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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [redacted]
EAC 01 149 51858

Office: VERMONT SERVICE CENTER

Date: MAR 25 2005

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

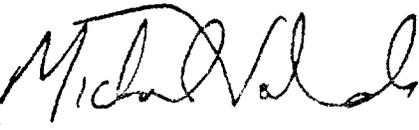
PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

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

The petitioner is a quick service diner and carry out. It seeks to employ the beneficiary permanently in the United States as a fast food services assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 20, 2001. The proffered salary as stated on the labor certification is \$12.00 per month or \$24,960 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$12,303 and net current assets of -\$3,727. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on June 18, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested a copy of the petitioner's 2001 U.S. federal income tax return, with all schedules and attachments, and, if employed by the petitioner, a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement. The director further noted that the beneficiary's country of birth as listed on the Form I-140, Immigrant Petition for Alien Worker, and on the Form ETA 750 were different, and she requested an explanation regarding this discrepancy.

In response, counsel provided a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, and two copies of pay stubs for the beneficiary for the periods ended July 7, 2002 and August 4, 2002. Counsel did not provide an explanation regarding the discrepancy in the beneficiary's place of birth. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$21,251 and net current assets of \$5,872. The pay stubs showed year to date earnings of \$4,950.63 as of August 4, 2002 and a rate of pay at \$11.50 per hour.

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. On November 13, 2002, the director denied the petition. It is noted that the beneficiary filed a Form I-485, Application to Register Permanent Resident or Adjust Status, on February 13, 2003. With the application, the beneficiary provided two additional pay stubs. As of September 29, 2002, the beneficiary's year to date earnings were \$9,545.69, and the rate of pay was listed at \$9.75 per hour. As of January 5, 2003, the beneficiary's earnings were \$996.24 for the period December 23, 2002 to January 5, 2003 (two weeks). There is no indication as to whether the beneficiary worked overtime during this period.

On appeal, counsel states:

As mentioned above, petitioner's job offer to beneficiary was only made in April 2001. Hence, had petitioner employed beneficiary in April 2001, petitioner would only have paid beneficiary about \$18,000 for the year 2001. This amount would have been within petitioner's net income of \$21,251 in 2001, with a few thousand dollars to spare. It is therefore unfair and unreasonable to conclude that petitioner did not have financial capacity to pay the offered salary just because its declared net income fell short of a few thousand dollars, where in reality it could have paid the offered wage to beneficiary.

As regards the observation that petitioner's "*x x x current assets of \$16,215 exceeded current liabilities of \$10,343 by \$5,872 x x x,*" it is our humble opinion that citing such data also borders on unfairness, the reason being that the majority of companies in this country operate on credit lines and stock assets that has no bearing on their actual capacity to hire and employ workers. Otherwise, most dot.com and "stock bubble" companies, including those without tangible assets such as Amazon.com, would not pass muster under the rigorous standards employed in this case.

Regarding the third ground, we wish to apologize for such a clerical error on our part. At any rate, we wish to take this opportunity to explain the discrepancy on the forms. Beneficiary was born in Indonesia and is currently a citizen thereof. The error may be explained by the fact that almost ninety percent of counsel's clients are from the Philippines; hence, it is expected that occasionally an office staff would commit a mistake in filling out the forms. Be that as it may, we respectfully opine that such a mistake should not have affected the merit of the petition.

In sum, we wish to reiterate that petitioner could afford to hire and compensate herein beneficiary had the latter started to work for petitioner in April 2001. From April 2001 through December 2001, petitioner could have paid only approximately \$18,000 to beneficiary, and this is well within the \$21,251 income declared by petitioner on its income tax return.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

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

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. The petitioner's net current assets during 2001 were \$5,872. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel points out that the priority date is April 20, 2001, and, therefore, the petitioner need only pay approximately \$18,000 for the year 2001. However, counsel is urging CIS to look at twelve months worth of income (\$21,251) to show the ability of the petitioner to pay only eight and one half months of the wage. To determine the petitioner's ability to pay the proffered wage, CIS will compare a year's worth of wages to a year's worth of income. If CIS were to discount the proffered wage to \$18,000, then CIS would also have to proportionally discount the net income.

Counsel asserts that the majority of companies in this country operate on credit lines and stock assets that have no bearing on their actual capacity to hire and employ workers. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also states that the observation by the director that petitioner's "x x x current assets of \$16,215 exceeded current liabilities of \$10,343 by \$5,872 x x x," borders on unfairness. However, counsel should

prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

be aware that the director was merely trying to show counsel that CIS does consider different methods of determining the ability to pay the proffered wage. If the petitioner had shown that it had net current assets equal to or above the proffered wage, then the director would have determined that the petitioner had established its ability to pay the proffered wage.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$21,251 and net current assets of \$5,872. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2001.

The second issue in this proceeding is the discrepancy in the listing of the beneficiary's country of birth. As counsel provided a copy of the beneficiary's Visa and I-94 with the initial petition clearly showing the beneficiary's country of birth as Indonesia, there is no reason to doubt that a clerical error was made. This issue has been satisfactorily resolved.

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.