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Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: EAC 02 009 53358 Office: VERMONT SERVICE CENTER Date: JUN 28 2005

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

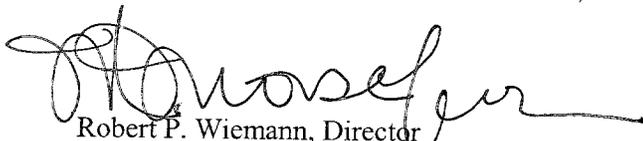
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 service center director denied the employment-based visa petition on February 25, 2002. The AAO subsequently denied the appeal on February 10, 2004. The matter is now before the Administrative Appeals Office (AAO) as a motion to reconsider, and/or reopen. The motion to reopen is granted. The appeal will be dismissed. The petition will be denied.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty 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 motion, counsel states that other sources of income, such as depreciation, should be considered in analyzing whether the petitioner has the ability to pay the proffered wage. The petitioner submits additional federal income tax returns, along with other evidence.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted new documentation with regard to the petitioner's ability to pay the proffered wage. This evidence is viewed as sufficient to reopen the proceedings.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$12, or an annual salary of \$24,960. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1996 and to have a net annual income of \$15,506, inclusive of depreciation. The petitioner indicated it had two part time employees. In support of the petition, the petitioner submitted a letter of support that stated the petitioner had sufficient funds to pay the proffered wage and that by definition for tax accounting purposes, the Internal Revenue Service (IRS) allowed deduction of the cost of operating assets which are recovered over the estimated useful life of an asset. The petitioner stated that in 2000 the petitioner claimed \$7,798 for depreciation, and that this money was available to the petitioner to pay salaries in the year that the figure was claimed. The petitioner also submitted bank statements from April and May 2001. Counsel stated that in April 2001, the petitioner had \$18,576 in its checking account and that in May of 2001 the petitioner had \$11,153.37 in its checking account. Counsel then stated that based on the petitioner's depreciation and its banking accounts, the petitioner had the ability to pay the proffered wage as of April 26, 2001. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2000, which indicated the petitioner's ordinary income for 2000 was \$7,700.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 13, 2001, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that if the petitioner employed the beneficiary in 2000, that the petitioner should submit copies of the beneficiary's Form W-2. The director also stated that based on the petitioner's current liabilities and assets reflected on the petitioner's 2000 federal income tax return, the petitioner did not appear to have the ability to pay the proffered wage. The director requested that the petitioner respond to this statement.

In response, counsel submitted a copy of an unpublished AAO decision. Counsel stated that the AAO decision supported the fact that petitioner's year-end cash balances must be considered when assessing the petitioner's ability to pay the proffered wage. Counsel stated that the petitioner had a year-end cash balance of \$14,027, as indicated in Schedule L of its tax return. Counsel stated that when the cash balance was added to the net profit inclusive of depreciation, the petitioner had \$29,533 with which to pay the proffered annual wage of \$24,960. Counsel also stated that the petitioner's bank statement for either May or April 2001 had sufficient funds to apply to the proffered wage. Counsel resubmitted the petitioner's 2000 federal income tax return.

On February 25, 2002, the director denied the petition. In his denial of the petition, the director stated that the petitioner's liabilities in 2000 were greater than its current assets in 2000, the petitioner's profits or net income of \$7,709 in 2000 was not enough to pay the proffered wage, and the submission of only two bank statements, both of which show a balance lower than the proffered wage, was not sufficient to establish the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the director's decision ignored other sources of funds available to pay the proffered wage, namely depreciation and year-end cash balances. Counsel also refers to *Matter of Sonogawa* and states that the director erred in only considering the petitioner's taxable income. Counsel asserts that the director should have considered all the information contained in the petitioner's tax return, as well as the additional evidence of financial viability represented by the petitioner's bank statements.

On February 10, 2004, the AAO dismissed the petitioner's appeal, and determined that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date to the present time. The AAO cited *K.C.P. Food Co., Inc. v. Sava*, and stated that the court in this decision rejected the argument that CIS should have considered income before expenses rather than the petitioner's net income. The AAO determined that the petitioner's depreciation and its long-term assets and liabilities would not be considered in evaluating the petitioner's ability to pay the proffered wage. The AAO also stated that the petitioner provided no further evidence that the statements on the petitioner's bank statements represented additional funds beyond those already listed in the petitioner's tax returns and financial records. The AAO did not view the *Sonegawa* decision to be analogous to the instant petition. With regard to the unpublished AAO decision submitted by counsel to the record, the AAO stated that unpublished decisions are not binding on all CIS employees in the administration of the Act.

Beyond the decision of the director, the AAO noted that the petitioner had failed to establish that the beneficiary had the requisite experience of two years as a cook as listed on the Form ETA 750. The AAO states that the letter of employment verification submitted with the I-140 petition did not specifically describe the duties of the beneficiary performed, nor did it identify the writer of the letter. Nevertheless, the AAO stated that the appeal was dismissed because the petitioner had not established that it had the ability to pay the proffered wage from the priority date to the present time.

On motion, counsel submits copies of the petitioner's 2000, 2001, and 2002 Forms 1120S federal income tax returns, as well as a letter from the petitioner's accountant. Counsel notes that the AAO based its previous denial of the appeal and petition on an examination of the petitioner's net profits in 2000. Counsel asserts that the relevant tax returns for the purpose of establishing whether the petitioner had the ability to pay the proffered wage as of April 2001 are the petitioner's tax returns for 2001, not 2000. Counsel raises the issue of depreciation again and states that the AAO in its decision patently ignored the depreciation sum, as well as the cash balances in the petitioner's banking accounts. Counsel cites to another unpublished AAO decision and states that both unpublished AAO decisions were both decided on combined depreciation and ordinary income or a combination of net profit, depreciation and retained earnings. Counsel states that the AAO should honor its own past practices and consider alternative sources of income when determining ability to pay. Counsel describes depreciation in the amount of \$7,759 in the year 2001 as an alternative amount. Counsel also cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441,449 (D.D.C. 1988). Counsel notes that *Full Gospel* was issued after *K.C.P. Food Co.* Counsel states that \$324,501 was available to the petitioner to pay the proffered wage in 2001, based on depreciation, year end business cash balance, amortization, retained earnings and assets. Counsel further states that if the amortization and assets figures were eliminated, the sum of retained earnings, net income, depreciation, and year-end cash balance is \$28,668, a sum that is sufficient to pay the beneficiary the proffered wage. Counsel states that if depreciation, net income, retained earnings, and year-end cash balances are combined, the petitioner had \$60,567 available to pay the proffered wage.

With regard to the beneficiary's letter of experience, counsel states that the previous letter of employment verification was signed and both the address and telephone number of the business were on the letter. Counsel submits a copy of the letter with a certified translation of the same. Counsel states that the AAO erred when it

observed that the petitioner had not established that the beneficiary had the requisite work experience for the job.

Counsel also submits a letter from ██████████ Pennsylvania that accompanies the copies of the petitioner's federal income tax returns for the years 2000, 2001, and 2002. The accountant states that if the petitioner's depreciation were added to the petitioner's income for 2000, 2001, and 2002, the cash flow for each of the respective years would increase as follows: In 2000, the cash flow would be \$7,798, in 2001, the cash flow would be \$7,758, and in 2002, the cash flow would be \$8,295.

On motion, counsel refers to the *Full Gospel* decision as a rationale for why the director and the AAO should examine depreciation amounts in their examination of the petitioner's ability to pay the proffered wage. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a music instructor. Here, counsel is asserting that CIS should treat the petitioner's depreciation amounts as evidence of its ability to pay

Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate, however, is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang Y. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. V. Sava*, 632 F. Supp. 1049 (S.D. N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. This is in contrast to *Full Gospel*, in which parishioners' pledges were promises to give money to a church. In the latter situation, a pledge is not an accounting device, but rather actual future assets.

Counsel also refers to two previous unpublished AAO decisions that did allow the petitioner's depreciation to be added with other items in consideration of the petitioner's ability to pay the proffered wage. However, as pointed out in the AAO appeal to the instant petition, while 8 C.F.R. § 103.3(C) provides that CIS precedent decisions are binding on all CIS employees, unpublished decisions are not similarly binding. In addition, the financial records examined by the adjudicators to reach the decisions in the unpublished AAO decisions are not in the record. See below for further discussion of pertinent case law.

Counsel is correct in her statement that the petitioner's 2001 federal income tax return is the appropriate and dispositive evidence with regard to the petitioner's ability to pay the proffered wage in 2001. Neither the

director nor counsel commented on this fact prior to the motion to reopen/reconsider. This is primarily due to the fact that the petitioner filed the I-140 petition in October 2001, and responded to the director's request for further evidence in November of 2001. In addition, the director denied the petition on February 25, 2002, and the petitioner submitted its appeal to the Vermont Service Center on March 13, 2002. All of these dates are prior to April 15, 2002, the date by which the petitioner had to submit its 2001 federal corporate income tax return. Neither the director, the AAO, nor counsel is remiss in examining whatever financial documents were submitted to the record at the time of filing. Nevertheless, the AAO will examine the petitioner's federal income tax returns for 2001 and 2002 in this proceeding.

Counsel's reliance on the two 2001 monthly statements for 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 two bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 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. Contrary to counsel's assertions on motion, CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in its analysis. 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 the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income. Counsel's assertion that the petitioner's depreciation for 2000 can be added to the petitioner's net profit to determine whether the petitioner can pay the proffered salary is not supported by either case law or by published AAO decisions that are binding on all CIS employees. As correctly stated by the director and by the AAO, depreciation is not considered a part of the petitioner's net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As noted previously, the wage and tax documentation submitted by the petitioner for the year 2000, although examined by both counsel, the director, and the AAO is not relevant to the priority date of April 2001. Therefore, only the petitioner's 2001 and 2002 federal income tax returns are considered with regard to its net income. In 2001, the petitioner's net income was \$4,460, and for 2002, the petitioner's net income is \$30,044. Thus the petitioner has sufficient net income in 2002 to pay the proffered wage of \$24,960. However, the petitioner did not have sufficient net income to pay the proffered wage as of the priority date of April 26, 2001.

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.<sup>1</sup> 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 submitted the following information for tax year 2001:

	2001
Ordinary Income	\$ 4,460
Current Assets	\$ 18,533
Current Liabilities	\$ 24,280
Net current assets	\$ -5,747

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of \$4,460 and net current assets of -\$5,747, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. As noted previously, the 2001 bank account statements are not viewed as evidence of additional financial assets. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2001. Thus, the petitioner has not established that it had the ability to pay the proffered wage during the salient part of 2001. As stated previously,

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

the petitioner did establish that it has the capability to pay the proffered wage in 2002. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

With regard to the issue of the beneficiary's letter of employment verification that the director raised in his decision, counsel states on motion that the initial letter states clearly the beneficiary worked as a cook. Counsel states that the petitioner who issued the letter is clearly an Italian restaurant. Counsel states that someone who worked as a cook in an Italian restaurant in Italy is qualified to perform these same duties as a cook in an Italian restaurant in the United States.

Counsel's statements with regard to the beneficiary's letter of employment verification are not persuasive. Contrary to counsel's assertion, the letter does not identify the position of the letter signer by title, nor does it provide any specific details on the petitioner's cooking responsibilities. Without more detail, the record is not conclusive that the beneficiary actually did the job in question in Italy. Nevertheless, as the director stated, the motion to reopen the petition is not denied based on the letter of verification, but rather on an examination of whether the petitioner has sufficient financial resources to pay 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.