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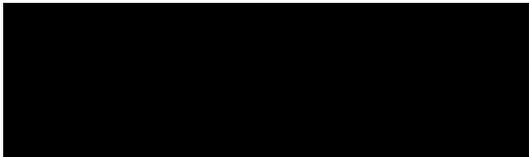


FILE: LIN 03 135 51428 Office: NEBRASKA SERVICE CENTER Date: **DEC 21 2005**

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 Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 and copies of documents previously provided.

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 granting 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 September 2, 2002. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

On the petition, the petitioner stated that it was established during 1988 and that it employs two workers. The petition states that the petitioner's gross annual income is \$257,115 and that its net annual income is \$13,464. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Chicago, Illinois.

In support of the petition, counsel submitted copies of monthly bank statements pertinent to the petitioner's account and two pages of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on November 16, 1988 that it reports taxes pursuant to the calendar year and accrual accounting. During 2001 the petitioner declared ordinary income of \$13,464. Because counsel did not provide the corresponding Schedule L the Service Center was unable to calculate its net current assets. This office notes that, in any event, because the priority date of the

petition is September 2, 2002, evidence pertinent to the petitioner's finances during 2001 and previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on December 29, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center stated, incorrectly, that the petitioner appears to be a sole proprietorship. The Service Center requested the petitioner's tax return¹ and the petitioner's owner's monthly budget.

In response, counsel submitted copies of (1) four pages of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) three pages of its 2003 return, (3) copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002 and all four quarters of 2003, and (4) additional bank statements.

The 2002 return shows that the petitioner declared ordinary income of \$17,250 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$58,499 and current liabilities of \$5,121, which yields net current assets of \$53,378.

The 2003 return shows that the petitioner declared ordinary income of \$15,093 during that year. Because counsel did not provide the corresponding Schedule L the Service Center was unable to determine the amount of the petitioner's 2003 end-of-year net current assets.

The 2002 quarterly returns show that the petitioner paid total wages of \$16,863 during each of the first three quarters and \$15,473 during the final quarter, for a total of \$66,064 during that calendar year. The 2003 quarterly return shows that the petitioner paid total wages of \$14,781 during the first quarter, \$15,247.01 during the second quarter, and \$15,179.01 during both of the last two quarters of that year, for a total of \$66,476.03 during that calendar year.

In a cover letter dated March 15, 2004, counsel stated that the petitioner would not be filling a new position, but would be replacing employees who have left or have indicated that they will be leaving in the immediate future. Counsel did not identify those other employees or state the amounts the petitioner had paid them.

Counsel further argued that the total of the petitioner's net income and its wage and salary expense during each of the salient years should both be included in the calculation of funds available to the petitioner to pay the wage proffered to the beneficiary. Finally, counsel argued that the petitioner's bank balances show its continuing ability to pay the proffered wage beginning on the priority date.

¹ The Service Center made these requests under the misapprehension that the petitioner is a sole proprietorship. Whether the Service Center was requesting a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation or a copy of the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return is unclear. Because the petitioner's own tax return is more directly relevant to its ability to pay the proffered wage than that of its owner, however, this office interprets that request as calling for the petitioner's own tax return, and finds that the petitioner's submission was responsive.

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 7, 2004, denied the petition. The decision notes that the petitioner did not provide its Schedule L with its 2003 income tax return.

On appeal, counsel again asserts that the beneficiary would replace employees who have left or would leave in the future, but, again, without identifying those employees or the amount of their wages. Counsel reiterates the previous assertions that the petitioner's net income, its total wages and salaries, and its bank statements demonstrate its ability to pay the proffered wage.

Finally, counsel stated that the Service Center incorrectly identified the petitioner as a sole proprietorship "and its decision is clearly tainted by this bias." Counsel further states that because the petitioner is a corporation, the requested Schedules C and L are unavailable.

Initially, this office notes that the Schedule C is used to report the income of a sole proprietorship on its owner's Form 1040 U.S. Individual Income Tax Return. Therefore the petitioner, a subchapter S corporation, has no Schedule C.

The Schedule L, however, is submitted with both Form 1120 U.S. Corporation Income Tax Returns and Form 1120S, U.S. Income Tax Returns for an S Corporation. The petitioner should have had Schedules L available and should have presented them with the rest of its income tax returns for the salient years.²

Counsel misapprehended that, in the decision of denial, the director was noting the absence of an inapplicable document. Given that misapprehension, counsel's assertion that the decision was tainted by the Service Center's failure to identify the type of ownership under which the petitioner is held is understandable. However, the Schedule L is applicable to subchapter S corporations, and should have been provided. Further, although the Request for Evidence indicates that the Service Center misidentified the petitioner as a sole proprietorship that error appears to have been corrected in the decision of denial. No evidence of the misidentification or the resultant bias that counsel alleges appears in that decision.

Counsel asserts that the beneficiary would replace recent or existing employees. Counsel does not identify those employees, however, or demonstrate the amounts they were paid in wages during the salient years. Counsel has not demonstrated that any amount of wages was available from those unidentified employees wages with which to pay the proffered wage.

Counsel also asserts, apparently in the alternative, that the total wages the petitioner paid to all of its employees during a given year added to the petitioner's net income during that year is an index of the petitioner's ability to pay the proffered wage during that year.

The entire amount of the petitioner's wage expense during a given year, however, is unlikely to be available to pay the wages of the proffered position. Unless the petitioner can show that hiring the beneficiary would

² The reference to Schedule C in the decision of denial was clearly in error. In context, it appears that the director intended to refer to Schedule L.

somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

The total wages the petitioner paid to all of its employees would only be available to pay the wage proffered in this case if the petitioner was able to replace all of its existing employees on all of its shifts with the beneficiary without the beneficiary exceeding 40 hours of work per week. Again, as the petitioner has not demonstrated that the beneficiary would replace any specific employees, this office is unable to determine the amount of those replaced employees' wages and cannot count those obviated wages as funds available to pay the proffered wage.

Further, even if the petitioner had named the employees the beneficiary would replace, this would trigger an additional inquiry. The purpose of the instant visa category is to provide workers for positions for which U.S. workers are unavailable. If the petitioner is replacing a U.S. worker with the beneficiary, the petitioner is obliged to demonstrate the reason the incumbent employee is leaving the position. The petitioner must demonstrate that it is not replacing a U.S. worker with a foreign worker out of preference.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁵ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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,

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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, or greatly exceeded it, 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,960 per year. The priority date is September 2, 2002.

During 2002 the petitioner declared ordinary income of \$17,250. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$53,378. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$15,093. That amount is insufficient to pay the proffered wage. Because the petitioner did not provide the corresponding Schedule L this office is unable to calculate the petitioner's 2003 end-of-year net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner provided no reliable evidence of other funds available to the petitioner during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

Counsel failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.