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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 03 004 51769

Office: VERMONT SERVICE CENTER

Date: JAN 07 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 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 asserts that the petitioner's evidence demonstrated its continuing financial ability to pay the certified wage.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which amounts to \$24,689.60 per annum. On Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in 1996 and to have a gross annual income of approximately \$538,000. In support of the petitioner's ability to pay the beneficiary's proposed wage offer, the petitioner submitted a copy of Form 1120, U.S. Corporation Income Tax Return for 2001. The filer is "Koubaria, Inc." The corporate address is different from that given as the petitioner's on the preference petition. This entity reported net income of \$4,916 in 2001. Schedule L shows that it had \$7,915 in current assets and \$3,804 in current liabilities, resulting in \$4,111 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.¹ A corporation's year-end current assets

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on December 6, 2002, the director requested additional evidence pertinent to that ability. The director also requested evidence that the petitioner and [REDACTED] are the same entity. The director additionally advised the petitioner to submit copies of its 2000 and 2001 tax returns, as well as a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if it employed the beneficiary during this period.

In response, counsel's transmittal letter indicates that the petitioner did not employ the beneficiary in 2001. It also states that the federal tax form shows that Koubaria, Inc. and the petitioner are the same entity. In addition to resubmitting another copy of the 2001 tax return, counsel also submits a copy of the petitioner's 2000 corporate tax return. In one of the supporting schedules, the petitioner's name is mentioned as "Milanos 1." The 2000 tax return reflects that the petitioner reported net income of \$325. Schedule L shows that it had \$9,158 in current assets and \$9,177 in current liabilities, resulting in -\$19 in net current assets. A copy of the petitioner's quarterly federal tax return filed for the quarter ending March 31, 2002 has also been provided. It shows that the petitioner paid \$34,853.47 in wages for six employees that quarter.

Counsel's cover letter suggests that the petitioner's nine-year history as a successful business, its increase in gross sales and taxable profit from 2000 to 2001, and its payment of total wages support its continuing ability to pay the proffered wage.

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 May 2, 2003 denied the petition. The director noted that the petitioner's net income and net current assets were not sufficient to pay the proffered wage.

On appeal, counsel adopts the arguments previously submitted with the petitioner's response to the director's request for evidence and additionally suggests that the director erred in failing to consider the beneficiary's potential to generate income for the petitioner.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In this instance, other than counsel's assertion presented on appeal, no detail or documentation has been provided to explain how the beneficiary's employment as a specialty cook will significantly increase profits for the restaurant. Counsel's hypothesis cannot be concluded to outweigh the evidence presented in the 2001 corporate tax return and cannot be considered to constitute evidence of the petitioner's continuing ability to pay the proffered wage. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

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 may have 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 does not reflect 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 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, as advocated here. 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.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its continuing ability to pay the proffered wage as of the visa priority date and must submit either federal tax returns, annual reports, or audited financial statements as part of this demonstration. In this case, it is noted that the petitioner's 2001 tax return covers the priority date of April 30, 2001. Neither its net income of \$4,916, nor its net current assets of \$4,111 could meet the proffered wage of \$24,689.60. It is not sufficient to simply go on record without supporting documentary evidence for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The assertion that the petitioner's history of successful operation and increase in gross sales and net profits demonstrates the petitioner's continuing ability to pay the proffered wage is inapposite. In some circumstances, the expectations of increasing business and profits can support the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, although the claim is that the increase in gross receipts or sales from \$474,464 in 2000 to \$538,253 in 2001 supports the petitioner's ability to pay the proffered wage, it can also be noted that the petitioner's total income decreased in those two years, while its net taxable income only showed a modest increase. It cannot be concluded that, based on these two tax returns, that

petitioner has not demonstrated that it has operated within a framework of profitable years or that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Based on a review of the evidence in the record and the evidence and argument offered on appeal, the AAO concludes that the petitioner has not sufficiently demonstrated that it has 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.