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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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MAR 04 2005

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

WAC 03 104 52765

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importing and distributing firm of French gourmet specialties. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 wage.

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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 26, 2000. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 annually. The ETA 750B, signed by the alien beneficiary on April 26, 2000, indicates that the alien has worked for the petitioner since April 2000.

On Part 5 of the visa petition, it is claimed that the petitioner was established in 1983, has gross annual income of over four million dollars and currently employs twenty-five workers. As evidence of its continuing financial ability to pay the certified wage of \$31,200 per year, the petitioner initially submitted an unaudited financial statement covering the period ending June 30, 2002, state quarterly wage reports for 2002, a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001, and a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. This copy, prepared by an accountant in August 2002, contains a original signature from one of the petitioner's officers, dated February 10, 2003.

The state quarterly wage reports for 2002 show that the petitioner paid the beneficiary wages totaling \$20,541.52. The beneficiary's 2001 W-2 shows that she received \$17,758.42 in wages from the petitioner. The petitioner's 2001 corporate tax return reflects that the petitioner files its returns using a fiscal year running from July 1st to June 30th of the following year. Thus, the 2001 tax return reflects financial information covering the period from

July 1, 2001 to June 30, 2002. On this return, the petitioner reported taxable income of -\$114,877 before taking the net operating loss (NOL) deduction. Schedule L of the tax return shows that the petitioner had \$1,204,551 in current assets and \$1,272,634 in current liabilities, resulting in -\$68,083 in net current assets. As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on April 17, 2003. The director requested that the petitioner supply evidence of its ability to pay the proffered salary by providing audited financial statements, annual reports, or copies of Internal Revenue Service (IRS) certified filed tax returns. The director instructed the petitioner to provide this evidence for 2000 and 2002. He further requested that the petitioner also submit copies of the beneficiary's W-2s for 2000 and 2002.

In response, the petitioner, through counsel, submitted IRS-stamped computer printouts of the petitioner's corporate tax returns for 2000, 2001, and 2002. The IRS stamp on all three printouts is dated May 6, 2003. As noted in the director's decision, these printouts do not contain an itemization of the petitioner's Schedule L balance sheet figures. They are also labeled as a fiscal year (FY) corporate income tax return. This causes some confusion in correlating the figures on the IRS printouts with the numbers reflected on the petitioner's 2001 tax return. Here, the IRS printout for FY 2002 is a reflection of the figures itemized on the petitioner's tax return for 2001, covering data until June 30, 2002, as mentioned above. It shows taxable income before taking the net operating loss (NOL) deduction of -\$114,877. The figures shown on the IRS printout for FY 2001 would have been reported on the petitioner's 2000 tax return. The 2001 FY printout indicates that the petitioner reported taxable income of -\$202,568 before taking the NOL deduction, and the 2000 printout, which would have covered the period between July 1, 1999 and June 30, 2000, shows that the petitioner reported \$24,795 in taxable income with no net operating loss deduction taken. The taxable income before the net operating loss (line 28) is simply stated as "not-numeric" on this printout.

Counsel also submitted copies of the beneficiary's W-2s for 2000 and 2002. In 2002, the W-2 reflects the same figure of \$20,541.52 in wages paid as shown by the 2002 state quarterly wage reports. In 2000, the W-2 reflects that the petitioner paid the beneficiary \$18,353.05. Also included with these documents are copies of the petitioner's bank statements for 2000, 2001, and 2002, as well as copies of the petitioner's other employees' W-2s covering the same three years.

Upon reviewing the net income figures reflected on the petitioner's IRS printouts, the director determined that the petitioner had sustained losses for three consecutive years. He concluded that the evidence submitted did not support petitioner's continuing ability to pay the proffered wage beginning on the priority date, and, on June 10, 2003, denied the petition.

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.

On appeal, counsel resubmits copies of various documentation previously supplied to the record, along with copies of correspondence directed to the Dept. of Labor related to the recruitment efforts supporting the labor certification, a summary of the petitioner's 2003 plans to increase business, copies of correspondence memorializing its distributorship of various French-made products, a copy of a consignment agreement with Naturgie S.A., and a sample brochure describing some of the petitioner's products.

Counsel asserts that the petitioner's financial position as shown by its tax returns is not indicative of its continuing ability to pay the proffered wage. He maintains that the petitioner's bank statements represent additional financial resources and show monthly and yearly balances sufficient to pay the difference between the beneficiary's proposed wage offer and the wages that the beneficiary actually received. Counsel cites *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989) as a precedent Board of Immigration Appeals decision in defining the petitioner's burden of proof.² The AAO concurs with counsel that a petitioner must carry its burden of proof. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). "How much of a showing is sufficient to establish eligibility by a preponderance of evidence will often turn upon the factual circumstances of each case." *Matter of E-M-* at p.79.

Counsel also relies upon a January 2002 AAO case in support of his assertion that bank statements may be a persuasive form of evidence to be considered. The case cited by counsel is not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. Moreover, the facts of that case also involved a petitioner whose net current assets were well above the amount necessary to pay the proffered wage. In this case, the data from Schedule L was omitted on the IRS printouts. Only the figures from Schedule L of the petitioner's 2001 tax return were available and they failed to show that the petitioner's net current assets of -\$68,083 were sufficient to cover the proffered wage during that period.

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 may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. Here, as noted above, the petitioner has paid the beneficiary \$18,353.05 in 2000, \$17,758.42 in 2001, and \$20,541.52 in 2002. The shortfall between these actual wages paid and the proffered annualized salary amounts to \$12,846.95, \$13,441.58, and \$10,658.48, respectively.

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

² According to the citation, the former Immigration and Naturalization Service (INS) commissioner decided this case.

F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 reliance on the petitioner's bank statements is misplaced. 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 provides an inaccurate financial portrait of the petitioner other than to assert that corporate petitioners strive to minimize their taxable income. Attempting to minimize taxable income is a common strategy, but it remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

Counsel argues on appeal that the petitioner would incur hardship if the preference petition is not approved allowing it to permanently hire the alien beneficiary. Counsel offers evidence of recruitment requirements underlying the DOL certification procedure in determining that there are no available U.S. workers who were eligible for the certified position. These arguments are not persuasive. The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether a petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, at 1302. Similarly, there are no statutory or regulatory provisions that allow consideration of a petitioner's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act.

Counsel also maintains that the petitioner is planning to increase its profits and that the continuous employment of the beneficiary will substantially increase its business. Although the petitioner's plans for future development of revenue is recognized in the documentation submitted, it doesn't convincingly show how the continued employment of the beneficiary as a bookkeeper will significantly enhance the petitioner's profile as a purveyor of French delicacies. It is further noted that the petitioner's tax returns do not demonstrate that the beneficiary's claimed full-time employment thus far has noticeably increased the petitioner's net profit, as its reported net income has shown losses in two out of the three relevant years. Counsel's hypothesis in this regard cannot be concluded to outweigh the evidence presented in the corporate tax returns and cannot be considered to constitute evidence of the petitioner's continuing ability to pay the proffered wage. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this case, although the information set forth on the federal tax returns is based on a fiscal year and does not correspond directly to the calendar year wages earned by the beneficiary, it can be concluded that the net income

amounts of -\$202,568 and -\$114,877, reflected on the respective 2001 and 2002 IRS corporate tax return printouts are inadequate to cover any difference between the actual wages paid to the beneficiary and the proffered salary of \$31,200 per year. It is again noted that the petitioner's net current assets of -\$68,083 shown in Schedule L of its 2001 signed tax return is also insufficient to pay any difference between the certified wage and actual wages paid to the beneficiary.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's determination that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.