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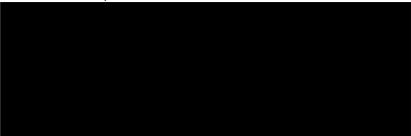
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FILE: EAC 02 251 50272 Office: VERMONT SERVICE CENTER Date: MAY 3 2005

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

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook (Italian style). 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 bank statements and readopts his argument as presented in his May 27, 2003, letter to the record.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$14.72 per hour, which amounts to \$30,617.60 per annum. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claims to have worked for the petitioner since 1994.

On Part 5 of the visa petition, filed July 26, 2002, the petitioner claims to have been established in 1986, have a gross annual income of \$458,423, and to currently employ nine workers.

In support of its continuing ability to pay the proffered salary, the petitioner initially provided copies of two bank account statements covering a period of April to December 2002 and a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It reflects that the petitioner paid \$8,496.50 in wages to the beneficiary.

The petitioner also supplied a copy of its Form 1120, U.S. Corporation Income Tax Return for "2001." It appears to represent, however, the petitioner's financial data using a fiscal year running from July 1, 2000 to June 30, 2001. This tax return reveals that the petitioner reported taxable income of \$7,937 before the net operating loss (NOL) deduction. Schedule L of the return indicates that it had \$30,971 in current assets and \$23,138 in current liabilities, resulting in \$7,833 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of determining a petitioner's 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 and current 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.

The director requested additional evidence from the petitioner on April 14, 2003. He advised the petitioner that it must demonstrate the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In response, the petitioner, through counsel, resubmitted a copy of the tax return and W-2 previously offered with the petition. Additionally, the petitioner also provided copies of its bank account statements for 2001 and the remaining statements from January to March 2002, not otherwise previously offered. It further supplied a copy of the beneficiary's W-2 for 2002 showing that he received \$12,870.06 in wages from the petitioner, as well as a copy of the petitioner's corporate tax return for 2001. This tax return contains the petitioner's financial data covering the period from July 1, 2001 to June 30, 2002. It shows that the petitioner reported -\$1,598 in taxable income before the NOL deduction. Schedule L reflects that the petitioner had \$20,631 in current assets and \$16,403 in current liabilities, resulting in \$4,228 in net current assets.

Counsel's transmittal letter, dated May 27, 2003, which accompanied these submissions, and is adopted on appeal as the petitioner's position in opposition to the denial of the petition, indicates that Schedule L of the tax return for the fiscal year ending on June 30, 2001 shows assets of \$116,412 including \$24,827 in cash, and liabilities of \$23,138. Counsel also points out that the corresponding figures contained in the tax return for the year ending June 30, 2002 reveal \$106,261 in assets, including \$14,589 in cash, and liabilities of \$16,403. Counsel maintains that if the petitioner's income, assets, and wages paid to the beneficiary were combined, it would demonstrate the petitioner's ability to pay the certified wage of \$30,617.60 per annum.

The director reviewed the petitioner's net income and net current assets as shown in the corporate tax returns and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered

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.

wage as of the priority date of April 23, 2001. The director denied the petition on September 12, 2003. The director noted that it was more appropriate to consider the petitioner's net current assets rather than total assets as suggested by counsel and found that the sums represented in the bank statements did not outweigh the conclusions drawn from the petitioner's figures contained within the corporate tax returns.

In support of the petitioner's ability to pay the proffered wage of \$30,617.60 per year, on appeal, counsel submits additional bank statements from another of the petitioner's checking accounts, covering a period from January 2002 to August 2003. Counsel also states that he relies on the arguments contained in his May 27, 2003 in opposition to the denial of the petition.

It is noted as a preliminary matter that 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 provides an inaccurate financial portrait of the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports, federal tax returns or audited financial statements to demonstrate its financial ability to pay the proffered wage. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the facts reveal that the petitioner employed the beneficiary and paid him \$8,496.50 in 2001 and \$12,870.06 in 2002. These wages represent \$22,121.10 less than the proffered salary paid in 2001 and \$17,747.54 less than the certified wage paid in 2002. If these shortfalls can be covered by the petitioner's net income or net current assets in a given period, it will be deemed to have demonstrated the ability to pay the proffered salary.

CIS also reviews 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). Showing that the petitioner's gross receipts exceeded 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 the Service should have considered income before expenses were paid rather than net income.

In this case, the comparison of wages paid to the beneficiary and the petitioner's net income or net current asset figures presented on the petitioner's corporate tax returns is not perfectly straightforward because the W-2s represent wages paid in a calendar year and the tax returns represent fiscal years running from July 1st to the following June 30th. By averaging the net income reflected on both tax returns it can be concluded that an adjusted figure of approximately \$3,170 represents the petitioner's net taxable income in calendar year 2001. This could not cover the \$22,121.10 shortfall resulting from a comparison of the compensation paid to the beneficiary and the proffered wage. An adjusted figure of approximately \$6,030 as the petitioner's 2001 net current assets also fails to reach a sufficient level necessary to meet the shortfall between the actual wages of \$8,496.50 paid to the beneficiary in 2001 and the proffered salary of \$30,617.60.

Similarly, an adjusted figure of -\$798.96 representing the petitioner's average net taxable income for the first six months of 2002, as drawn from its corresponding corporate tax return, is not sufficient to pay any shortfall resulting from the comparison of the beneficiary's wages reflected on his W-2 and the proffered wage. Nor would an approximate value of \$2,114 representing the petitioner's average net current assets during this period be enough to cover the difference of about \$8,874 between the proffered salary and the corresponding portion of the beneficiary's wages paid during this time.

As noted above and by the director, counsel's reliance on the petitioner's total assets of \$116,412 and current liabilities of \$23,138, as contained within the tax return for the fiscal year ending June 2001, as well as total assets of \$106,261 and current liabilities of \$16,403 reflected by the tax return for fiscal year ending June 2002, is misplaced and compares long term assets to short term liabilities. 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, any comparison using the petitioner's total assets must also be balanced by the petitioner's total liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Rather, as stated above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage because it represents cash or cash equivalent assets that would be readily available to pay the proposed wage offer. Moreover, net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. If net income greater than the amount of the proffered wage indicates that a petitioner could have paid the wage during a given period out of its income. Net current assets at the end of a given period, which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage. In this matter, the petitioner's adjusted net current assets as revealed in the respective corporate tax returns were

substantially below the amounts needed to pay the additional sums required to cover the difference between the beneficiary's earnings and the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay the proffered salary. Based on the evidence and argument contained in the record and submitted on appeal, it cannot be concluded that the petitioner has persuasively demonstrated its continuing financial ability to pay the proffered as of the priority date and continuing until the present.

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.