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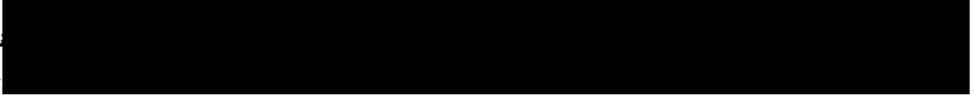
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MAR 08 2005

FILE: EAC 01 263 53046 Office: VERMONT SERVICE CENTER Date:

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, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted. The director's decision and that previously entered by the AAO will be withdrawn. The petition will be approved.

The petitioner is a [REDACTED] school. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a specialty cook. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, January 14, 1998, and denied the petition accordingly. On May 28, 2003, the AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief and additional evidence.

Counsel recites that the AAO previously determined that the petitioner's earlier submission on appeal of the petitioner's quarterly tax returns for 1998 and 1999 did not satisfy the petitioner's burden to prove its continuous ability to pay. He states now, however, that new, more complete documentation for the period from the priority date forward to June 2002 does demonstrate that ability to pay.

The regulation at 8 C.F.R. § 103.5(A)(2) states, in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion qualifies as a motion to reopen because counsel provided new 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 or seasonal nature, for which qualified workers are unavailable in the United States.

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 either 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. Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which equals \$34,379.98 per year, based upon a 35-hour workweek.

With the petition counsel submitted a Form G-28; an approved application for Alien Employment Certification, also bearing the beneficiary's signature to a statement that he has held the proffered position with the petitioner since February 1992; and a copy of a letter from the petitioner's accountant. The accountant, a CPA, states in his August 8, 2001 letter that as a religious organization the petitioner is exempt from filing an income tax return. He also states that the petitioner has engaged in service to the community for more than 90 years and accordingly had the financial capacity to sponsor the beneficiary's employment.

On October 15, 2001, the Vermont Service Center sent a request for evidence (RFE) that would show the beneficiary had the required two years of work experience as a cook as of the priority date, to which the petitioner provided a November 6, 2001 letter from a former employer of the beneficiary stating he had cooked at a Polish bar from January 1978 to December 1980.

Because the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director issued a second RFE on January 25, 2002, requesting the following:

- Documentary evidence of previous petitions filed on behalf of other beneficiaries;
- Evidence of the net and gross annual income for 1998 and 1999, either with a) the current Form 990 exempt organization tax form or b) a current financial statement that has been audited or reviewed by a Certified Public Accountant (CPA);
- The petitioner's 1998 and 1999 income tax returns and all supporting schedules;
- Documentary evidence showing proof of the payment of salaries of the employees (35) as claimed, by submitting Forms W-2, 1099, W-3 and 1096 for both 1999 and 2000;
- The petitioner's 2000 bank statements showing the ending balances for each of the 12 months

The RFE further requested that the petitioner submit supporting proof that it is a religious organization, including:

- Documentation that it has qualified as a section-501(c)(3) religious organization; or,
- Documentation showing that it is a qualifying section-501(c)(3) religious organization.

Since the beneficiary's employment did not involve being a minister or religious professional, the RFE further requested "a letter from an authorized official" explaining the petitioner's affiliation to such a tax-exempt religious organization. Such proof should include, for 1998 and 1999:

- Quarterly employer withholding statements for eight quarters minimum;
- The most recent Form 990 or 990 EZ; or,
- The petitioner's current CPA-reviewed or -audited financial statement.

Rejecting the adequacy of the letter from the Polish village administrator as to the beneficiary's qualifications based upon two year's work experience, the RFE further requested:

- Letters from current or previous employers or trainers, including a description of job duties.

In response, on April 19, 2002, counsel submitted:

- The petitioner's employer's quarterly returns for tax years 2000 and 2001;
- The beneficiary's Form W-2 for 2001 showing \$14,586.52 in wages paid;

- The petitioner's letter listing all of its other petitioners either pending with or approved by Citizenship and Immigration Services (CIS);
- A pictorial brochure of the petitioner;
- A letter from a Krakow, Poland administrator for a public preschool attesting to the beneficiary's experience, as an institutional cook, between October 1, 1976, to December 1, 1978; and
- A December 9, 1996, letter from the Internal Revenue Service (IRS) affirming the petitioner's 501(c)(3) exempt status, which dates from April 1957.

The series of eight quarterly returns reported total wages during the two years ranging from a low in the second quarter of 2001 of \$353,097.27 paid to an unstated number of employees, to a high in the first quarter of 2001 of \$625,776.47 paid to 48 employees.

On July 12, 2002, 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 thus denied the petition. In his decision, the director noted that the petitioner had failed to supply all of the evidence requested in the January 25, 2002 RFE. Specifically the director pointed to incomplete financial documentation for 1998, precluding the director from determining that the petitioner possessed the ability to pay the proffered wages as of the priority date.

On August 13, 2002, counsel filed an appeal, submitting the petitioner's employer quarterly tax returns for 1998 and 1999.

The AAO found that counsel had submitted no evidence with the petition of the petitioner's ability to pay, in the form of tax returns, annual reports or audited financial statements. 8 C.F.R. § 204.5(g)(2). The AAO also cited counsel's incomplete responses to the RFE's. The AAO also found that the 1998 and 1999 quarterly returns did not show the petitioner's ability to pay.

With the instant motion, counsel has submitted CPA-reviewed financial statements for 1998–2002, with an attached CPA certificate of accuracy based upon a review under “generally accepted accounting principles.” The author of the statement acknowledged that it did not constitute an audit.

Because the petitioner is a not-for-profit entity, counsel could not avail himself of the petitioner's federal income tax returns to prove ability to pay. The petitioner might instead have submitted the Form 990s, however, which most tax-exempt organizations with gross receipts of more than \$25,000 for the year must file.¹ The forms include such information as annual revenue, expenses, changes in net assets and fund balances. Rather than responding to the January 25, 2002 RFE by submitting the petitioner's Forms 990 for 1998 and 1999, or, in the alternative, with its the CPA-reviewed or audited financial statement for 1998 and 1999, counsel inexplicably submitted federal employer's quarterly tax returns for 2000 and 2001 in spite of the RFE's request for the two previous years' returns.

The Accountant's Review Report is dated January 10, 2003. The report is nominally evidence submitted for the first time on appeal that was previously requested by the director. Normally the AAO would not accept such evidence. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, since the accountant's report is dated after the closure of the record in the present matter, and for the reasons described below, this office will consider the report as new evidence submitted on appeal.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by

¹ 13 Journal of Taxation of Exempt Organizations 82 (Sept.–Oct., 2001).

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 1998 and thereafter.

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)). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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.

CIS will, when necessary, 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.² 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 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is 18.89 per hour, which amounts to \$34,380 annually with a 35-hour workweek. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from February 1992 to the present.

Counsel has submitted the petitioner's W-2 income tax form for the beneficiary showing the petitioner paid \$14,586.52 for 2001. Thus, for 2001, the petitioner need only show ability to pay \$19,793, but otherwise, for each other relevant year from the priority date forward, the petitioner must establish ability to pay for the entire proffered wage.

On the petition, the petitioner left incomplete the date when the petition claims to have been established, although according to the IRS, the petitioner has been treated as a tax-exempt organization since 1957. Between 1998 and 2002, total revenues ranged between \$13 million and \$21 million, according to the petitioner's CPA-reviewed financial statement. The petition states the petitioner employs 35 workers although its employer's quarterly return for the first quarter of 2001 listed 48 workers.

² 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.

The CPA-reviewed financial statements submitted with the motion reveal the following, in millions of dollars:

For Years	1998	1999	2000	2001	2002
Total Revenue	\$13.6	\$21.0	\$16.7	\$16.0	\$14.4
Total Expenses	\$10.1	\$11.7	\$11.7	\$12.4	\$13.3
Current Assets	\$16.8	\$26.4	\$32.6	\$36.9	\$37.9
Current Liabilities	\$ 1.6	\$ 1.8	\$ 2.3	\$ 1.3	\$ 1.5
Net Current Assets	\$15.2	\$24.6	\$30.3	\$35.6	\$36.4

While the CPA-reviewed statements are not unaudited financial statements, and normally not persuasive evidence according to the plain language of 8 C.F.R. § 204.5(g)(2), the January 25, 2002 RFE requested either audited or CPA reviewed financial statements. The report merits some consideration when examined as part of the totality of the circumstances in this matter. The AAO considers factors such as the petitioner's longevity, number of employees, and the overall magnitude. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). According to documentation in the record, the Mestiva Yeshiva Rabbi Chiam Berlin Gur Aryeh Institute was founded in 1905. The IRS has accorded it tax-exempt status since 1957, and according to its quarterly wages reports, employs approximately 50 employees. The figures shown in the report contend that the petitioner's revenues were at least \$1 million greater than expenses throughout the entire pertinent period. The petitioner's current assets were at least \$10 million greater than its current liabilities throughout the period. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage of \$34,380 per year.

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 met that burden. Accordingly, the previous decisions of the director and the AAO will be withdrawn, and the petition will be approved.

ORDER: The motion is granted. The AAO's decision of May 28, 2003, is withdrawn. The petition is approved.