



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: JUN 07 2005

EAC 03 139 52722

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

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 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 sous chef. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$480 per week, which amounts to \$24,960 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 1997.

The petition states the petitioner was established on December 10, 1998; that it has a gross annual income of \$250,000; and that it currently employs six workers. In support of the petition, the petitioner submitted:

- A certified original of a Form ETA 750; and,
- The petitioner's 4th-quarter 2002 Form 941 showing the beneficiary's wages were \$4,680, for a total of \$11,960 for the year.

On May 14, 2003, the director sent a request for evidence (RFE) seeking evidence of the petitioner's ability to pay. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, further specifying the evidence could more particularly be the petitioner's 2001 and 2002 federal income tax returns; its Form W-2 Wage and Tax Statements showing "how much the beneficiary was paid by your business;" or annual reports for 2001 and 2002 accompanied by "audited or reviewed financial statements."

In response, counsel submitted:

- A brief;¹
- A 1999 Form 1120 corporate tax return for its fiscal year ending June 30, 2000²;
- Form 941 employer's quarterly returns for the years 1999, 2000, 2002 and 2003; and
- A translated letter certifying that the beneficiary had worked as a cook in an Albanian restaurant from January 1995 to December 1996.

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 October 20, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's quarterly returns show wages paid in a fiscal quarter of 2001 ranged between \$12,500 and \$13,500; that the petitioner paid salaries of between \$18,400 and \$20,200 for year "immediately preceding the current year;" and that those salaries are "in excess of the proposed wage," demonstrating the petitioner's "continued viability" and "consistently increased" wages over the last several years.

Counsel submits:

- The petitioner's quarterly reports for 2001, 2002 and 2003.

As the petition's priority date is April 25, 2001, the AAO notes that the RFE asked for the petitioner's tax returns 2001 and 2002 "federal income tax returns." Because the petitioner's fiscal year ends on June 30, counsel should have submitted the petitioner's return for its fiscal year ending June 30, 2001. Instead counsel submitted only the petitioner's 1999 Form 1120 return for the fiscal year ending June 30, 2000, which predates the priority date and as such does not go toward establishing the petitioner's ability to pay the proffered wage continuously from and after the priority date.

Further, counsel's assertion that the petitioner's quarterly returns show its progressively stronger ability to pay its six employees does not establish its ability to pay the proffered wage to one of those employees. Moreover, counsel has not submitted any Form W-2s to document both that the petitioner has been paying the beneficiary wages and for how much. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 establish that it employed and paid the beneficiary the full proffered wage in 2001 or thereafter.

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

¹ The brief asserted first, that the "tax statements for years 1998-1999" reflected "substantial growth" in the petitioner's first two years of existence; and second, that the quarterly returns showed the petitioner had paid salaries "in excess of \$20,000 per quarter." Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

² Contrary to the October 20, 2003 decision, the record contains no 1998 Form 1120 return but instead a summary from the petitioner's 1998 return listing its income, deductions, total assets and total liabilities.

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).

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. 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.³ 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 year in question, 2001, however, were not established because counsel did not submit, as requested, the petitioner's 2001 and 2002 federal income returns. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

Counsel has not demonstrated that the petitioner paid any wages to the beneficiary during 2001, nor has he established the petitioner's net income for 2001. He has not, therefore, demonstrated the petitioner's ability to pay the proffered wage out of its net income or net current assets. 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 failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently until the director's decision. Therefore, the petitioner has not established that it 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.

³ 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.