



U.S. Citizenship
and Immigration
Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

86



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **JAN 27 2005**

WAC 03 047 50193

IN RE:

Petitioner:



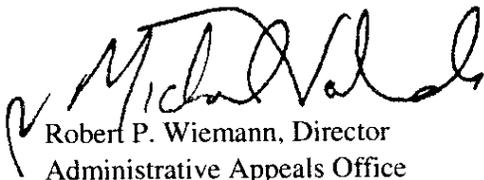
Beneficiary

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: SELF-REPRESENTED

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 remanded for further consideration.

The petitioner is a Mexican and seafood restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food. 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 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.

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 June 15, 1999. The proffered salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

With the petition, the petitioner failed to submit any evidence of its ability to pay the proffered wage. On February 3, 2003, the director requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, complete federal tax returns, or audited financial statements. The petitioner was requested to provide this evidence from 1999 to the present. The director also specifically requested that the petitioner provide copies of the beneficiary's Forms W-2, Wage and Tax Statements, for the years 1999 to the present.

In response, the petitioner submitted copies of its 1999 through 2001 Forms 1065, U.S. Partnership Return of Income, and copies of the beneficiary's 1999 through 2002 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C-EZ, Net Profit From Business. The petitioner's 1999 through 2001 federal tax returns

reflected an ordinary income of -\$6,845, -\$240, and -\$124, respectively. The returns also reflected \$0 net current assets for each of those years. The beneficiary's 1999 through 2002 Forms 1040, reflected wages earned of \$10,280, \$11,560, \$16,720, and \$18,040, respectively. Schedule C-EZ showed the petitioner as the beneficiary's employer

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 5, 2003, denied the petition.

On appeal, the petitioner provides copies of previously submitted material, a copy of the restaurant's menu, copies of seven payroll entries for the beneficiary in 2003 reflecting \$270 paid each pay period, a chart showing the restaurant's growth from 1998 through 2003, copies of Income and Expenses statements for 1998 through May 31, 2003, and pictures of the restaurant. A letter, dated June 23, 2003, to the director states:

- ❖ EL TACO RICO is a Partnership with two Partners, [REDACTED] the subscriber and [REDACTED] both of us are full working in the restaurant. At the present time we have four employees working in the following capacities:
 - [REDACTED] - WAITRESS
 - [REDACTED] - COOK
 - [REDACTED] - COOK
 - [REDACTED] - COOK
- ❖ We have grown a lot during the last years. Our Gross Sales from 1998 thru 2003 were:

1998	2000	2002
\$146,687.00	\$197,600.00	\$223,895.00
1999	2001	2003
\$163,079.00	\$211,222.00	\$240,000.00(*)

(*) This is only an estimate

- ❖ We have had the opportunity to grow much more but it was very difficult to find cooks with experience in Mexican Food.
- ❖ It is important to mention that we have followed all of the instructions and steps for this kind of processing for example while the Department of Labor held the case there were no responses to the mandatory advertisement, no responses from the Job Service, no responses to the mandatory Job Posting and unsatisfactory results to previous and later recruitment efforts.
- ❖ The Alien is an experienced cook, Mexican Style Food and we followed a bona-fide Job Opening; we did not have any responses to our recruitment efforts. After a cautious analysis of the whole case, it was approved by the Department of Labor on April 10, 2002.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services 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 provide evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage from 1999 through 2002.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 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 the years in question, 1999 and 2001 were \$0. The petitioner could not have paid the proffered wage in 1999 through 2001 from its net current assets.

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.

The petitioner is a general partnership. Partners/owners of general partnerships are required to pay the debts and obligations of the partnership out of their own funds. The petitioner's owners are also obliged to show that they were able to pay the proffered wage out of their adjusted gross income, the amount left after all appropriate deductions. Furthermore, they are obliged to show that the amount remaining after the proffered wage is subtracted from their adjusted gross income is sufficient to support their family, or that they have other resources and need not rely upon that income. Therefore, the income and assets of the partners may be considered in determining the ability of the petitioner to pay the proffered wage. In this case, the evidence does not include the personal income tax returns of either of the partners/owners. It is noted that the Service Center requested no budget information from the partners/owners and they provided none.

The 1999 through 2001 tax returns reflect ordinary incomes of -\$6,845, -\$240, and -\$124, respectively, and net current assets of \$0. The petitioner could not pay the proffered wage in any of the years from these incomes.

No evidence was provided that the petitioner possessed other resources with which to pay the proffered wage and no evidence was provided to establish that the beneficiary would be replacing another full-time cook.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioning owners' household expenses, Forms 1040, U.S. Individual Income Tax Returns, additional resources with which to pay the proffered wage such as bank accounts, CDs, etc., and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's June 5, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.