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U.S. Citizenship
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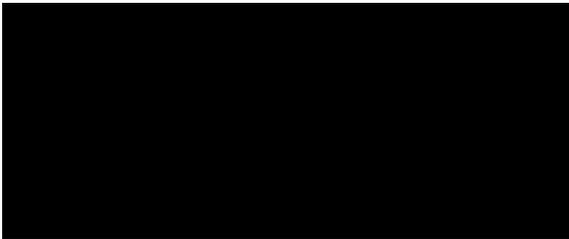
FILE: SRC 03 135 51555 Office: TEXAS SERVICE CENTER Date:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 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.

8 C.F.R. § 204.5(g)(2) states:

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. 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 the Service.

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 July 8, 2002. The proffered wage as stated on the Form ETA 750 is \$1,800 per month, which equals \$21,600 per year.

On the petition, the petitioner stated that it was established during 2002 and that it employs six 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 will employ the beneficiary in Memphis, Tennessee.

In support of the petition, counsel submitted a letter, dated March 20, 2003, from the petitioner's owner, stating that the petitioner has gross revenues of \$225,000 and the ability to pay the proffered wage.

According to 8 C.F.R. § 204.5(g)(2), such a statement may suffice to show the ability of the petitioner to pay the proffered wage in the case of petitioner's who employ 100 or more employees. The petitioner in the instant case stated, on the Form I-140 petition, that it employs six employees. The statement of the petitioner's owner is insufficient, in the instant case, to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submitted a copy of the petitioner's 2002 Form 940-EZ, a copy of its Form 941 Quarterly Federal Tax Return for the last quarter of 2002, a copy of its 2002 Form W-2 transmittal, and copies of the 2002 W-2 Wage and Tax Statements showing wages it paid to its employees.

The Form 941 shows that the petitioner paid total wages, tips, and other compensation of \$15,469 to its employees during the last quarter of 2002. The Form 940-EZ shows that the petitioner paid taxable wages of \$48,294.25 to its employees during 2002. The W-3 transmittal confirms that amount. The W-2 forms show that the petitioner paid those wages to seven employees, including the beneficiary, to whom it paid \$16,200 during 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on July 11, 2003, requested 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 that the evidence cover both 2002 and 2003.¹

In response, counsel submitted an unaudited statement, dated August 22, 2003, from the petitioner's accountant. The accountant stated that from its inception in April of 2002 through December of 2002 the petitioner had gross sales of \$168,405.56 and that that from January to July of 2003 it had gross sales of \$126,771.43. The accountant also gave a gross sales figure for another restaurant. The accountant gave no other financial data pertinent to the petitioner.

Counsel also submitted a letter, dated September 4, 2003, in which he stated that the petitioner's owner also owns the other restaurant for which the accountant gave gross sales figures.² Counsel urged that the gross sales figures demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 September 30, 2003, denied the petition.

¹ Because 2003 had not yet ended, 2003 tax returns, annual reports, and financial statements were not then available.

² Actually, counsel stated that the petitioner owns that restaurant. This office suspects that counsel meant that they have the same owner, rather than that one restaurant owns the other.

On appeal, counsel contends that the evidence submitted is sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. No further information, argument or documentation was submitted.

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 established that it employed the beneficiary during 2002 and paid him \$16,200.

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 \$21,600 per year. The priority date is July 8, 2002.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that evidence of the petitioner's ability to pay the proffered wage must consist of copies of annual reports, Federal tax returns, or audited financial statements. Counsel submitted no annual reports. The financial statements the petitioner submitted are actually only statements of the gross sales of the petitioner and another restaurant, and are not audited.

The only Federal tax returns submitted are the petitioner's quarterly return for the last quarter of 2002. That return does not show the petitioner's profit or its net current assets, but only the amount of wages it paid during that quarter.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

The petitioner submitted a W-2 form showing that it paid the beneficiary \$16,200 during 2002. The petitioner submitted no reliable evidence sufficient to show its ability to pay \$5,400 balance of the proffered wage during that year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002.

Having failed to establish that it had the ability to pay the proffered wage during 2002, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.