



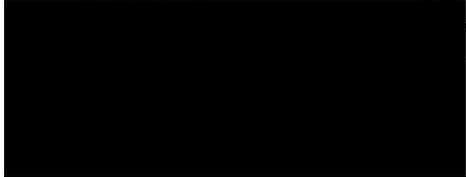
U.S. Citizenship  
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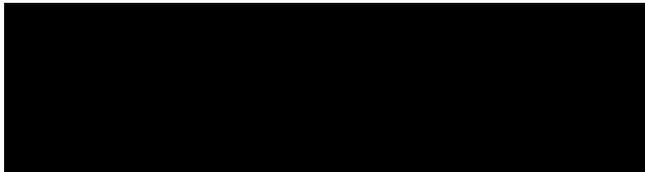
FILE: WAC 03 068 53271 Office: CALIFORNIA SERVICE CENTER Date:

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, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be remanded.

The petitioner is an adult residential facility. 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 statement.

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 granting 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 February 13, 2001. The proffered wage as stated on the Form ETA 750 is per \$12.71, which equals \$26,436.80 per year.

On the petition, the petitioner stated that it was established during 1997 and that it employs 23 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Garden Grove, California.

In support of the petition, counsel submitted a copy of the petitioner's nominal 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner then reported income based on a fiscal year running from July 1 of the nominal year until June 30 of the following year. That return, therefore, covers the petitioner's 2001 fiscal year, which ran from July 1, 2001 to June 30, 2002. During that fiscal year the petitioner reported taxable income before net operating loss deduction and special deductions of \$55,799. At the end of that fiscal year the petitioner had current assets of \$82,364 and no current liabilities, which yields net current assets of \$82,364.

Counsel also provided the petitioner's Form 941 Employer's Federal Quarterly Tax Returns for all four quarters of 2001. Those returns show that the petitioner employed between 15 and 21 workers during those quarters, but did not employ the beneficiary.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 24, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters and, if the beneficiary had worked for the petitioner during 2001 or 2002, Form W-2 Wage and Tax Statements showing the wages he was paid.

In response, counsel submitted an IRS printout of figures from the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return.<sup>1</sup> In the space reserved for the petitioner's taxable income before net operating loss deduction and special deductions, that printout states "not numeric." That printout also does not state the petitioner's net current assets at the end of the period covered by that printout, nor does it give figures from which the petitioner's net current assets may be computed.

The petitioner did not provide any W-2 forms, thus implying that it did not employ the beneficiary during 2001 or 2002. Counsel submitted, in lieu of the requested California Form DE-6 reports, printouts showing the amount it paid to each of its employees each of the four quarters of 2002.<sup>2</sup> Those reports show that the petitioner did not employ the beneficiary during 2002.

Counsel submitted a letter, dated July 3, 2003, stating that the petitioner had changed status from a subchapter C corporation to a subchapter S corporation, and therefore needed to convert from its fiscal year to reporting taxes based on the calendar year. That letter further stated that the petitioner had filed its 2001 tax return, covering the fiscal year from July 1, 2001 to June 30, 2002, on February 23, 2003. Counsel stated that the petitioner's return for the remaining half of 2002 would be filed during October 2003. Counsel submitted a letter from IRS stating that the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return was received on February 23, 2003.

On July 25, 2003 the California Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, a copy of the petitioner's 2002 tax return.

In response, counsel provided a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. A letter from counsel, dated October 16, 2003, notes that the 2002 return covers only the last half of 2002.

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<sup>1</sup> This office observes that in response to a request for evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. February 13, 2001, counsel submitted an IRS printout covering the same period as the tax return previously submitted. (July 1, 2001 to June 30, 2002)

<sup>2</sup> Counsel offered no reason for declining to comply with the director's request.

That return states that the petitioner declared ordinary income of \$18,307 during those six months. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$80,056 and current liabilities of \$11,240, which yields net current assets of \$68,816. Counsel also submitted the petitioner's unaudited income statement and balance sheet for the same six months.

The director found 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 October 30, 2003, denied the petition. The basis for that decision was a comparison of figures from the IRS printout and figures from the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. Because those figures do not match the director found the printout, the tax returns, and the balance of the petitioner's evidence not to be credible.

On appeal, counsel notes that the director apparently did not observe that the printout does not cover the same period as the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel explains that the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return covered fiscal year 2001 which ran from July 1, 2001 through June 30, 2002, and that the printout is of figures from that form, whereas the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation covers the last six months of 2002.

A letter, dated January 13, 2004, from the petitioner's accountant confirms counsel's explanation. The accountant also observed that the petitioner's 2003 tax return would cover the entire 2003 calendar year, but had not yet been prepared and could not, therefore, be submitted. The accountant provided, however, the petitioner's unaudited income statement and balance sheet for the period from January 1, 2003 to November 30, 2003.

This office concurs with counsel and the accountant on that point. The printout clearly covers the petitioner's fiscal year 2001 and the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation clearly covers the last six months of the 2002 calendar year. No suspicion attaches from the failure of the figures on those two documents to match each other.

The unaudited financial statements submitted in this case are not reliable evidence. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$26,436.80 per year. The priority date is February 13, 2001.

During the petitioner's 2001 fiscal year, which ran from July 1, 2001 through June 30, 2002, the petitioner declared taxable income before net operating loss deduction and special deductions of \$55,799. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

During the last half of the 2002 calendar year the petitioner declared ordinary income of \$18,307. The petitioner need only demonstrate the ability to pay half of the proffered annual wage, or \$13,218.40, during those six months. The petitioner's ordinary income during that half year was sufficient to pay the requisite portion of the proffered wage during the same period. The petitioner has demonstrated the ability to pay the proffered wage during the last half of 2002.

The petitioner, however, has never submitted any evidence pertinent to its ability to pay the proffered wage during the first half of 2001. The record, therefore, contains no evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date to June 30, 2001. Without such evidence the petition may not be approved. The Service Center, however, apparently failing to realize that the petitioner at that time reported taxes based on a fiscal year, did not request the petitioner's fiscal year 2000 tax return or any other evidence pertinent to that period.

The matter will be remanded so that the director may request evidence of the petitioner's ability to pay the proffered wage from the priority date to June 30, 2001. The director may also inquire into the petitioner's finances during later years, the beneficiary's qualifications, or any other matter relevant to the approvability of the instant 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 petition is remanded for further consideration and action in accordance with the foregoing.