

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

FEB 18 2005

WAC 02 216 53585

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$11.26 per hour or \$23,420.80 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, and copies of Forms DE-6, Quarterly Wage and Withholding Report, for the quarters ended September 30, 2001 and December 31, 2001. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$95,046. Schedule L was not provided with the tax return. The Forms DE-6 showed that the beneficiary did not work for the petitioner during the third and fourth quarter of 2001. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on October 11, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from 2000 and continuing to the present to be in the form of copies of annual reports, federal tax returns with appropriate signature(s), or audited financial statements. The director specifically requested that the tax returns include all schedules

and tables that accompany the submitted tax return and that the beneficiary's Forms W-2 are submitted from 2001 to the present.

In response, counsel provided a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, copies of Forms DE-6, Quarterly Wage and Withholding Reports, for the quarters ended June 30, 2001 through September 30, 2002, and copies of bank statements for the periods December 7, 2000 through January 8, 2001, December 7, 2001 through January 8, 2002, January 9, 2002 through February 5, 2002, and October 3, 2002 through November 5, 2002. The Forms DE-6 show that the beneficiary did not work for the beneficiary in 2001 or in the first three quarters of 2002. The bank balances range from a low of \$13,546.48 to a high of \$24,295.75. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$192,583 and net current assets of -\$151,325.

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. On June 10, 2003, the director denied the petition.

On appeal, counsel submits previously submitted documentation, additional bank balances, and additional Forms DE-6. Counsel states:

The petitioner is operating [a] restaurant business. It filed an alien labor certification application for beneficiary on April 30, 2001 for a permanent position of cook-foreign specialty. With the following documents, the petitioner is able to prove its financial ability to pay salary:

A. Petitioner's 2000 and 2001 Form 1120 U.S. Corporation Tax Return

The federal tax return for fiscal year 2000 shows company's total assets of \$522,062; gross receipts of \$394,026; gross profit of \$189,9996 [sic]; salaries and wages paid of \$45,810 (Exhibit A-1). The 2001 tax return (Exhibit A-2) reflected its total assets of \$1,060,048; gross receipts of \$1,007,393; gross profit of \$566,144; salaries and wages paid of \$84,273. The tax returns demonstrate substantial and increasing income that greatly exceeds beneficiary's salary. The increasing amount of assets also has warranted the petitioner's ability to pay required wages when the priority date is established. Although the 2001 taxable income on line 30 is a negative number, it is utilized as an accepted and expedient business practice by the petitioner. It is evident that the petitioner spent \$450,000 to purchase a real property as business premises in 2001 (See Schedule L).

B. Petitioner's Bank Account Statements From 2001 Through The Present Time

The attached monthly bank account statements (Exhibit B-1) demonstrate that before and after the priority date was established the petitioner has maintained sufficient amounts of balance, which is much higher than the beneficiary's wage. The petitioner's cash balance

is further evidenced by its new deposit of \$100,000 (Exhibit B-2) in support of business operation.

C. Petitioner's Quarterly Wage and Withholding Reports for the Year 2001 to 2003

The petitioner is currently hiring about eleven workers. The reports (Exhibit C) show the company is paying much higher salaries than previous years. The petitioner paid a total of \$169,757.35 in salaries in 2002. In the first quarter of 2003, the petitioner paid salaries of \$35,193. The wage reports clearly negate the Service's finding that the petitioner is unable to pay beneficiary's yearly salary of \$21,619 since they show a yearly increase in overall salaries in excess of that amount.

It is thus convincingly clear from argument and information available above that the petitioner has the financial ability to pay wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 net current assets during 2001 were -\$151,325. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel points to the petitioner's bank statements as evidence of its ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the cash specified on Schedule L.

Counsel also indicates that the petitioner is hiring a total of eleven additional employees. If the petitioner hires the additional employees in the same year as the priority date of the petition or subsequently, then the petitioner must show that it had sufficient income to pay all the wages at the priority date and continuing.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$192,583 and net current assets of -\$151,325. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2001.

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.

¹ 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.