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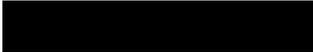
U.S. Citizenship
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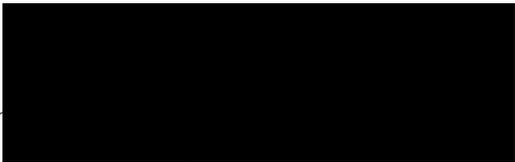
FILE: 
WAC 02 270 53293

Office: CALIFORNIA SERVICE CENTER Date:

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:



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

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 dismissed.

The petitioner is a Chinese restaurant. 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, 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 30, 2001. The proffered salary as stated on the labor certification is \$10.55 per hour or \$21,944 per year.

With the petition, counsel submitted copies of the petitioner's 2000 and 2001 Forms 1120, U.S. Corporation Income Tax Returns, an unaudited copy of the petitioner's statement of income for the period January 1, 2002 through June 30, 2002, and a copy of the petitioner's bank statements for August 8, 2002. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$40.159 and net current assets of -\$6,051. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$24,865 and net current assets of -\$40. The bank statements reflected balances of \$1,500.00 and \$32,435.38 as of August 8, 2002. The unaudited statement of income for the period January 1, 2002 through June 30, 2002 reflected net receipts and disbursements of \$5,746.87. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on October 22, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from 1999 and

continuing to the present to be in the form of copies of annual reports, federal tax returns with appropriate signature(s), or audited financial statements. The director specifically requested that the petitioner submit copies of its California Development Department (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California to include the names, social security numbers, and number of weeks worked for all employees. The director further requested that the petitioner provide the job title and a description of the duties of each employee listed on the DE-6 forms.

In response, counsel provided signed copies of the petitioner's 1999 through 2001 Forms 1120, U.S. Corporation Income Tax Returns, copies of Forms DE-6, Quarterly Wage and Withholding Reports, for the quarters ended March 31, 2001 through September 30, 2002, a copy of an unaudited statement of income for the period January 1, 2002 through September 30, 2002, a copy of the beneficiary's 2002 Form 1099, Miscellaneous Income, a statement of the employees' job titles with a description of their duties, and a copy of a bank statement for the period ended December 31, 2002. The Forms DE-6 show that the beneficiary did not work for the beneficiary in 2001 or in the first three quarters of 2002. The bank balances for the period ended December 31, 2002 were \$33,703.69 and \$1,500.00. The beneficiary's 2002 Form 1099 reflected wages earned of \$29,150. The petitioner's unaudited statement of income for the period January 1, 2002 through September 30, 2002 reflected net receipts and disbursements of \$36,885.96. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$40,638 and net current assets of \$9,442.

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 March 25, 2003, the director denied the petition.

On appeal, counsel submits copies of the petitioner's 2000 through 2002 unaudited statements of cash flows and disbursements, copies of the petitioner's 2000 and 2001 bonus disbursement summaries, and copies of the beneficiary's 2002 Form 1099 and Form 1040, U.S. Individual Income Tax Return. Again, the beneficiary's 2002 Form 1099 and tax return reflect wages earned of \$29,150. Counsel states:

The attached 2000 to 2002 Statement of Cash Flows and Disbursements, and 2000 and 2001 Bonus Disbursement Summaries for Vien Huong Restaurant, clearly demonstrate that the stated Petitioner has been operating in positive cash flow positions which even enable the Petitioner to have given out bonuses to certain key employees; the same evidence also demonstrate that the Petitioner has the ability to pay the Beneficiary's salary as stated in the ETA750A. Furthermore, stated Beneficiary's 2002 individual tax return also demonstrates that the Petitioner has the ability to pay the \$21,944 salary stated on ETA750A, as Petitioner is already paying Benef. \$29,150 in 2002.

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 2001. The petitioner has established that it employed the beneficiary at a salary equal to or greater than the proffered wage in 2002 (\$29,150).

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 1999 through 2001² were

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.

² It is noted that the priority date of the petition is March 30, 2001. Therefore, the AAO will not consider the tax returns for 1999 and 2000 in determining the petitioner's ability to pay the proffered wage.

\$9,442, -\$6,051, and -\$40, respectively. The petitioner could not have paid the proffered wage in 1999 through 2001 from its net current assets.

Counsel points to the petitioner's bank statements as evidence of its ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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 statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L. Furthermore, the bank statements submitted were only for 2002 and did not cover 2001 at the time of filing (March 30, 2001).

Counsel also points to its unaudited statements of cash flows and bonus disbursements as evidence that the petitioner has the ability to pay the proffered wage. However, again, these 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. In addition, wages or bonuses already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$24,865 and net current assets of -\$40. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2001.

The beneficiary's 2002 Form 1099 reflects wages earned of \$29,150. The petitioner has established its ability to pay the proffered wage in 2002 by employing the beneficiary at a salary greater than the proffered wage.

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.