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U.S. Citizenship  
and Immigration  
Services

*B6*

MAR 23 2005



FILE: EAC 02 221 51248 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:   
Beneficiary:

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

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 accordingly denied the petition.

On appeal, counsel submits as reasons for the appeal that the petitioner's assets either drawn from its bank account or liquidated as needed would establish the petitioner's 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 or seasonal 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 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour or \$24,690 annualized. On the Form ETA 750B, signed by the beneficiary on March 19, 2001, the beneficiary claimed to have worked for the petitioner from August 2000 to the "present". The petition states that the petitioner was established on September 16, 1998, that the petitioner's gross annual income was \$154,341 and currently employs five workers.

In support of the petition, the petitioner submitted:

- A G-28;
- An incomplete copy of the petitioner's Form 1120S U.S. income tax returns for 2001;
- An offer of employment letter dated March 7, 2002, from the petitioner's owner; and
- A previous employer's translated letter attesting to the beneficiary's qualifications.

The director found the evidence insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and issued a request for evidence (RFE) dated March 31, 2003 seeking evidence of that ability and, more specifically, its 2001 federal tax return, any reviewed or audited financial statements for its 2001 operations, and of its Form W-2s for wages paid to the beneficiary in 2001.

In response, the counsel submitted a letter dated June 25, 2003, and the following:

- The requested W-2s for 2001 and 2002;
- An incomplete copy of the petitioner's 1120S tax return for 2001; and,
- Monthly bank statements covering the petitioner's 2001 business operations between March 1 and June 30, 2001.

The submitted 2001 tax return reflects the following information:

Net income	-\$26,748
Current Assets	None Listed
Current Liabilities	None Listed
Net Current Assets <sup>1</sup>	None Listed

The submitted W-2s reflect \$7,200 in wages paid the beneficiary for 2001, which is \$17,490 less than the proffered wage; and \$19,850 paid to the beneficiary for 2002, which is \$4,840 less than the proffered wage.

On August 13, 2003, the director found that the evidence did not establish the petitioner's ability to pay the proffered wage, and accordingly denied the petition.

On appeal, counsel asserts that it does have the ability to pay but submits no additional evidence. Counsel states that the petitioner has \$116,026 in total assets, as reported on the 2001 tax return, which he asserts could "easily cover" the beneficiary's salary if the petitioner were to sell some of the assets. Counsel also asserts that the petitioner would have plenty of cash to cover the proffered wage, which amounts to \$2,057.47 per month, if the petitioner were to draw those wages from its bank account, as evidenced by the beginning or ending bank balances.<sup>2</sup> Finally, counsel asserts that Citizenship and Immigration Services (CIS) should take "administrative notice" of the damage done to Washington-area businesses like the petitioner's by the September 11, 2001 terrorist attacks and the multiple-fatality October 2002 sniper shootings in and around Washington, D.C. Counsel implies CIS grant the petitioner a waiver from the normal ability-to-pay regulations governing employment-based immigrant visas, making an "exception" for the petitioner.

First addressing the assertions about the petitioner's bank accounts, counsel's reliance on the balances is misplaced. 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," 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 paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L. Unfortunately, contrary to the RFE, counsel did not

<sup>1</sup> For a brief discussion of net current assets, see below.

<sup>2</sup> The submitted bank account information only includes first pages from the four monthly statements.

submit a complete Form 1120S for 2001, which would have included the petitioner's Schedule L. Additionally, as discussed below, this omission does not allow CIS to verify counsel's contention that the petitioner may have been able to show the ability to pay with its assets.

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

In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

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).

Ordinarily, the petitioner's net income would not be the only statistic available to demonstrate a petitioner's ability to pay a proffered wage. If the petitioner's net income during the pertinent years plus the wages paid are insufficient to cover the proffered wage, then CIS will ordinarily then see if the petitioner's assets can establish ability to pay.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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.

However, based upon the record as previously discussed, this office cannot determine whether the petitioner had net current assets or net current liabilities during the year in question, 2001. That is because the petitioner did not fully respond to the RFE that sought the 2001 tax return including all schedules. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid the full proffered wage. In 2001, the petitioner shows a net income of a negative \$26,748, and did not submit enough information to calculate its net current assets, and has not, therefore, demonstrated the ability to pay the proffered wage or the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner's submitted W-2 for 2002 shows the petitioner paid the beneficiary \$19,850 in wages, but without knowing the petitioner's ordinary income for 2002, this office cannot calculate the petitioner's ability to pay for 2002<sup>4</sup>.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 2002. Therefore, 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 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.

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<sup>4</sup> That the director's March 31, 2003 RFE did not seek the petitioner's tax return for 2002 does not change the rule that places upon the petitioner the burden of proof for establishing ability to pay.