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U.S. Citizenship  
and Immigration  
Services



**PUBLIC COPY**

**B6** JAN 27 2005

FILE: EAC 02 156 53824 Office: VERMONT SERVICE CENTER Date:

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as director of a cook of Italian food specialties. 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 states that the petitioner's gross receipts and gross profits for four years established that the petitioner had the ability to pay the proffered wage. Counsel submits no further documentation.

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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 January 16, 1998. The proffered wage as stated on the Form ETA 750 is an hourly salary of \$18.89, or an annual salary of \$39,291. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1989, did not indicate a net annual income, and stated that it had eight employees. In support of the petition, the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax return for 1998, with accompanying Schedules K and L, as well as a letter from the beneficiary's former employer.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 14, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of its 1998 and 2001 federal income tax returns with all schedules and attachments. In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns, for the years 1998, 1999, 2000, and 2001. The petitioner also submitted copies of its income tax for the State of New York and for New York City for the years 1998, 1999, and 2000.

On April 2, 2003, the director denied the petition. In his denial of the petition, the director stated that the petitioner's federal income tax returns did not reflect that the ordinary income of the petitioner for the salient years was sufficient to establish the petitioner's ability to pay the proffered wage. In addition, the director stated that the current asset to current liability ratio as documented by the Schedule L's on the tax returns indicated resources less than the proffered wage. The director also determined that the petitioner had not employed the beneficiary from 1998 to the present time, and could not establish its ability to pay through documentation of the beneficiary's employment, such as W-2 forms.

On appeal, counsel states that the petitioner's gross receipts or sales during 1998 were \$1,152,054, and its gross profit was \$763,373. Counsel asserts that such gross profits are sufficient to pay the \$39,291 annual salary offered to the beneficiary. Counsel notes that the 1998 tax returns show that the petitioner actually paid compensation of \$285,926 to its other employees. Counsel examines the beneficiary's gross receipts for 1999, 2000, and 2001, and finds the income and cash flow reported in the tax returns more than sufficient to pay the beneficiary 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 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 state nor did it establish that it employed and paid the beneficiary the full proffered wage in 1998 and onward.

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. With regard to counsel's assertion that the petitioner's gross receipts should have been considered in evaluating the petitioner's ability to pay the proffered wage, 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. In addition, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for the years 1998 to 2001 are as follows: \$23,185 in 1998; -\$109,434 in 1999; \$7,530 in 2000; and -\$263,835 in 2001. These figures fail to establish the ability of the petitioner to pay the proffered wage.

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.<sup>1</sup> 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 the years 1998, 1999, 2000, and 2001 are as follows: \$14,779 in 1998; -\$65,711 in 1999; -\$38,266 in 2000; and \$14,779 in 2001. If the annual salary of \$39,291 paid to the beneficiary were subtracted from the net current assets in those years in which the petitioner had positive net current assets, namely 1998 and 2001, \$24,512 would still be lacking from the petitioner's net current assets to pay the proffered wage.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In addition, the petitioner has not demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. Furthermore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1998 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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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.

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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.