

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC, 20529



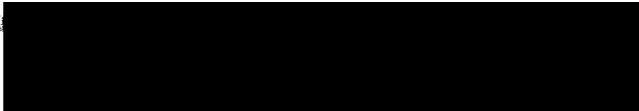
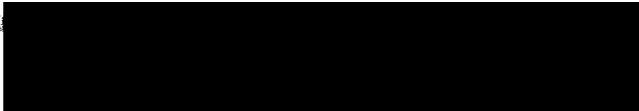
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



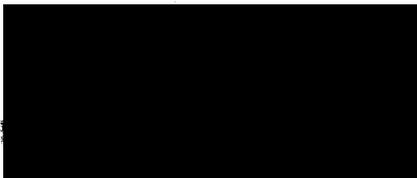
B6

FILE: EAC 02 168 51583 Office: VERMONT SERVICE CENTER Date: **JUN 04 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 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 an Italian 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 17, 2001. The proffered wage as stated on the Form ETA 750 is \$14.90 per hour, which amounts to \$30,992 per annum. On the Form ETA 750B, signed by the beneficiary on April 3, 2001, the beneficiary claims to have worked for the petitioner since January 1999.

On Part 5 of the visa petition, the petitioner claims to have been established in October 2000. In support of its ability to pay the beneficiary's proposed wage offer of \$30,992 per year, the petitioner initially submitted a copy of its Form 1065, U.S. Return of Partnership Income for 2001. It reflects that the petitioner, a limited liability company, files its federal tax returns using a standard calendar year. In 2001, the petitioner reported ordinary

income of -\$5,103. Schedule L of the tax return shows that the petitioner had \$7,283 in current assets and \$1,182 in current liabilities, resulting in net current assets of \$6,101. Besides net income, as an alternative method of evaluating a petitioner's ability to pay a proffered salary, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period and a possible source out of which a proposed wage offer could be paid.¹ A limited liability company's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If its 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On August 13, 2002, the director advised the petitioner that its 2001 federal tax return failed to show that it had the ability to pay the proffered wage. The director also informed the petitioner that evidence of the ability to pay the proffered wage shall be in the form of copies of annual reports, audited financial statements, or federal tax returns. The director requested the petitioner to provide a copy of the beneficiary's Wage and Tax Statement for 2001 if it employed the beneficiary during this period and invited the petitioner to submit additional evidence to support its continuing ability to pay the proffered wage.

In response, counsel resubmitted a copy of the petitioner's 2001 federal tax return, copies of its March, April, and May 2001 bank statements from the First County Bank of Stamford, Connecticut, and an undated affidavit from the petitioner's two partners pledging to pay the certified salary from their profits shown on line 10 of the 2001 tax return when the beneficiary is authorized to work or gains permanent resident status.

The director reviewed the petitioner's net income and net current assets as shown on its 2001 tax return, the three months of 2001 bank statements, and the partners' pledge submitted in response to the director's request for evidence. The director determined that neither the petitioner's net income, nor its net current assets as set forth on the 2001 tax return was sufficient to cover the annual proffered wage. The director also found the bank statements and partners' pledge inadequate to show an ability to pay a proffered wage, noting that a limited liability company is a separate legal entity from its shareholders or partners and that the shareholders or partners are individually liable for the limited liability company's debts. As separate legal entities, the director found this precluded consideration of the partners' individual assets. He finally noted that the petitioner had failed to supply the beneficiary's 2001 W-2.

On appeal, counsel submits copies of the petitioner's bank statements for January and February 2001, as well as June 2001 through December 2002. Counsel also resubmits a duplicate original of the previously submitted pledge of payment from the petitioner's two partners. Counsel maintains the partners are not pledging a sum from individual assets but from the limited liability company resources.

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether a petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the petitioner has not provided any credible documentation confirming that it has paid wages to the beneficiary.

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 or compensation already paid to other employees or shareholders exceeded 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.

As noted above, the petitioner's 2001 federal tax return failed to demonstrate that the certified wage of \$30,992 could be paid by either its net income of -\$5,103 or its net current assets of salary of \$6,101. The petitioner has not demonstrated its continuing ability to pay the proffered wage during this period.

Nor is counsel's reliance on the balances in the petitioner's bank statements persuasive. 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," as discussed above, the petitioner has not convincingly 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. As discussed by the director, bank balances represent only a portion of a petitioner's assets and do not reflect other encumbrances that may affect its financial status. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements correlating to the period covered by the 2001 tax return somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that has been considered above in determining the petitioner's net current assets.

With regard to the petitioner's individual owners' pledges for prospective payment of the certified wage, it is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49

(Comm. 1971). Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, whether characterized as a pledge from individual assets or as a promise to redirect projected profits, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, *supra*. As the evidence fails to establish that the petitioning company had the ability to pay the proffered beginning on the visa priority date of April 17, 2001, the petition may not be approved.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.