



U.S. Citizenship
and Immigration
Services

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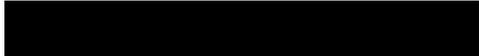
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FILE: EAC 02 241 54858 Office: VERMONT SERVICE CENTER Date: JUN 29 2005

IN RE: Petitioner: 

Beneficiary: 

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be sustained with regard to the petitioner's ability to pay the proffered wage; however, the matter will be remanded to the director for further consideration of the beneficiary's qualifications.

The petitioner is a 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, 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 March 28, 2001. The proffered wage as stated on the Form ETA 750 is \$18.23 per hour, which amounts to \$37,918 annually.

On the petition, the petitioner indicated it was established in 1989, had ten employees, and indicated no gross or net annual income. The petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 1999, 2000, and 2001, as well as an untranslated letter from the owner of El Balcon De Los Arrieros, No. 3.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date to the present time, on April 15, 2003, 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 the petitioner provide copies of its 2002 federal tax return, with all accompanying schedules, statements and attachments. In addition, the director requested copies of the beneficiary's IRS Form W-2 if the petitioner had employed the beneficiary in 2001 and 2002.

In response, the petitioner submitted Form 1120 corporate tax returns for the petitioner for the year 2002, along with the petitioner bank statement for 2001 and 2002. The legal assistant to counsel stated that the petitioner's bank accounts had an average of \$8,300 per month for 2001 and an average of \$8,505 per month for 2002. Accordingly, the assistant stated that the average funds that the petitioner should have available to pay the monthly salary would be \$3,159.83, and the petitioner showed more than this amount of funds in its average banking balances. The petitioner submitted the front page of its monthly bank statements from the Bank of Smithtown from January 2001 to December 2002.¹ Counsel also submitted a one-page letter from [REDACTED] New York, New York. This letter indicated that the petitioner is one of nine restaurants doing business under the parent company name of [REDACTED], but that each was a separate corporate entity. The letter also indicated that the parent company also owned five real estate entities, but did not identify these entities.²

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 August 18, 2003, denied the petition. The director stated that the petitioner's 2001 and 2002 federal income tax return indicated net losses. With regard to the petitioner's monthly bank statements and monthly average balances, the director indicated that if these funds had been used to pay the beneficiary's monthly salary, based on the petitioner's proffered wage, the funds would have been used by July 2001 and not available for later payment of the proffered wage. The director then stated that the petitioner had failed to establish that it was able to pay the proffered wage as of the priority date and continuing to the present.

On appeal, counsel resubmits the petitioner's bank statements and states that the evidence clearly demonstrates that the petitioner had an average end-of-the-month balance of \$8,300 for the year 2001 and an average end-of-the-month balance of \$8,505 for the year 2002. Counsel states that these balances are almost triple the amount needed to pay the monthly wage of \$3,159.

Counsel's reliance on the balances in the petitioner's Bank of Smithtown 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. The director's comments with regard to the diminution of funds available to the petitioner in its bank account based on the use of the funds to pay the proffered wage are well founded. 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 that will be considered below in determining the petitioner's net current assets.

¹ It is noted that the petitioner submitted complete bank statements for the initial months of 2001, and thereafter submitted just the front page of the statements for 2001 and 2002.

² Since this letter is undated, the record is not clear as to whether the petitioner is still part of the [REDACTED] restaurant structure.

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. The petitioner did not claim to have employed the beneficiary as of the priority date. Therefore, 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. 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. It is noted that although the petitioner submitted its federal income tax returns for the years 1999 and 2000, the priority date for the petition is April 2001; therefore the petitioner's financial records for 1999 and 2000 are not dispositive in these proceedings. Therefore the AAO will only consider only the petitioner's federal income tax returns for 2001 and 2002 in these proceedings. In 2001, the petitioner's net income was \$2,201.59. In 2002, the petitioner's net income was -3,900.75. Neither amount is sufficient to pay the proffered wage of \$37,918.

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.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). While the 1120 form identifies line 17 as mortgages, notes, and bonds payable in less than 1 year, and line 18 as other current liabilities, the petitioner in the instant petition identifies Line 17 as payroll taxes payable, and Line 18 as accrued expenses. If a corporation's end-of-year net

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.

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 ⁴	\$ 2,201.59	\$ -3,901
Current Assets	\$ 112,989	\$ 106,002
Current Liabilities	\$ 75,732	\$ 57,128
Net current assets	\$ 37,166	\$ 48,874

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$2,201.59, and net current assets of \$37,166 and has not, therefore, demonstrated the ability to pay the proffered wage of \$37,918. As previously stated, the petitioner's bank statements and monthly balances are not viewed as sources of additional funds to cover the remaining \$752 needed to pay the proffered wage in 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of -\$3,900.75 and net current assets of \$48,874. Thus, the petitioner did have the ability to pay the proffered wage during 2002, based on its net current assets. 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).

Nevertheless, upon review of the record, within the context of the totality of circumstances, as outlined in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the AAO notes that the petitioner from the years 1999 to 2002, while experiencing small negative net incomes in these years, had positive net current assets. In 1999 and 2000, the petitioner had net current assets of \$27,382 and \$26,093, respectively. While these two years are prior to the priority date, they do demonstrate the longer-term viability of the petitioner's business operations. In addition, in both years pertinent to the instant petition, namely, 2001 and 2002, the petitioner compensated its one officer, \$15,000 and \$12,000, respectively. Officer compensation is a discretionary item, as opposed to employee salaries that are non-discretionary. If the petitioner had so chosen, the monies paid to the sole officer, could have been applied to the payment of the remainder of the proffered wage in 2001, namely \$752. These factors, in combination with the petitioner's claim to have been in existence since 1989, are sufficient to favorably view the petitioner's future business viability, and ability to pay the proffered wage, based on *Sonogawa*.

Therefore, the petitioner has established, within the totality of circumstances, that it had the ability to pay the proffered wage from the priority date to the present.

⁴ 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.

Beyond the decision of the director, the petitioner submitted an untranslated letter from [REDACTED] city and country unidentified as verification of the beneficiary's previous foreign employment. Pursuant to 8 C.F.R. § 103.2(b)(3) any document containing foreign language submitted to CIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Furthermore, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

To establish the beneficiary's work experience, former employers are also requested to establish the hours worked by the beneficiary, specific job duties, and proof of employment. While the untranslated letter submitted by the petitioner is on the previous employer's letterhead and appears to have the title of the person signing the letter, as previously stated, the letter does not identify what country the beneficiary worked in, his hours of work, or provide any specific job duties, or wages paid. Without more persuasive evidence as to the beneficiary's previous employment, the petitioner has not established that the beneficiary has the requisite two years of previous employment as a cook, as required by the Form ETA 750.

As stated previously, the petitioner has established that it has the ability to pay the proffered wage from the priority date and onward. In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for further consideration of the beneficiary's previous work experience. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Although the petitioner has met its burden with regard to establishing the petitioner's ability to pay the proffered wage, the petitioner has not met that burden with regard to the beneficiary's qualifications.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.