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U.S. Citizenship
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Services

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MAR 28 2005



FILE: EAC 02 211 51046 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 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 sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign-food specialty 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 brief of points and authorities and additional 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 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of 1998 until the “present.”

On the petition, the petitioner claimed to have been established on January 28, 1998, to have a gross annual income of \$363,316, and to currently employ four workers. In support of the petition, the petitioner submitted:

- A Form G-28;
- An approved ETA 750, labor certification application;
- A prior employer’s letter attesting to the beneficiary’s work experience;
- A letter dated March 21, 2002 from the petitioner’s certified public accountant (CPA)¹; and,
- The petitioner’s original Form 1120 tax return for 2001.

¹ The letter asserts that, to avoid double taxation, the petitioner paid out company profit as wages to its owner, thereby reducing the amount of company income otherwise available to cover the proffered wage.

On December 9, 2002, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage from the priority date forward, the director requested additional evidence pertinent to that ability. The director specifically requested copies of the beneficiary's 2001 Form W-2, Wage and Tax Statement, but did not ask for the petitioner's annual reports, federal tax returns, or audited financial statements, which can ordinarily demonstrate continuing ability to pay the proffered wage.

In response, counsel submitted written explanations from the petitioner's owner, in a letter dated February 27, 2003; and in letters from the CPA, dated December 30, 2002, and February 26, 2003. Counsel did not submit the requested W-2. Instead, the CPA's letter asserted that without a U.S. Social Security card number, the beneficiary did not receive a W-2 for the wages paid him in 2001.

On April 7, 2003, 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 accordingly denied the petition. Specifically, the director found that the petitioner had not supplied any documentation to show the petitioner had paid \$15,603 in wages to the beneficiary. The director observed that the petitioner could have provided that documentation had it issued the beneficiary a Form 1099 for the year's wage payments.

On May 7, 2003, counsel moved the director to reopen or reconsider his decision, submitting the beneficiary's Form 1040 tax return for 2001 with an Internal Revenue Service (IRS) date-stamp of April 23, 2003, reporting the \$15,603 in wages. Attached to the Form 1040 were 1) the petitioner's Form 1096, an Annual Summary and Transmittal of U.S. Information Returns, signed April 22, 2003, reporting the \$15,603 in the beneficiary's wages; and 2) a Form 1099 issued to the beneficiary reporting the \$15,603 paid in wages.

Also filed with the motion was an April 24, 2003 letter from the petitioner's CPA in further support of the petitioner's ability to pay. The CPA asserted that the petitioner had \$26,488 available to pay the proffered wage of \$26,000, listing the following figures:

▪ The beneficiary's wages	\$15,603
▪ The petitioner's net income	\$4,811
▪ The petitioner's deduction for depreciation	\$4,612
▪ The petitioner's current assets	\$2,496
▪ <u>The petitioner's current liabilities</u>	-\$1,034
▪ <u>Total available for proffered wage</u>	\$26,488

On August 14, 2003, the director granted counsel's motions but affirmed his prior decision. Contrary to the to the CPA's new analysis, the director found that the accountant had improperly mixed income and assets in determining ability to pay, and that, separately, income and assets each left the petitioner about \$5,500 short of establishing ability to pay. Thus, as to income, the director found:

▪ The beneficiary's wages	\$15,603
▪ The petitioner's 2001 net income ²	-\$4,811
▪ Total available for proffered wage	About \$5,500 short of the proffered \$26,000

² The August 14, 2003 decision inadvertently listed the net income as a negative amount.

As to net current assets, the director similarly concluded:

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|--|---|
| ▪ The beneficiary's wages | \$15,603 |
| ▪ The petitioner's net current assets ³ | -\$3,530 |
| ▪ Total available for proffered wage | About \$5,500 short of the proffered \$26,000 |

On September 12, 2003, counsel appealed the director's August 14, 2003 decision and submitted:

- A September 4, 2003 letter from the petitioner's CPA;
- An attached Form 1120X, IRS date-stamped September 8, 2003, to "account for receipts which were unreported in 2001."
- The amended Form 1120 tax return for 2001 reporting a revised \$11,717 in taxable income.

On appeal, counsel asserts:

- The director conceded, in his August 14, 2003 decision, that the petitioner did pay the beneficiary \$15,603 in wages during 2001.
- The petitioner thus only needs to find the income or assets to cover a \$10,397 deficit left after crediting the \$15,603 in the beneficiary's 2001 paid wages against the proffered wage of \$26,000.
- The petitioner's amended Form 1120 tax return for 2001 reports a revised taxable income of \$11,717,⁴ which effectively closes the \$10,397 deficit.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first 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. Again, it is noted that the petitioner paid the beneficiary \$15,603 in wages for the year.

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, Form 1120 at line No. 28. CIS, however, makes this examination 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

³ Net current assets are the difference between the petitioner's current assets and current liabilities. 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.

⁴ The \$11,717 in taxable income is \$6,906 more than the amount reported on the original Form 1120.

(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).

Comparing the original and revised returns, the petitioner's income as originally reported for 2001 left a deficit, while the petitioner's income as amended overcomes the deficit, producing instead a credit:

	<u>Original Return</u>	<u>Deficit</u>	<u>Amended Return</u>	<u>Credit</u>
<u>Net income</u>	\$4,811	\$5,586	\$11,717	\$1,323 ⁵

This office finds that the petitioner has met its burden of proof and established that the petitioner had sufficient income in 2001 to pay the proffered wage. At the first opportunity after the petitioner had corrected its income tax return for 2001, counsel has advised CIS of the resulting changes in the petitioner's income as evidenced by the tax return. As indicated, 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. The director properly found from the record that the petitioner had not established ability to pay. The difference on appeal is demonstrated in the new, competent and objective evidence in the form of a date-stamped, amended return, which confirms counsel's assertions of the petitioner's ability to pay.

The petitioner's evidence is accordingly sufficient to demonstrate its ability to pay the proffered wage during the salient portion of 2001. Therefore, the petitioner has 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 met that burden. The appeal will be sustained. The petition will be approved.

ORDER: The appeal is sustained. The petition is approved.

⁵ The difference, when expressed as a deficit, would be a negative \$1,323.