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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: JUN 07 2005

EAC 03 098 51779

IN RE:

Petitioner:

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:

[REDACTED]

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

The petitioner is a food catering business. It seeks to employ the beneficiary permanently in the United States as a 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$12.73 per hour, which amounts to \$26,478 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001 and 2000, as well as documentation of the beneficiary's educational credentials, and previous employment in Brazil.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 6, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide additional evidence that the petitioner had the ability to pay the proffered wage as of the 2001 priority date and continuing to the present. In addition, the director stated that if the petitioner employed the beneficiary in 2001, that the petitioner should submit copies of the beneficiary's Form W-2. In response the petitioner submitted the beneficiary's 2001 W-2 Form that indicated the beneficiary had earned \$5,798.29. The petitioner also resubmitted its IRS Form 1120 for 2001. In subsequent correspondence, counsel submitted a letter from the petitioner's treasurer, the 2000 and 2001

federal income tax returns for the petitioner, the 2001 Massachusetts Corporation Annual Report, and a petitioner-generated employee earnings statement for the beneficiary for the years 2002 and 2003. The letter from Robert Karlyn, the petitioner's treasurer, stated that the company was established on July 1, 1984 and had approximately 80 employees. The treasurer further stated that in fiscal year 2002 the petitioner had gross revenues totaling \$778,289 and a net income of \$548,733. The treasurer asserted that the petitioner has had and continues to have the financial means to meet its payroll. The document identified as Employee Earnings Summary appears to be generated by the petitioner and stated that the beneficiary in the period of January 1 to December 16, 2003, or tax year 2003, earned \$25,758, and that in tax year 2002, the beneficiary earned \$18,693.

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 January 12, 2004, denied the petition. The director examined the petitioner's net income, current assets and liabilities as listed on the petitioner's 2001 federal income tax return. The director stated that the petitioner's federal income tax return did not indicate sufficient financial resources to pay the proffered wage of \$26,478.40. Furthermore the director stated that the W-2 Form submitted by the petitioner to the record documented that the petitioner paid the beneficiary \$5,798.29 in 2001, which was over \$20,000 less than the proffered wage.

On appeal, counsel resubmits the documentation provided in its response to the director's request for further evidence. Counsel also submits the petitioner's corporate bank statements for April, July, and October 2001, as well as the petitioner's 2000, 2001, and 2002 federal income tax returns. Counsel states that the petitioner's 2000 tax return for the year ending March 31, 2001 provides a more accurate representation of the petitioner's income at the time of filing, April 17, 2001. The 2000 income tax return shows \$45,786 of income prior to deductions. Counsel states that this amount is well above the proffered wage, without taking into account the beneficiary's 2001 earnings. Counsel also states that the petitioner's bank statement dated April 30, 2001 shows the petitioner's bank balance as more than \$50,000, a sum that is clearly more than the proffered wage. Counsel maintains that the petitioner's net income as of the end of March 2001, clearly establishes the petitioner's ability to pay the beneficiary's salary.

Counsel further states that the petitioner's 2001 income tax return should not be determinative of its ability to pay the beneficiary's wages. Counsel states that the fact that a corporation recognizes a tax loss for income tax purposes does not mean that the corporation did not have the ability to pay the beneficiary's proffered wage. Counsel also draws attention to the fact that the petitioner is an accrual basis taxpayer, and states that this means that there is a timing difference between the time that the petitioner is allowed to deduct an expense and the time that it pays the expense. Counsel asserts that some tax items can increase the petitioner's tax loss even though the corporation has sufficient cash to pay the wages to the beneficiary. Counsel finally states that the amount that the beneficiary is actually paid is not determinative of whether the petitioner has the funds available to pay the beneficiary the proffered wage. Counsel states that the petitioner has provided clear and convincing evidence, via its tax returns, earnings statements, and bank account statements, that it has the financial means to pay the beneficiary the proffered salary as of the priority date.

On appeal, counsel submits the petitioner's bank statements for three months in 2001, as well as the monthly balance for its payroll banking account for April 2001. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R.

§ 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement for April 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return. It is also noted that only the monthly bank statement for April 2001 shows an increase between the beginning and closing balances. The statements for July 2001 shows a decrease of \$14,000 between the beginning and ending balances, while the October 2001 monthly statement shows a marked decrease in the beginning balance which is stated as \$13,745. Such variances further illustrate the difficulties of using monthly bank statements to establish the petitioner's ability to pay the proffered wage.

In addition, counsel's statement that the petitioner's net income in its 2000 tax year, which runs from April 1, 2000 to March 30, 2001, should be given more weight than the petitioner's income in the following tax year of 2001, the year in which the priority date was established, is not persuasive. The regulations clearly state that the petitioner has to establish its ability to pay the proffered wage as of the priority date, namely, April 30, 2001. Counsel's statement with regard to using the petitioner's income as of March 30, 2001 rather than the beneficiary's financial health as reflected in its 2001 federal income tax returns, is equally non persuasive. The petitioner is not required to establish its ability to pay the proffered wage prior to the priority date, or before April 30, 2001. Thus, the petitioner's actual assets at the end of the petitioner's 2000 tax year would not be relevant in the present proceeding, while the petitioner's net current assets, as determined by its 2001 and 2002 federal income tax returns, have been determined to be a viable element in determining the petitioner's 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 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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from August 2000 to the present, the beneficiary's earnings in 2000 prior to the 2001 priority date are not be dispositive in these proceedings. In addition, the petitioner only provided a W-2 Form for the beneficiary's earnings in 2001. With regard to the documentation submitted by the petitioner for the beneficiary's earnings in 2002 and 2003, the self-generated Employee's Earnings Summary is not viewed as sufficient evidentiary documentation. The IRS W-2 Forms for the beneficiary for the years 2002 and 2003 carry much more probative weight. The petitioner also did not provide any explanation of why the beneficiary's W-2 Forms for these years were not submitted to the record. Accordingly, the employee earnings summary is given no weight in these proceedings, while the W-2 Form submitted to document the beneficiary's 2001 earnings will be considered in these proceedings. Although the petitioner has established that it employed the beneficiary in 2001, and paid him \$5,798.29, it has not established that it paid the beneficiary an amount equal to or the same as the proffered wage as of the priority date 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. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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, now CIS, should have considered income before expenses were paid rather than net income. The petitioner's 2001 and 2002 income tax returns indicate the following net incomes: in 2001, -\$117,223, and in 2002, -\$157,077. Neither of these sums is sufficient to pay the proffered wage of \$26,478.

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. In addition, 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 tax returns reflect the following information for the following years:

	2001	2002
Taxable income ²	\$ -117,223	\$ -157,077
Current Assets	\$ 10,963	\$ 1,586
Current Liabilities	\$ 111,054	\$ 162,960
Net current assets	\$ -100,091	\$ -161,374

The petitioner has demonstrated that it paid the beneficiary \$5,798.29 during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$117,223, and negative net current assets of \$100,091. The petitioner, therefore, has not demonstrated the ability to pay the difference between the beneficiary's actual wages in 2001 and the proffered wage, namely, \$20,679.71. Although counsel asserted that the petitioner's monthly

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

banking accounts established that the petitioner had sufficient financial resources to pay the proffered wage in 2001, as stated previously, the petitioner's bank statements are not viewed as dispositive of the petitioner's ability to pay the proffered wage. Without more persuasive evidence, 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 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. As previously stated, the employees earnings summary documents submitted by the petitioner for both tax years 2002 and 2003 were given no weight in this proceeding. In 2002, the petitioner shows a taxable income of -\$157,077 and net current assets of -\$161,374. Again, these negative sums of taxable income and net current assets can not utilized to establish the petitioner's ability to pay the proffered wage in 2002. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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.