

PUBLIC COPY

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

identifying data deleted to
prevent disclosure of information
warranting
invasion of personal privacy



U.S. Citizenship
and Immigration
Services



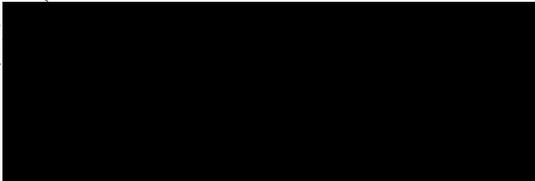
MAY 18 2005

FILE: WAC 03 161 50483 Office: CALIFORNIA 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 Director, California 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 brief and additional documentation.

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.

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, 1999. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

On the petition, the petitioner stated that it was established during 1990 and that it employs 42 workers. The petition states that the petitioner's gross annual income is \$1,500,000 and that its net annual income is \$170,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The only salient employment experience the beneficiary claimed was from March 1991 to May 1997 as a cook for a restaurant in [REDACTED]. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, counsel submitted a letter, dated April 14, 2003, from the petitioner's owner. That letters emphasizes the petitioner's gross receipts and net profit during 2000 and 2002 in stating that the petitioner is able to pay the proffered wage. Specifically, that letter states that during 2000 the petitioner's gross receipts were \$1,700,000 and its net profit \$240,000, and that during 2002 it had gross receipts of \$1,500,000 and net profit of \$170,000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 26, 2003, requested, *inter alia*, 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 the petitioner's California Form DE-6 Quarterly Wage Reports and Form W-2 Wage and Tax Statements showing wages the petitioner had paid to the beneficiary.

In response, counsel submitted (1) an undated letter from the petitioner's owner, (2) Form DE-6 wage reports for all four quarters of 2003, (3) the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return, and (4) the petitioner's 2000, 2001, and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

The letter from the petitioner's owner states that, because the petitioner does not employ the beneficiary the petitioner is unable to provide salient W-2 forms.

The petitioner's wage reports show that it employed between 44 and 50 workers during those quarters. Those wage reports do not name the beneficiary's as an employee.¹

The petitioner's tax returns show that it is a corporation and reports taxes pursuant to the calendar year. During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$24,150. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2000 the petitioner declared ordinary income of \$146,979. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2001 the petitioner declared ordinary income of \$27,508. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared ordinary income of \$13,782. At the end of that year the petitioner's current liabilities exceeded its current assets.

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 February 16, 2004, denied the petition.

On appeal, counsel observes that the sum of petitioner's profit and its depreciation deduction during each of the salient years exceeds the annual amount of the proffered wage. Counsel argues that, therefore, the tax

¹ The beneficiary's name, as shown on the Form I-140 petition, is [REDACTED]. Although the Forms DE-6 show that the petitioner employed an [REDACTED] during each of the quarters of 2003, no evidence was presented to show that either of those workers is the beneficiary, and the petitioner's owner's letter indicates that they are not.

returns submitted show the petitioner's continuing ability to pay the proffered wage beginning on the priority date and cites a non-precedent decision² of this office in support of that proposition.

Counsel also provides 2000, 2001, 2002, and 2003 W-2 forms showing that the petitioner paid [REDACTED] wages of \$25,024.50, \$27,644.89, \$30,632.63, and \$28,000.08 during those years, respectively. In his brief, counsel implies that Alfonso Santiago is the beneficiary, but does not address the name discrepancy.

Apparently as support for that implicit assertion, counsel provided the beneficiary's 2000 California Form 540A Income Tax Return and his 2001, 2002, and 2003 Form 1040A U.S. Individual Income Tax Returns. The wages declared on the 2000 and 2003 returns closely match those shown on the 2000 and 2003 W-2 forms provided. The wages declared on the 2001 and 2003 returns exceed the wages shown on the corresponding W-2 forms.

Counsel states that the W-2 forms provided show that the petitioner paid the beneficiary wages in excess of the proffered wage during each of the years for which W-2 forms were provided, and demonstrate, therefore, the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In support of that assertion counsel cites another non-precedent decision of this office.³

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

In the brief, counsel refers to the sum of the petitioner's net profit and its depreciation deduction as the petitioner's "Real and Actual Income," thus implying that the petitioner's depreciation deduction is a sort of phantom expense, rather than a real expense, and represents an additional fund available to pay wages.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. [REDACTED]

[REDACTED] See also [REDACTED] The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

² Counsel incorrectly refers to that decision as a published decision.

³ Again, counsel mischaracterizes the decision as a published decision.

Counsel is correct that, if the petitioner shows that it paid wages of some amount to the beneficiary during a given year, then it has demonstrated the ability to pay those wages during that year. The W-2 forms submitted in this case purport to show that the petitioner paid wages in excess of the proffered wage to the beneficiary during 2000, 2001, 2002, and 2003.⁴ If those W-2 forms are taken as authentic and their contents considered, then those W-2 forms would show the ability to pay the proffered wage during those years.

In the October 26, 2003 Request for Evidence the California Service Center requested that the petitioner provide W-2 forms showing wages paid to the beneficiary. In an undated response submitted on January 23, 2004, the petitioner's owner stated, "Please note that the beneficiary [REDACTED] is not currently employed by the [REDACTED]. Therefore, I cannot provide his W-2 forms."

Of course, that the beneficiary might not have worked for the petitioner on the specific unstated date on which that letter was composed would not prevent the owner from providing W-2 forms showing wages paid to him previously, if the petitioner had ever previously employed the beneficiary. The petitioner's owner implied, therefore, on some date between October 26, 2003 and January 23, 2004, that the petitioner had not previously employed the beneficiary. The petitioner's owner implied, therefore, that the [REDACTED] shown on the Form DE-6 quarterly reports, provided concurrently with that undated letter, is not the same person as the beneficiary [REDACTED].

Now, on appeal, counsel implies that [REDACTED] the beneficiary. Counsel does not address the name discrepancy and does not address the petitioner's owner's previous implicit assertion that [REDACTED] and that the petitioner did not employ the beneficiary during any of the years for which counsel now provides W-2 forms. In the absence of any explanation of that adverse evidence, counsel has not demonstrated that [REDACTED].

Further, in the October 26, 2003 Request for Evidence the California Service Center requested W-2 forms showing wages the petitioner paid the beneficiary. No W-2 forms were provided at that time. The W-2 forms were subsequently provided on appeal.

The regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and afforded a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and, in fact, denied its existence, but now submits it on appeal. The AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 762 (BIA 1988). The appeal will be adjudicated based on the record of proceeding without the W-2 forms.

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

⁴ Because no 1999 W-2 form was provided, the W-2 forms would offer no support for the petitioner's ability to pay the proffered wage during that year, even if accepted as reliable and considered on appeal.

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.

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.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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.

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 \$24,960 per year. The priority date is April 26, 1999.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$24,150. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage during that year out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared ordinary income of \$146,979. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared ordinary income of \$27,508. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$13,782. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage during that year out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 and 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 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.