a request for additional evidence in support of the petitioner's ability to pay the proposed wage offer. In accordance with 8 C.F.R. § 204.5(g)(2), she advised the petitioner that it must demonstrate the ability to pay the proffered wage as of the priority date and continuing until the present. The director specifically requested that the petitioner supply copies of the beneficiary's Wage and Tax Statements (W-2s) or Form 1099-MISC showing how much compensation was paid to the beneficiary if it employed the beneficiary in 2001 or 2002.

In response, the petitioner submitted a letter, dated July 16, 2003, from the petitioner signed by [REDACTED] Vice-President." and a letter, dated July 8, 2003, from a certified public accountant [REDACTED]. Ms. [REDACTED] letter emphasizes the petitioner's gross sales and payroll level in 2001 as demonstrating the petitioner's financial ability to pay the proposed wage. She also states that the beneficiary was not employed by the petitioner in 2001, but that he has been "collaborating from time to time in order to be familiar with the restaurant's routine. She refers to an accompanying 2001 W-2 as that which was issued to

¹ 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.

"employee [REDACTED] who has been working as a kosher cook. No W-2 or Form 1099-MISC was submitted that related to the beneficiary's employment with the petitioner.

Mr. [REDACTED] letter also relates the level of gross sales and gross payroll of the petitioner for the year ending April 30, 2002 and further explains that the loss of income recorded on the 2001 tax return includes a depreciation expense as a non-cash deduction of \$2,699.

The director reviewed the petitioner's net income and net current assets as shown on its 2001 corporate tax return, and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 24, 2001. The director denied the petition on October 23, 2003. The director also noted that Mr. [REDACTED] is not just an employee, but also a vice-president of the petitioner and that no mention was made in any of the documentation that the beneficiary was his replacement.

On appeal, counsel states that Mr. [REDACTED] wishes to devote his time to another business and needs the beneficiary to replace him. He claims that it is not uncommon for a partner-owner to also function as a cook and that the argument that the beneficiary could not replace him is not accurate.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this matter, the case reveals certain inconsistencies in the representations concerning the beneficiary's employment. As noted above, the beneficiary does not claim employment with the petitioner as of April 21, 2001, when he signed the ETA 750B. On the G-325 (Biographic Information Form), however, submitted with the beneficiary's application for permanent residence, and signed by the beneficiary on March 28, 2003, he claims that he has worked for the petitioner since January 1, 1999. Similarly, Mr. [REDACTED] 2003 letter indicates that the beneficiary has been providing services to the petitioner, but Ms. [REDACTED] 2003 letter hints that the beneficiary's services have been some sort of voluntary collaboration. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as asserted here by the accountant. 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. 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. Noting that the depreciation, or decreased value of the assets of a

business to be a relevant factor in reviewing the financial viability in a business, the court in *Chi-Feng Chang v. Thornburgh*, *supra* at 536, stated:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and *net income figures* in determining petitioner's ability to pay.

In this case, as set forth on its 2001 corporate tax return, neither the petitioner's reported -\$4,811 in net taxable income, nor its net current assets of \$2,077 could not cover the proposed wage offer of \$41,600.

That the beneficiary was intended to directly replace Mr. [REDACTED], an officer and owner of the petitioner, as noted by the director, is not directly supported by the record. Counsel's assertions in this regard 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). Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. If a terminated employee performed other kinds of work, then the beneficiary could not have replaced him.

As stated above, neither the petitioner's net taxable income, nor its net current assets was sufficient to cover the proffered salary as shown on the 2001 corporate federal tax return. Based on the evidence contained in the record, the AAO concludes that the petitioner has failed to demonstrate its continuing financial ability to pay the proffered as of the priority date of the petition.

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.