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U.S. Citizenship  
and Immigration  
Services

*BS6*



FILE: EAC 02 182 51891 Office: VERMONT SERVICE CENTER Date: **JAN 04 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*  
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 and 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.

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 April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$510 per week, which amounts to \$26,520 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On Part 5 the petition, the petitioner claims to have been established in 1996, to have a gross annual income of \$140,000, and to currently employ two workers. In support of its continuing ability to pay the proposed wage offer, the petitioner initially submitted undated copies of four federal employer's quarterly tax returns.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on September 12, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide a copy of its 2001 federal tax return, a copy of its 2001 Transmittal of Wage and Tax Statements (W-3), and a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if it employed the beneficiary during that year.

In response, the petitioner submitted its U.S. Income Tax Return for an S Corporation for the year 2001. It reflects that the petitioner files its tax return using a standard calendar year. In 2001, it reported a net loss of \$547. Schedule L of the tax return shows that the petitioner had \$7,571 in current assets and \$3,813 in current liabilities, resulting in \$3,758 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets and liabilities are shown on Schedule L of the 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.

In addition, counsel submitted copies of four W-2s issued by the petitioner in 2001. None reflect that the petitioner employed the beneficiary. The petitioner's W-3 reflects that it paid a total of \$25,225 in wages during 2001.

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 February 27, 2003, denied the petition. The director found that the petitioner's net loss reported on its 2001 corporate tax return failed to demonstrate its ability to pay the proffered salary of \$26,520 per year.

On appeal, counsel merely asserts that the director erred and resubmits the tax documentation previously offered. Counsel also provides a copy of the petitioner's W-3 for 2002 and a copy of its federal tax return for 2002. The W-3 shows that the petitioner reported that it paid a total of \$26,515 in wages in 2002. The petitioner's 2002 tax return shows that it declared net income of \$7,694. Schedule L of the tax return indicates that the petitioner had current assets of \$7,274, current liabilities of \$6,693, yielding \$581 in net current assets.

The additional evidence submitted on appeal does not support the petitioner's continuing ability to pay the proffered wage. 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 may have 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 no indication that the petitioner has employed 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 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*

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

*v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). As stated above, CIS will also consider a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, neither the petitioner's net income of -\$547, nor its net current assets of \$3,758 showed that it could cover the proffered salary of \$26,520 per year in 2001. Similarly, the petitioner's 2002 tax return failed to demonstrate that either its net income of \$7,694 or its net current assets of \$581 were sufficient to pay the proposed salary during that period either. Therefore the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date of April 20, 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.