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U.S. Citizenship
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Services

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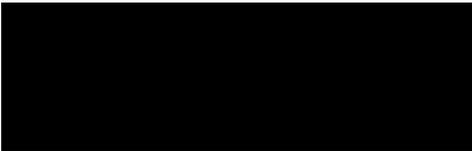
Office: VERMONT SERVICE CENTER

Date: **MAY 16 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 petition will be approved.

The petitioner is an ethnic foods processing firm. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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 additional evidence and contends that the petitioner has demonstrated its continuing ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$31,657. The Form ETA 750B, signed by the beneficiary, reflects that she has worked for the petitioner since April 1999.

On the petition, the petitioner claims to have been established in 1979, to have a gross annual income of about \$500,000 and to currently employ ten workers. In support of its ability to pay the proffered wage, the petitioner initially submitted an incomplete copy of its Form 1120S, U.S. Corporation Tax Return for an S Corporation for 2001. It shows that the petitioner reported net taxable income of -\$122,446.

Pursuant to a request for additional evidence issued on November 25, 2002, the petitioner was requested to provide a complete copy of its 2001 corporate tax return, a copy of its 2001 Transmittal of Wage and Tax Statement (W-3), and an explanation of how a payroll of ten employees could only produce \$69,963 in cumulative wages and salaries paid for 2001.

In response, the petitioner's vice-president explains in a letter, dated February 18, 2003, that the W-3 wages reflect the salaries of four workers and that sometimes "spot-job" part-time workers are hired to aid in handling unanticipated labor needs. They are paid outside the regular payroll.

The petitioner also submitted copies of its 2002 business checking account statements and a copy of its April 30, 2001 statement, as well as a more complete copy of its 2001 corporate tax return. In addition to its net taxable income shown on page one, Schedule L of the tax return reflects that the petitioner had \$77,064 in current assets and \$40,482 in current liabilities, resulting in net current assets of \$36,582. Besides net income, CIS will also review a petitioner's net current assets as an alternative method of examining its continuing ability to pay the beneficiary's proposed wage offer. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and liabilities are shown on Schedule L of its federal tax return. If a corporation's year-end 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. By this measure, although the petitioner's net income of -\$122,446 was not sufficient to cover the proffered wage of \$31,657, its net current assets of \$36,582 were enough to pay the certified salary.

In addition, counsel submitted copies of the beneficiary's Wage and Tax Statement for 2001, showing that the petitioner paid her \$17,970.13 in wages.

The director denied the petition on July 26, 2003, determining that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage. Although he discussed the petitioner's 2001 net income, the director failed to address the petitioner's net current assets as a possible resource out of which the proffered wage could have been paid. In this case, consideration of the petitioner's net current assets is determinative of its ability to pay the proposed wage offer.

On appeal, counsel submits various copies of the petitioner's bank statements for 2001, 2002, and 2003, asserting that the average cash balances were sufficient to pay the proffered wage. Counsel also provides copies of various invoices reflecting some of the petitioner's equipment purchases, and copies of media articles describing the petitioner's business operations. Counsel additionally offers a copy of the petitioner's 2002 corporate tax return. It shows that the petitioner reported net taxable income of \$5,926. Schedule L indicates that the petitioner had \$89,255 in current assets and \$30,225 in current liabilities, yielding \$59,030 in net current assets. Also submitted is a copy of the beneficiary's 2002 W-2 showing that she received \$20,300 in earnings from the petitioner.

Counsel's reliance on the petitioner's bank statements, invoices, and media articles is misplaced. None are 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. Further, with regard to the 2001 and 2002 bank statements, no evidence was submitted to demonstrate that the funds reported on these statements somehow reflect additional available funds that were not reflected on the petitioner's tax returns, such as the cash specified on Schedule L, that has already been considered in reviewing the petitioner's net current assets.

As mentioned above, CIS generally examines the net taxable 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*,

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 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.

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). 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 the Service should have considered income before expenses were paid rather than net income.

Nevertheless, CIS will also review a petitioner's net current assets and amounts already paid as wages to an alien beneficiary. In this case, even without considering the beneficiary's wages, as stated above, the petitioner's 2001 net current assets of \$36,582 were sufficient to demonstrate its ability to pay the proffered wage of \$31,657. Similarly, the petitioner's 2002 corporate tax return also shows that its net current assets of \$59,030 were enough to cover the proffered wage.

Upon review of the federal tax returns contained in the record, the AAO concludes that the petitioner has demonstrated its continuing financial ability to pay the proffered wage as of the visa 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.

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