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U.S. Citizenship
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JUN 14 2005

FILE: [Redacted]
EAC 03 044 50215

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

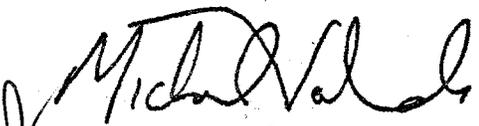
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 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 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 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 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.

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 March 26, 2001. The proffered salary as stated on the labor certification is \$11.87 an hour or \$24,689.60 per year.

With the petition, counsel submitted copies of the petitioner's unaudited 2000 and 2001 income statements, a copy of the petitioner's 2002 Maryland personal property return, and a copy of a payroll register for the period ending July 25, 2002. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on February 4, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested copies of the petitioner's 2000 and 2001 federal income tax returns. The director also requested copies of the beneficiary's Forms W-2, Wage and Tax Statements, if the petitioner employed the beneficiary in 2001.

In response, counsel provided a copy of its 2000 Form 1120, U.S. Corporation Income Tax Return, a copy of the petitioner's 2001 Form 1120A, U.S. Corporation Short-Form Income Tax Return, copies of

bank statements for the period January 31, 2001 through July 31, 2001, and indicated that the petitioner had not employed the beneficiary in 2001 or 2002. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$9,001 and net current assets of -\$22,211. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$4,252 and net current assets of -\$26,931. The petitioner's bank statements reflected balances ranging from a low of \$2,088.90 to a high of \$9,440.08.

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. On June 9, 2003, the director denied the petition.

On appeal, counsel submits a letter from the petitioner stating that its retained earnings are available to the corporation to hire more staff, and copies of the previously submitted 2000 and 2001 tax returns. Counsel states:

In his letter in support of this appeal, Petitioner submits that he intends to employ more full time and fewer part time employees in the future. Petitioner has paid out substantial funds in salaries and wages in the past several years, reported over \$13,000 in cash at the end of the fiscal years 2000 and 2001, and has attested to his willingness to utilize retained earnings to compensate the Beneficiary.

* * *

In 2000, Petitioner reported taxable income of \$9001, a depreciation deduction of \$1,570, cash on hand of \$16,064 and retained unappropriated earnings of \$23,193. In 2001, Petitioner reported taxable income of -\$4252, a depreciation deduction of \$1,532, cash on hand of \$13,665 and retained earnings of \$18,941. Petitioner submits that the sum total of these "assets" is more than sufficient to pay the salary offered to the Beneficiary of \$24,689 per year.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) 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 establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 or 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 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." See also *Elatos Restaurant Corp.*, 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 2000 and 2001 were -\$22,211 and -\$26,931, respectively. The petitioner could not have paid the proffered wage in 2000 and 2001 from its net current assets.

Counsel points to a nonprecedent decision in support of his contention that the petitioner has established its ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel suggests that the petitioner's retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer. Counsel cites no authority for this proposition. It is noted that the court in *Sitar v. Ashcroft*, (2003 WL 22203717 (D. Mass)) specifically rejected this line of

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.

reasoning, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet. In addition, retained earnings are often non-cash in nature and can represent income spent on investments into the petitioner's business as opposed to being distributed among shareholders or shown as profit. The AAO generally won't credit monies spent during the normal course of business to be available to show the ability to pay the proffered wage.

Finally, counsel points out that the petitioner had \$16,064 in cash on hand at the end of the 2000 and had \$13,665 in cash on hand at the end of 2001. However, cash on hand at the end of the year is part of net current assets. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$9,001 and net current assets of -\$22,211. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2000.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$4,252 and net current assets of -\$26,931. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2001.

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.