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U.S. Citizenship
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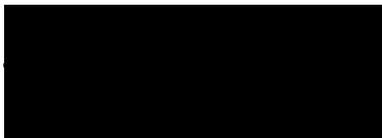
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JAN 27 2005**
WAC 02 210 51461

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a giftware wholesaler. It seeks to employ the beneficiary permanently in the United States as a purchase price analyst. 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.

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 granting 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 granting 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24.10 per hour, which equals \$50,128 per year.

On the petition, the petitioner stated that it was established during 1940 and that it employs 18 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Covina, California.

In support of the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of \$14,513

during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$1,800,857 and current liabilities of \$895,558, which yields net current assets of \$905,299.

Counsel submitted a Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return requested that it be permitted until September 15, 2002 to file its 2001 tax return. Because the petition was filed on June 17, 2002 petitioner's 2001 tax return appears not to have then been available.

Counsel submitted the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for the last three quarters of 2001 and the first quarter of 2002. Those wage reports show that the petitioner employed the beneficiary and paid him \$7,107.66, \$6,092.28, \$7,107.66, and \$6,879.20 during those quarters, respectively.

On October 24, 2002 the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the present date, that is, the date of that request.

In response, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation and the petitioner's unaudited balance sheet as of September 30, 2002.

The 2001 return shows that the petitioner declared a loss of \$171,496 as its ordinary income during that year. The corresponding Schedule L shows that the petitioner ended the year with current assets of \$1,247,989 and current liabilities of \$631,133, which yields net current assets of \$616,856.

On February 5, 2003, the California Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, signed and certified copies of the petitioner's 2000, 2001, and 2002 income tax returns, or IRS printouts of the data from those returns.¹

In response, counsel submitted additional copies of the petitioner's 2000 and 2001 tax returns. Instead of its 2002 tax returns, counsel submitted the petitioner's unaudited financial statements for 2002. Although counsel did not state the reason for failing to provide the petitioner's 2002 tax returns, this office notes that the Request for Evidence was dated that February 5, 2003 and counsel's response was dated March 31, 2003. On those dates, the petitioner's 2002 income tax return was not yet due to IRS and, even without requesting the automatically available extension, may not have been available.

Finally, counsel submitted California Form DE-6 Quarterly Wage and Withholding Reports for all four quarters of 2002. Those reports show that the petitioner employed the beneficiary and paid him \$6,879.20, \$7,107.66, \$6,092.28, and \$7,107.66 during those quarters, respectively, for a total of \$27,186.80 during 2002.

¹ Because the priority date is April 30, 2001 and the petitioner reports taxes based on the calendar year, the petitioner's 2000 tax returns are unlikely to contain any information directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Why the Service Center requested the petitioner's 2000 tax return is unclear.

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 June 11, 2003, denied the petition.

On appeal, counsel observes that the petitioner's net current assets during 2000 and 2001 exceeded the amount of the proffered wage. Counsel argues that this shows the continuing ability to pay the proffered wage beginning on the priority date, and that the petition should be approved.

In a subsequent letter, dated September 8, 2004, counsel stated that, as the decision of denial was based on a clear error of law, it should be addressed at the Service Center as a motion, rather than as an appeal to this office. Counsel requested that the matter be returned to the Service Center.

The record contains a work sheet showing that the Service Center considered the petitioner's Form I-290B appeal and declined to treat it as a motion before forwarding it to this office. As the Service Center declined to treat it as a motion, it is now correctly to be treated as an appeal. Counsel's request that the matter be returned to the Service Center for adjudication with no action by this office is denied.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed and paid the beneficiary \$20,307.60 during the last three quarters of 2001 and \$27,186.80 during 2002. Those amounts are \$29,820.40 and \$22,941.20 short, respectively, of the annual amount of the proffered wage.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.²

The proffered wage is \$50,128 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income. The petitioner ended the year, however, with net current assets of \$616,856. That amount is greater than the proffered wage and shows that the petitioner was able to pay the proffered wage during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

As was noted above, the petitioner's 2002 tax return was not due when the Request for Evidence was issued or when the petitioner responded. To require the petitioner to provide that return or later returns or else face denial of the petition is therefore unreasonable. The petitioner has provided its tax return for the only salient year for which a return was available and that return shows that it had the ability to pay the proffered wage during that year. Therefore, the petitioner has satisfactorily established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has overcome the sole basis for the decision of denial.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.

² This analysis differs from the "cash assets" analysis employed by the director on page two of the decision.