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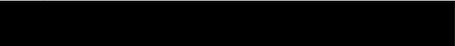
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BF

FILE: WAC-03-179-53058 Office: CALIFORNIA SERVICE CENTER Date: **DEC 10 2005**

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 preference visa petition was denied by the Director, California 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 an Italian specialty 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 statement.

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) 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024 per year). On the Form ETA 750B, signed by the beneficiary on March 15, 2001, the beneficiary claimed to have worked for the petitioner since December 1999.

On the petition, the petitioner claimed to have been established on February 13, 2001, to have a gross annual income of \$375,892, to have a net annual income of \$18,000, and to currently employ 5 workers. The record indicates the petitioner is structured as a partnership and files its tax returns on Form 1065. The petitioner's fiscal year is based on calendar year.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 26, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750, evidence of the petitioner's ability to pay the beneficiary's wage for the year 2001 through 2003, the beneficiary's W-2 forms for 1999 through 2003, and Form DE-6, Quarterly Wage Reports for all employees for the last 4 quarters.

In response, counsel submitted the petitioner's federal tax returns for 2001 through 2003, Quarterly EDD statements for 3rd and 4th quarters of 2003 and 1st quarter of 2004, the petitioner's payroll reports from

January 16 to June 11, 2003, W-2 earning records of the beneficiary from 2000 to 2003 and a letter pertaining to the beneficiary's prior experience with a certified English translation.

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 June 28, 2004, denied the petition. The petitioner through its counsel submits this appeal.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 record contains copies of Form W-2 Wage and Tax Statements of the beneficiary. The beneficiary's Form W-2's for 2001 through 2003 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2001	\$5,531.27 ¹	\$24,024	\$18,492.73
2002	\$4,821.79	\$24,024	\$19,202.21
2003	\$0 ²	\$24,024	\$24,024.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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, CIS will next 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's

¹ The record of proceedings contains two W-2 forms for beneficiary for 2001 in the amount of \$1,546.99 and \$5,531.27 respectively. However, the AAO does not consider the first one as evidence that the petitioner paid the beneficiary because the W-2 form was issued by [REDACTED] with Federal employer identification number [REDACTED] although it located at the same address with the petitioner. Note that the modest amount of compensation that the W-2 in question documents would not, in any case, alter the ultimate decision.

² The beneficiary's W-2 forms for 2003 show that the petitioner did not paid any amount to the beneficiary in this year.

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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that 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 the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

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.³ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a partnership'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 has not demonstrated that it paid the full proffered wage to the beneficiary in 2001 through 2003. In 2001, 2002 and 2003, the petitioner reports \$2,479 in net income⁴ and \$9,299 in net current assets, \$(11,208) in net income and \$(10,498) in net current assets, and \$(19,369) in net income and \$(12,114) in net current assets respectively, and has not therefore, demonstrated the ability to pay the difference of \$18,492.73 and \$19,202.21 between the wage paid and the proffered wage in 2001 and 2002, and the full proffered wage

³ 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.

⁴ Shown on Line 22 of Form 1065.

in 2003 out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001, 2002 or 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in her brief accompanying the appeal that:

The appeal in this case is based on the fact that the job offer made by the Petitioner/Employer is of a job opening 8 to 10 years from the date the original job offer was made ...

This denial was made on the grounds of C.F.R. 204.5(g)(2) ...

It should be noted that the above Immigration section of the law was written and passed by Congress on the basis that all procedures required to apply for permanent residence was CURRENT, not backed-up 8 to 10 years.

Quite obviously, the above law should be changed or re-viewed by the power to be to take into consideration the lengthy delay before a case is certified and sent to INS.

Counsel's assertion does not allege any specific error of law or fact by CIS. Moreover, counsel did not submit legislation history documentation to support her assertion that the law was written and passed by Congress on the basis that all procedures required to apply for permanent residence was current, and nor is there such documentation. Therefore, her assertion is not supported by any legal authority. At any rate such a suggestion should be submitted to Congress instead of the AAO.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.