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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **DEC 21 2005**
EAC-03-134-53318

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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery and cafe. It seeks to employ the beneficiary permanently in the United States as a baker. 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 petition does not qualify as a skilled worker or professional because the proffered position only requires one year of experience. The director also 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. The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits additional evidence.

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), also provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. The petitioner applied under the skilled worker or professional category despite the position's requirement of only one year of experience by clearly marking the box "e" on Part 2 of the visa petition. No correspondence disputes the category selection sought, and neither counsel nor the petitioner addresses the issue on appeal. Thus, the AAO concurs with the director's determination that the petition does not qualify under the skilled worker category since the position does not require two years of training or employment experience.

The second issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date. The applicable 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 February 5, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1998.

On the petition, the petitioner claimed to have been established in August 1999, to have a gross annual income of \$360,841, and to currently employ five workers. In support of the petition, the petitioner submitted an

employment experience letter and the petitioner's corporate short-form income tax return for 2001, which according to its fiscal year, covered the period August 1, 2001 through July 31, 2002.

Without issuing a request for additional evidence, the director determined that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 20, 2004, denied the petition. In her decision, the director stated that the tax return submitted did not cover the priority date. The director also noted that the employment experience letter failed to conform to the content requirements delineated at 8 C.F.R. § 204.5(l)(3), which will be discussed further below after the discussion on the petitioner's ability to pay.

On appeal, counsel submits the petitioner's corporate tax return for 2000 that covers the period August 1, 2000 through July 31, 2001. Counsel does not provide any explanation or legal argument on appeal¹.

The petitioner's tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Net income	\$27,822 ²	\$21,135 ³
Current Assets	\$10,467	\$23,849
Current Liabilities	\$128,507	\$88,609
Net current assets	-\$118,040	-\$64,760

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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

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). Showing that the petitioner's 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

¹ It is noted that counsel's failure to identify a specific error to the director's decision as well as the failure to submit additional evidence or discussion with respect to all enumerated reasons for the director's decision to deny the petition could have resulted in a summary dismissal. The regulation at 8 C.F.R. § 103.3(a)(1)(v), states that an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The AAO is in its discretion adjudicating the appeal on its merits.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 24

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.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 for regular corporate income tax returns and Part III, Lines 1 through 6 on corporate short-form tax returns. Its year-end current liabilities are shown on lines 16 through 18 for regular corporate income tax returns or Part III Lines 13 and 14 on corporate short-form tax returns. 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.

The petitioner's reported net income for its 2000 and 2001 fiscal years are less than the proffered wage. Additionally, its net current assets are negative for both 2000 and 2001. Thus, the petitioner could not establish its continuing ability to pay the proffered wage beginning on the priority date out of its net income or net current assets. The petitioner did not provide any other evidence of its continuing ability to pay the proffered wage beginning on the priority date. Thus, the petition was properly denied for the petitioner's failure to establish its continuing ability to pay the proffered wage beginning on the priority date.

The second issue in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is February 5, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of baker. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank

⁴ 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.

College	Blank
College Degree Required	Blank
Major Field of Study	Blank

The applicant must also have one year of experience in order to perform the job duties listed in Item 13, which will not be restated here as they are incorporated into the public record of proceeding. Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked for the petitioner since April 1998. Prior to that, he indicated that he was employed as a baker for My Bagel Heaven in Wayne, NJ, from June 1996 through April 1998 including a job description that has the same description of duties as the proffered position.

With the initial petition, the petitioner submitted a letter from My [REDACTED] on letterhead signed by Nasir Breik, Manager, stating that the beneficiary was employed by that business from June 1996 to April 1998. The letter does not provide any additional details.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO concurs with the director's determination. The letter from My [REDACTED] fails to conform to the regulatory requirements at 8 C.F.R. § 204.5(1)(3) which provides that experience letters contain "a description of the training received or the experience of the alien." The letter from My [REDACTED] does not describe the beneficiary's training or experience received at that business and thus does not establish the beneficiary's qualifications for the proffered position. Thus, the petition was properly denied based on the petitioner's failure to establish the beneficiary's qualifications for the proffered position.

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.