

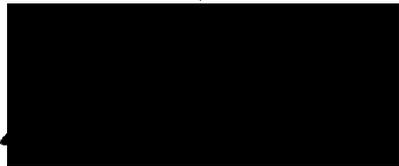
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U.S. Citizenship
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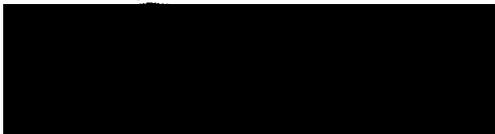
B6

FILE: EAC 02 247 52752 Office: VERMONT SERVICE CENTER Date: **AUG 30 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:



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 retail fish market and distributor. It seeks to employ the beneficiary permanently in the United States as an ice storage supervisor. 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 additional evidence and maintains that the petitioner has established its continuing 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 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$53.53 per hour, which amounts to \$111,342.40 per annum. On the Form ETA 750B, signed by the beneficiary on March 25, 2001, the beneficiary claims that he has worked for the petitioner 40 hours per week as an ice storage supervisor, but fails to specify when he started at this job.

On Part 5 of the visa petition, filed on July 22, 2002, the petitioner claims to have been established in 1981, to have a gross annual income of over two million dollars and to currently employ five workers. In support of its

continuing financial ability to pay the proffered salary, the petitioner initially provided a copy of its Form 1120S, U.S. Income Tax Return For an S Corporation for the year 2000. It shows that the petitioner reported ordinary income¹ of -\$58,866. Schedule L of the return indicates that it had \$193,827 in current assets and \$254,505 in current liabilities, resulting in -\$60,678 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.² A corporation's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of 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.

The petitioner also initially provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 1998 through 2001. They indicate that the petitioner paid the beneficiary wages of \$5,248.50 in 1998, \$21,400.50 in 1999, \$21,997.50 in 2000, and \$22,341.95 in 2001.

The director issued a request for additional evidence on April 16, 2003. 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 beneficiary obtains lawful permanent residence. Evidence must consist of federal tax returns, annual reports or audited financial statements. The director specifically requested that the petitioner supply a copy of its 2001 federal tax return or an annual report accompanied by audited or reviewed financial statements.

In response, the petitioner, through counsel, submitted a copy of its corporate tax return for 2001. It reveals that the petitioner reported ordinary income of -\$50,980. Schedule L shows that the petitioner had \$179,655 in current assets and \$308,520 in current liabilities, resulting in -\$128,865 in net current assets. The petitioner did not provide any financial data relating to 2002.

Counsel's contends in his transmittal letter, dated May 22 2003, that the petitioner's gross receipts and sales are more indicative of its ability to pay the certified wage than the losses shown on the tax return. He maintains that the petitioner's tax return should not be relied upon to determine the availability of funds to pay the proffered salary.

The director reviewed the petitioner's net income and net current assets as shown on its 2000 and 2001 corporate tax returns 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 March 19, 2001. The director denied the petition on October 23, 2003.

¹ For purposes of this review, the petitioner's ordinary income will be treated as its net taxable income.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel submits a copy of the petitioner's corporate tax return for 2002. It shows that the petitioner reported \$97,964 in ordinary income. Schedule L reflects that the petitioner had \$192,689 in current assets and \$270,228 in current liabilities, resulting in -\$77,539 in net current assets. The petitioner also supplied a copy of the beneficiary's 2002 W-2. It shows that the petitioner paid the beneficiary \$30,057.37.

Counsel also submits copies of W-2s issued to eight of the petitioner's other employees for 2001, along with a copy of an unsigned letter. The author's identity is not revealed, however he/she states that these W-2s represent the 2001 earnings of employees no longer working for the petitioner, except for one employee who is a student and now works part-time. The earnings for these employees' ranges from \$3,296 to \$36,737.22 in 2001. Counsel maintains that, once approved, the beneficiary's certified position of ice storage supervisor would substitute for the duties (and wages) then carried on by the other 2001 eight employees who have since departed or are working part-time for the petitioner.

Counsel also contends that the petitioner's 2002 tax return demonstrates the petitioner's ability to pay the proffered salary if the calculation includes consideration of the petitioner's net income, the wages already paid to the beneficiary in 2002, and the petitioner's depreciation.

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 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. To the extent that a petitioner's net income or net current assets can cover the shortfall resulting from a comparison of actual wages that may have been paid to a beneficiary and the proffered wage, a petitioner will be deemed to have demonstrated its ability to pay the certified salary during a given period. In this case, the record indicates that the petitioner has employed the beneficiary since 1998. The beneficiary's wages of \$22,341.95 in 2001 were \$89,000.45 short of the proffered wage. In 2002, the beneficiary's wages of \$30,057.37 were \$81,285.03 less than the proffered wage.

As suggested above, 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 counsel. 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, counsel's contention that the petitioner's 2002 corporate tax return demonstrated the petitioner's ability to pay the proffered wage is correct. The petitioner's net taxable income of \$97,964 was sufficient to cover the \$81,285.03 difference between the beneficiary's 2002 actual wages paid and the proffered wage.

In 2001, however, neither the petitioner's net taxable income of -\$50,980, nor its net current assets of -\$128,868 could cover the \$89,000.45 shortfall resulting from a comparison of the compensation paid to the beneficiary and the proffered wage.

Counsel's assertion that the beneficiary is intended to directly replace no less than seven departed and one currently part-time worker is not convincing. This argument is undercut by the record, which indicates that the petitioner has employed the beneficiary simultaneously during the period in which wages were paid to these eight other employees. The petitioner has not documented that these eight workers, one of whom is still employed, ever performed the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). If the employees performed other kinds of work, then the beneficiary could not have replaced them. Moreover, expenses already paid out are not generally available to prove the ability to pay the beneficiary's wage offer as of the priority date of the petition. It is additionally noted that the assertions of counsel 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).

As stated above, neither the petitioner's net taxable income, nor its net current assets was sufficient to cover the additional \$89,000.45 needed to pay the proffered salary in 2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the certified wage beginning on the priority date. 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.

Beyond the decision of the director, it is noted that the record fails to contain sufficiently convincingly evidence that the beneficiary has accrued two years of work experience in the job offered of ice storage supervisor as of the priority date of April 2, 2001. To establish this experience, the petitioner had originally offered a letter from an acquaintance of the beneficiary, who knew him during a particular period of employment in Mexico. As pointed out in the director's request for additional evidence establishing this qualifying experience, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that such verification must come from the relevant prior employer or trainer. Upon review of the record, we could not locate where the petitioner responded to the director's concern relating to this issue. Failure to submit requested evidence, which precludes a material line of inquiry, shall be grounds for denying the application or petition. *See* 8 C.F.R. § 103.2(b)(14). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify

all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis of denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.