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U.S. Citizenship
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Services

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FILE: [Redacted]
EAC 03 013 50304

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 an Irish restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 contends that the petitioner has demonstrated its continuing financial ability to pay the proffered salary

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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$12.73 per hour, which amounts to \$26,478.40 per annum. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary claims to have worked full-time for the petitioner since November 1999 as a chef. The beneficiary also claims the same employment on the biographic information form (Form G-325A), signed on September 26, 2002, filed in connection with his application for permanent residence.

On Part 5 of the visa petition, filed in October 2002, the petitioner states that it was established in 1999, has a gross annual income of \$490,071, a net annual income of \$259,362, and currently employs eight workers. In support of its ability to pay the beneficiary's proposed wage offer of \$26,478.40 per year, the petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It reflects that the petitioner files its returns using a standard calendar year. The 2001 tax return reveals that the petitioner reported ordinary income¹ of -\$532. Schedule L of the return indicates that it had \$11,855 in current assets and \$84,439 in current liabilities, resulting in -\$72,584 in net current assets. Besides net income, and as an alternative resource out of which a proffered salary may be paid, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period. 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 Schedule L of its federal tax return. 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On September 26, 2003, the director advised the petitioner that such evidence of its ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director also requested the petitioner to provide a copy of the Wage and Tax Statement (W-2) issued to the beneficiary in 2001 if it employed the beneficiary during that period.

In response, the petitioner resubmitted a copy of its 2001 corporate tax return and additionally provided a copy of its 2002 federal tax return. The 2002 return reflects that the petitioner reported -\$2,366 in ordinary income. Schedule L shows that the petitioner had \$19,256 in current assets and \$6,334 in current liabilities, resulting in \$12,922 in net current assets.

The petitioner also supplied copies of the beneficiary's individual tax returns for 2001 and 2002 that he filed jointly with his spouse. Both tax returns reflect that all income was derived from self-employment but no supporting documentation established the derivation of such income or a connection to the petitioner as noted by subsequently by the director.

The director denied the petition on February 20, 2004. She reviewed the petitioner's net income and net current assets as shown on its two corporate tax returns and concluded that the evidence failed to demonstrate that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 19, 2001.

On appeal, counsel asserts that the intent of the petitioner's owner is to replace her spouse and co-owner's services as a cook at the petitioning restaurant with the beneficiary's services. A copy of a statement from her spouse, James O'Haire, is submitted with the appeal, along with copies of his W-2s issued by the petitioner in

¹ For purposes of this review, the petitioner's ordinary income (line 21) will be treated as 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.

2001 and 2002, showing \$28,800 and \$30,600 in wages paid, respectively. [REDACTED] states that since he is currently employed at [REDACTED] Pub in Portsmouth, New Hampshire, his salary is no longer on the books and these monies are available to pay the beneficiary.”

Counsel also cites a quote from a CIS headquarters memorandum from [REDACTED] dated August 4, 2003, relating to the procedure for qualifying for consideration for “American Competitiveness in the Twenty-First Century Act” (AC21) (Public Law 106-313), in that a beneficiary can qualify under this law even if the petitioning employer has not actually employed him. Counsel’s reference to AC21 is misplaced in this case. That legislation, enacted in 2000, permits individuals who have filed for adjustment of status and whose cases have been pending for more than 180 days to change jobs or employers, without affecting the validity of the underlying approved Immigrant Petition for Alien Worker (I-140) or labor certification as long as the new job is in the same or a similar occupational classification. In this case, there is no approved I-140. AC21 applicability is only appropriate, except for limited exceptions, for review in the adjudication of the application for the beneficiary’s adjustment of status to permanent residence, not during the adjudication of the I-140.

The record in this case suggests that the petitioner has employed the beneficiary from 1999 until September 2002. This undercuts the petitioner’s argument on appeal that the beneficiary could replace the owner’s husband as a cook since it appears that they already were working for the petitioner during the same period. Moreover, expenses already paid out are not generally available to prove the ability to pay the wage proffered to the beneficiary as of the priority date of the petition. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing ability to pay the proffered wage beginning as of the priority date. Further if an employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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. As stated above, the record suggests that the petitioner has employed the beneficiary since 1999, but as noted by the director, the petitioner’s response to the request for additional evidence failed to sufficiently corroborate the amount of wages or compensation paid. Therefore such sums cannot be considered in determining the petitioner’s ability to pay the certified wage.

CIS will also examine the net income figure 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 (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.

In this case, as noted by the director, in 2001, the petitioner's ability to pay the proposed wage offer of \$26,478.40 could not be established during this period, as neither its reported net taxable income of -\$532, nor its -\$72,584 in net current assets was sufficient to meet the proffered wage.

Similarly, neither the petitioner's net taxable income of -\$2,366, nor its net current assets of \$12,922 could pay the certified wage in 2002. The petitioner's evidence has not persuasively demonstrated its continuing ability to pay the proffered wage in either 2001 or 2002.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated 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.